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CASES

ON THE LAW OF

PUBLIC UTILITIES

SELECTED AND ANNOTATED BY

YOUNG B. SMITH

PROFESSOR OF LAW IN COLUMBIA UNIVERSITY

AND

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INCLUDING

CASES AND READINGS ON RATES

SELECTED AND ARRANGED BY

ROBERT L. HALE

LECTURER IN LEGAL ECONOMICS IN COLUMBIA UNIVERSITY

AMERICAN CASEBOOK SERIES

WILLIAM REYNOLDS VANCE

GENERAL EDITOR

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PREFACE

THE rapid growth during recent years in the law relating to public utilities has given to this subject a position of importance which was hardly conceivable a generation ago. Not only have the courts modified or expanded common-law principles to meet modern utility problems, but an enormous amount of regulatory legislation, both state and federal, has been enacted. This has been noticeably the case in the United States, where the problems have been further complicated by the rather vague lines dividing state and federal jurisdiction, and the constitutional limitations upon governmental control of business. Consequently, an adequate treatment of the modern law of public utilities necessarily includes, not only a consideration of common-law principles, but also a rather thorough investigation of applicable legislation and the constitutional and administrative law problems incident thereto. Throughout the book, particular emphasis has been placed upon the body of law which has been developed in the United States under the Interstate Commerce Act and similar state statutes.

The present tendency in this field to adopt the policy of controlled monopoly, rather than to encourage ruthless competition, has necessitated a treatment of the law relating to restraint of competition where public utilities are involved. Again, the control of labor relations has assumed such an important place in the regulation of public utilities that a treatment of certain phases of this topic has been included. Because of the recent expansion of governmental control of the organization of public utilities and the issuance of securities, a treatment of these topics would, perhaps, have been appropriate; but it has been deemed advisable for the present, at least, to leave these problems for consideration in other courses.

In an increasing number of American Law Schools the course on Public Utilities embraces not only the common law of carriers, but also numerous questions of constitutional law and statutory interpretation growing out of the creation and development of Public Service Commissions and other administrative bodies as means of governmental control. In some schools, the subject is divided into two courses, one on public service law generally and another on carriers in particular. Still other schools offer only the course on carriers. The editors have endeavored to group the material so as to make it available for teaching any of these courses.

American decisions have been selected in most instances. English cases have been used only for the purpose of developing the history

of certain common-law doctrines. Nevertheless, most of the leading English decisions dealing with the topics included in this book are fully discussed in the American cases which are reported. The footnotes have been prepared with a view to developing important collateral problems not covered by the text. In this connection, an endeavor has been made to cite, not only cases, but also suggestive articles and comments in the leading American law reviews and other publications.

Y. B. S.
N. T. D.

The law concerning rates is so confused as to present many difficulties in the arrangement of the cases. "Cost of reproduction," for instance, might properly be treated as one topic, or it might be treated in subsections of two distinct topics. If the rate base, on which the companies are entitled to a fair return, is the exchange value of the physical property, arguments for and against reproduction cost concern merely its relevance to the ascertainment of that exchange value. If, however, the rate base is to be determined in each case as a matter of public policy, with a view to the attraction of capital into the industry, or with a view to other grounds of expediency, then the arguments for and against reproduction cost have a totally different bearing on the problem. The law cannot be regarded as settled as to which concept of the rate base is to be applied. Hence both problems must be treated. It has been deemed advisable, for pedagogical reasons, to divide the treatment of reproduction cost. "Depreciation," however, is treated in a subsection of its own (except for certain phases), although the cases in that subsection might with equal logic have been scattered under other heads. Again, it has been thought advisable to print certain passages from cases or articles in their entirety, although these passages treat two or more topics. It is hoped that the cross-references in the footnotes will prevent undue confusion in the arrangement of the material.

As already indicated, the law concerning rates is unsettled in many of its aspects. For this reason, many cases and articles have been inserted as material for discussion, even though they do not represent the law, or even though they may have been reversed on appeal.

Acknowledgment is made to Professor James C. Bonbright, of the Columbia Business School, for the time and very valuable help he has given in the preparation of the chapter on rates.

R. L. H.

COLUMBIA UNIVERSITY, June, 1926.

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CASES ON

PUBLIC UTILITIES

CHAPTER I

REGULATION AND CONTROL OF BUSINESS

SECTION 1.—AT COMMON LAW

RICH v. KNEELAND.

(King's Bench, 1613. Cro. Jac. 330, 79 Reprint, 282.)

Action on the case. Whereas the defendant was a common bargeman, and used to carry for hire from London to Milton, and other places in Kent; that he delivered to him a portmanteau and thirty pounds therein to carry, and gave to him two pence for the carriage; and that the defendant tam negligenter custodivit, that it was taken from him by persons unknown, and so he lost it.

The defendant pleads, confessing the receipt, that he was a common bargeman; but that he, fearing to carry it, delivered it to J. D. to carry, and that he gave notice thereof to the plaintiff, and he agreed thereto, and discharged him of the carriage.

The plaintiff traverses that he did not discharge him.

It was thereupon demurred: and adjudged for the plaintiff; for the delivery by his assent is not material: but the only matter traversable is the discharge, which is issuable; and found for the plaintiff.

A writ of error being brought, it was assigned, first, because this action lies not against the common bargeman without special promise.[1]

[1] "There is also in law always an implied contract with a common innkeeper, to secure his guest's goods in his inn; with a common carrier, or bargemaster, to be answerable for the goods he carries; with a common farrier, that he shoes a horse well, without laming him; with a common tailor, or other workman, that he performs his business in a workmanlike manner; in which, if they fail, an action on the case lies to recover damages for such

But all the Justices and Barons held, that it well lies as against a common carrier upon the land. Secondly, they held, that the traverse was good. Wherefore the judgment was affirmed.

JACKSON v. ROGERS.

(King's Bench, 1683. 2 Show. 327, 89 Reprint, 968.)

Action on the case, for that whereas the defendant is a common carrier from London to Lymmington et abinde retrorsum, and setting it forth as the custom of England, that he is bound to carry goods, and that the plaintiff brought him such a pack, he refused to carry them, though offered his hire.

And held by JEFFERIES, Chief Justice, that the action is maintainable, as well as it is against an innkeeper for refusing guest, or a smith on the road who refuses to shoe my horse, being tendered satisfaction for the same.

Note, that it was alleged and proved that he had convenience to carry the same; and the plaintiff had a verdict.[2]

breach of their general undertaking. But if I employ a person to transact any of these concerns, whose common profession and business it is not, the law implies no such general undertaking; but, in order to charge him with damages, a special agreement is required." 3 Blackstone's Commentaries, 165. Concerning the early requirement of an undertaking in order to maintain tort for negligence against one to whom another had intrusted his goods, see Ames, The History of Assumpsit, 2 Harv. Law Rev. 1; Burdick, The Origin of the Peculiar Duties of Public Service Companies, 11 Col. Law Rev. 514.

[2] "Common carriers were not anciently contrasted with carpenters or mercers or drapers. It is a mistake to suppose that the instances of the innkeeper, victualler, taverner, smith, farrier, tailor, carrier, and ferryman are in any way exceptional as regards their public character. From the earliest times one who was engaged in a given occupation as a business was described as being in a common employment, otherwise the employment was private. In Leet Jurisdiction of Norwich during the period 1374 to 1391 are to be found instances of the common purchaser, common merchant, common huckster, common brewer, common fripperer, common cooker-up, common touter. In the Year Books we have the common inn or innkeeper, common merchant, common mareshal, common schoolmaster, common tavern, common surgeon. In the Beverley Town Documents are to be found the common shaver, common bellman, and common makers and venders. In the later books we find the common farrier, common carrier, common hoyman, common kidder, common chyrugeon, common baker, common brewhouse, common lighterman, common mill, common glasshouse, common oven, common boatman, common ferryboat, common badger, common distiller, common porter, common alehouse, common cook, common tipler, common balance, common builder. This list would suggest either that the range of common employments must be greatly extended beyond that generally accepted, and the subsequent shrinkage explained, or that 'common' does not have the significance usually ascribed to it, as characterizing and distinguishing one occupation from another. Not monopoly, or bailment, or necessity will be found differentiating all these employments from the few not somewhere called common. The list is so long and contains such different callings that we are led to the conclusion that the term 'common' did not serve to distinguish one employment

P.UTIL.

GISBOURN v. HURST.

(Common Bench, 1710. 1 Salk. 249, 91 Reprint, 220.)

In trover upon a special verdict the case was, the goods in the declaration were the plaintiff's, and by him delivered in London to one Richardson, to carry down to Birmingham. This Richardson was not a common carrier, but for some small time last past brought cheese to London, and in his return took such goods as he could get to carry back in his wagon into the country for a reasonable price. When he returned home, he put his wagon with the cheese into the barn, where it continued two nights and a day, and then the landlord came and distrained the cheese for rent due for the house, which was not an inn, but a private house; and it was agreed per Cur. that goods delivered to any person exercising a public trade or employment to be carried, wrought or managed in the way of his trade or employ, are for that time under a legal protection, and privileged from distress for rent; but this being a private undertaking required a farther consideration; and it was resolved, that any man undertaking for hire to carry the goods of all persons indifferently, as in this case, is, as to this privilege, a common carrier;[3] for the law has given the privilege in respect of the trader, and not in respect of the carrier; and the case in Cro. El. 596, is stronger. Two tradesmen brought their wool to a neighbor's beam, which he kept for his private use, and it was held that could not be distrained.

from another and that all occupations could be common. What, then did 'common' mean? Simply 'business'—business carrier, business tailor, business barber. A common surgeon was one who made a business of surgery, who practiced it commonly; a common tailor was one who was in the business of tailoring. In 1367 an order was made for porters and creelmen 'who then exercised that craft commonly' qui tunc communiter utebantur illa arte—a perfect illustration of the true meaning of the word 'common.'" Adler, Business Jurisprudence, 28 Harv. Law Rev. 135, 149. See, also, Cheadle, Government Control of Business, 20 Col. Law Rev. 438, 550.

The notion that certain callings are inherently public in nature, as distinguished from other callings strictly private, is of comparatively modern origin. See observations of Holt, C. J., in Lane v. Cotton, 12 Mod. 472, 88 Reprint, 1458 (1701); Holmes, The Common Law, p. 203; Beale, The Carrier's Liability; Its History, 21 Harv. Law Rev. 158; Wyman, Public Service Corporations, chapter I; Burdick, The Origin of The Peculiar Duties of Public Service Companies, 11 Col. Law Rev. 514, 616, 743. "The fundamental difficulty lies in the conception that business is of two classes, public and private, and that the latter is subject to no duties to the individual and none to the state. This conception was developed and has been perpetuated largely through the law of common carriers. 'Common' in this connection was assumed to mean 'public',—public in the sense of 'subject to control by the state.' It was recognized that originally there were other 'common' employments, but it was stated that they also were under peculiar duties and this was explained on the basis of some exceptional relation to the public. * * * But no evidence of such exceptional relation has been produced." Adler, Business Jurisprudence, 28 Harv. Law Rev. 135, 146. See, also, Cheadle, Government Control of Business, 20 Col. Law Rev. 438, 550.

[3] The definition of a common carrier stated in this case has, perhaps, been quoted more often by courts and text-writers than any other definition to be found in the reports.

PENNEWILL v. CULLEN.

(Superior Court of Delaware, 1849. 5 Har. 238.)

This was an action on the case for damage done to a cargo of corn freighted by the plaintiff, in board of defendant's sloop, the "Three Sisters," from Dover landing to New York. The declaration was against the defendant, as a common carrier; with counts charging him as a private carrier, or bailee.

The defendant was the owner of a new vessel, the "Three Sisters," which had been employed generally in carrying coal by contract, from one person in Philadelphia to New York, and returning to Little Creek, with lime to the defendant. She had once carried by contract a load of grain from Little Creek to New York, and returned with lime to J. L. Heverin; once a load of wood for M. Vandeusen; a load of grain from Cantwell's Bridge to Smyrna, by contract, for George W. Cummins; and there was also evidence that the owner and master had severally applied to the plaintiff and others for freight; but there was no evidence of any other freighting than above stated.

On an application by the plaintiff, the defendant agreed to take a load of corn from Dover landing to New York, at a certain price for freight. In May, 1848, the "Three Sisters" took the load in, being about 2,600 bushels, a part of which (150 bushels) was heated and partly spoiled when put on board, as was known to the plaintiff. The vessel went down to Little Creek bridge shortly after high water, and passing through struck upon a pile not before known to be there. When she arrived at New York, after a long and rough passage, it was found that there was a considerable quantity of water in the hold, by which alone, or the wetting and the bad corn shipped together, the cargo was condemned, and plaintiff suffered a loss on a re-sale of $271.

By the Court. 1. The defendant's liability as a common carrier. What constitutes a common carrier is a question of law; whether the defendant comes within that definition, is a question of fact for the jury. A correct definition of common carrier is given in the case of McHenry v. Railroad Co., 4 Har. 448.

The jury will decide upon the proof, whether the defendant held himself out to the public as engaged in the business of a common carrier. It is not necessary that his trips should be regular between the same points or places. If engaged in the business of carrying grain for others generally to and from any point, he is liable as a common carrier. But if the defendant kept his vessel for his own use, he would not be liable as a common carrier, even if he chartered or hired his vessel to another by special agreement.

The liability of a common carrier is that of an insurer against everything except inevitable accident, usually called the act of God; public enemies, and the plaintiff's own default. By the act of God, is meant lightning, tempest, other natural causes, beyond human control. The

question in such case, is not one of diligence or negligence, but of human ability. If a vessel strike on a rock or shoal not hitherto known, the master is excused; but if it was known or laid down on any chart, it is an accident that might have been avoided, and the defendant is liable.

The default of the plaintiff. If the injury or loss arose from defective or damaged corn when shipped, the defendant though a common carrier, is excused.

2. The defendant's liability as a private carrier. A private carrier is one who, without being engaged in such business as a public employment, undertakes to deliver goods in a particular case, for hire or reward. As such, the defendant was bound to furnish a tight good vessel, suitable to that navigation, and to provide a competent master. This results from his obligation to use ordinary care and diligence to prevent accident; such care as a prudent man would ordinarily take of his own goods.

It is alleged that on the arrival of this cargo at New York, it was very wet, the vessel having taken much water. If this be so, it will be for the jury to decide where or how this water was taken in. If taken in by reason of running on a hidden post, at the bridge, not known to persons navigating there, the defendant, as a private carrier, would not be liable, if he afterwards used due care and precaution to save the corn from the effects of such accident.

If the water was not taken in by reason of this accident, but was a consequence of the leaky vessel, or the master allowed an improper collection of bilge water by any neglect, or from defectiveness of pumps, the defendant would be liable.

The measure of damages would be the depreciation in price of the corn, by reason of the injury.

Verdict for plaintiff, $63.41.

ALLEN et al. v. SACKRIDER et al.

(Court of Appeals of New York, 1867. 37 N. Y. 341.)

This was an action by Elijah B. Allen and Walter B. Allen against Norman Sackrider and Frank Farnham, to charge the defendants as common carriers, with damage to a quantity of grain, shipped by the plaintiffs in a sloop of the defendants, to be transported from Trenton, in the province of Canada, to Ogdensburgh, in this state, which accrued from the wetting of the grain in a storm.

The case was tried before a referee, who found as follows: "The plaintiffs, in the fall of 1859, were partners, doing business at Ogdensburgh; the defendants were the owners of the sloop Creole, of which Farnham was master. In the fall of 1859, the plaintiffs applied to the defendants to bring a load of grain from the bay of Quinte to Ogdens-

burgh; the master stated, that he was a stranger to the bay, and did not know whether his sloop had capacity to go there; being assured by the plaintiffs that she had, he engaged her for the trip, at three cents per bushel, and performed it with safety. In November 1859, plaintiffs again applied to defendants, to make another similar trip for grain, and it was agreed at $100 for the trip. The vessel proceeded to the bay, took in a load of grain, and, on her return, was driven on shore, and the cargo injured to the amount of $1,346.34; that the injury did not result from the want of ordinary care, skill or foresight, nor was it the result of inevitable accident, or what, in law, is termed the act of God. From these facts, my conclusions of law are, that the defendants were special carriers, and only liable as such, and not as common carriers, and that the proof does not establish such facts as would make the defendants liable as special carriers; and, therefore, the plaintiffs have no cause of action against them."

Judgment was, accordingly, entered upon the report, in favor of the defendants; and the same having been affirmed at general term, the plaintiffs appealed to this court.

PARKER, J. (after stating the case.)—The only question in the case is, were the defendants common carriers? The facts found by the referee do not, I think, make the defendants common carriers. They owned a sloop; but it does not appear that it was offered to the public, or to individuals, for use, or ever put to any use, except in the two trips which it made for the plaintiffs, at their special request. Nor does it appear that the defendants were engaged in the business of carrying goods, or that they held themselves out to the world as carriers, or had ever offered their services as such. This casual use of their sloop in transporting plaintiffs' property, falls short of proof sufficient to show them common carriers.

A common carrier was defined, in Gisburn v. Hurst, 1 Salk. 249, to be, "any man undertaking, for hire, to carry the goods of all persons indifferently;" and in Dwight v. Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec. 133, to be, "one who undertakes, for hire, to transport the goods of such as choose to employ him, from place to place." In Orange Bank v. Brown, 3 Wend. 161, Chief Justice Savage said: "Every person who undertakes to carry, for a compensation, the goods of all persons, indifferently, is, as to the liability imposed, to be considered a common carrier. The distinction between a common carrier and a private or special carrier is, that the former holds himself out in common, that is to all persons who choose to employ him, as ready to carry for hire; while the latter agrees, in some special case, with some private individual, to carry for hire." Story on Contracts, § 752a. The employment of a common carrier is a public one, and he assumes a public duty, and is bound to receive and carry the goods of any one who offers. "On the whole," says Prof. Parsons, "it seems to be clear, that no one can be considered as a common carrier, unless he has, in some way, held himself out to the public as a carrier, in such manner as to render him

liable to an action, if he should refuse to carry for any one who wished to employ him." 2 Pars. on Cont. (5th Ed.) 166, note.

The learned counsel for the appellant, in effect, recognizes the necessity of the carrier holding himself out to the world as such, in order to invest him with the character and responsibilities of a common carrier; and, to meet that necessity, says, "the Creole was a freight vessel, rigged and manned suitably for carrying freight from port to port; her appearance in the harbor of Ogdensburgh, waiting for business, was an emphatic advertisement that she sought employment." These facts do not appear in the findings of the referee, and, therefore, cannot, if they existed, help the appellants upon this appeal.

It is not claimed that the defendants are liable, unless as common carriers. Very clearly, they were not common carriers; and the judgment should, therefore, be affirmed.

Judgment affirmed.[4]

W. N. STEVENSON & CO. Inc., v. HARTMAN.

(Court of Appeals of New York, 1921. 231 N. Y. 378, 132 N. E. 121, 18 A. L. R. 1314.)

Action by W. N. Stevenson & Co., Incorporated, against Herman Hartman. From judgment entered on an order of the Appellate Division (191 App. Div. 406, 181 N. Y. S. 465), overruling exceptions taken on trial in the city court in the City of New York, ordered to be heard in the first instance at the Appellate Division, plaintiff appeals.

HISCOCK, C. J. This action was brought to recover the value of merchandise delivered by plaintiff to defendant, a cartman, for transportation within the city of New York. After the goods had been delivered to him and placed upon his cart he was temporarily called away, and while thus absent some thief drove his cart away and stole the merchandise.

It was established, we think, that if defendant received these goods as an ordinary bailee he was not guilty of any neglect of duty which made him responsible for the value thereof. On the other hand, it is practically conceded by him that if he received the goods as a common carrier he has not offered any excuse or defense which relieves him from responsibility for their value. It has thus far been held as matter of law

[4] Accord: Samms v. Stewart, 20 Ohio 70, 55 Am. Dec. 445 (1851); Varble v. Bigley, 77 Ky. (14 Bush) 698, 29 Am. Rep. 435 (1879); Edgar Lumber Co. v. Cornie Stave Co., 95 Ark. 449, 130 S. W. 452 (1910); Anderson v. Smith-Powers Logging Co., 71 Or. 276, 139 P. 736, Ann. Cas. 1916B, 1089 (1914). But see Gordon v. Hutchinson, 1 Watts & S. (Pa.) 285, 37 Am. Dec. 464 (1841). A special carrier may by contract render himself liable as an insurer. Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393 (1847). When the whole of a ship is chartered, she is not a common carrier. The Oakley C. Curtis, 4 F. (2d) 979 (1924); The C. R. Sheffer, 249 F. 600, 161 C. C. A. 526 (1918); The Wildenfels, 161 F. 864, 89 C. C. A. 58 (1908), certiorari denied 215 U. S. 597, 30 S. Ct. 399, 54 L. Ed. 342 (1909).

that he was not a common carrier, and was not liable for the value of the merchandise. The decisive question, therefore, presented for our consideration is whether this conclusion was correct. We do not think that it was.

Defendant was a public cartman, duly licensed under an ordinance of the city of New York. Under this ordinance and the license which he took out thereunder he became engaged in the business of public, that is, general, carting. He was privileged in the case of certain bulky articles to make a special contract for his compensation, but otherwise he was compelled to carry such articles as might be intrusted to him under a regular scale of prices.

So far as appears, his time was devoted to this business of carting. He had a regular stand upon one of the streets of the city, whereof the only purpose could be to invite and accept such business as might be offered to him by any one who desired his services. Much stress is laid upon the fact that the bulk of his business came from certain classes of merchants in the neighborhood of the stand which he occupied, but to our mind this means nothing more than that naturally those who sought and employed his services were the ones near by, who knew of his location, rather than those in some distant part of the city, who knew nothing of him, and whose convenience would not be served by hiring him. There is nothing to indicate that his customers were controlled or classified by any other test or rule than that of mere proximity and convenience. The business which he carried on is fairly described by him in his evidence, some of which may be quoted as follows:

"Q. Are you located at any particular place or have you a stand at any particular place? A. I stand at Fifteenth street and Sixth avenue.

"Q. Where are your customers? A. They are around in that particular neighborhood. * * *

"Q. Where do you truck merchandise to? A. To the piers and city deliveries.

"Q. You make deliveries all over the city? A. Yes, sir. * * *

"Q. Do you have any special routes? Not exactly special routes—it all depends on the goods you have for delivery? A. Yes, sir.

"Q. How many deliveries do you make in a day—any special number? A. Sometimes 20, sometimes 15 and sometimes 30.

"Q. That depends? A. It depends on what I pick up from certain people.

"Q. When you get a truck load full you start off to deliver? A. Yes, sir.

"Q. And you wait until you have a truck full before you start delivering; is that correct? A. Yes, sir, I take all that I can possibly get from all the people, and when they give me their goods and when I get a truck full, I go around and make deliveries."

As we have indicated, it seems to us perfectly clear that the business thus described was that of a common carrier of goods. Defendant was either a private carrier, carrying occasionally for some particular person

under some particular arrangement, or he was a common carrier engaged in the general business of carrying goods generally for those who desired his services. It seems plain that his case is not fitted by the former description, but that he comes within the latter definition. Anderson v. Fidelity & Casualty Co. of New York, 228 N. Y. 475, 127 N. E. 584, 9 A. L. R. 1544; Jackson Architectural Iron Works v. Hurlburt, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432; Allen v. Sackrider, 37 N. Y. 341.

According to these views, we think the judgment appealed from should be reversed, and a new trial granted, with costs to abide event.

HOGAN, MCLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

CHASE and CARDOZO, JJ., dissent.

Judgment reversed, etc.[5]

FISH et al. v. CLARK.

(Court of Appeals of New York, 1872. 49 N. Y. 122.)

Appeal from order of the General Term of the Supreme Court in the Seventh Judicial District, reversing judgment in favor of plaintiffs against defendant Clark, entered upon the report of a referee and granting new trial. Reported below, 2 Lans. 176.[6] * * *

GROVER, J. The respondent was part owner of a canal boat used generally for transporting freight for himself and the other part owner. He entered into a contract with the plaintiffs, who were common carriers between Rochester and New York, to load the boat with freight furnished by them at Rochester, and to transport the same to New York, for which they were to pay him the then price of freight, less commissions on the amount to be retained by them. The year previous he had carried one or more boat loads to New York for the plaintiffs upon the same terms. This did not make the respondent a common carrier, or subject him as such to liability for the property which was shipped upon the boat by plaintiffs. Allen v. Sackrider, 37 N. Y. 341; Angel on Carriers, § 68. The fact that the respondent applied to the plaintiffs for a load for the boat, instead of their making application to

[5] Accord: City of Chicago v. Mayer, 290 Ill. 142, 124 N. E. 842 (1919); Hinchliffe v. Wenig Teaming Co., 274 Ill. 417, 113 N. E. 707 (1916); Lawson v. Judge of Recorder's Court of City of Detroit, 175 Mich. 375, 141 N. W. 623, 45 L. R. A. (N. S.) 1152 (1913); Lloyd v. Haugh & Keenan Storage & Transfer Co., 223 Pa. 148, 72 A. 516, 21 L. R. A. (N. S.) 188 (1909); Benson v. Oregon Short Line R. Co., 35 Utah, 241, 99 P. 1072, 136 Am. St. Rep. 1052, 19 Ann. Cas. 803 (1909); Model Clothing Co. v. Columbia Transfer Co., 158 Mo. App. 481, 139 S. W. 242 (1911); Arkadelphia Milling Co. v. Smoker Mdse. Co., 100 Ark. 37, 139 S. W. 680 (1911); Farley v. Lavary, 107 Ky. 523, 54 S. W. 840, 47 L. R. A. 383 (1900); Caye v. Pool's Assignee, 108 Ky. 124, 55 S. W. 887, 49 L. R. A. 251, 94 Am. St. Rep. 348 (1900); Jackson Architectural Iron Works v. Hurlburt, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432 (1899). For further collection of cases, see notes in 21 L. R. A. (N. S.) 188; 45 L. R. A. (N. S.) 1152; 18 A. L. R. 1316.

[6] Part of the statement of facts is omitted.

him to carry it, did not, under the circumstances, affect the question. The plaintiffs knew that the defendant was not in business as a common carrier, and was only to carry goods for them, and not for any other person. The fact that the plaintiffs, as common carriers, contracted with others for the carriage of the freight with which they loaded the boat, and that the respondent was aware of this, did not make the defendant liable as common carrier to them. His liability must be determined by the business in which he was engaged and the character of his own employment, and not that of the plaintiffs. The counsel for the appellants insists that the facts show that the respondent employed the plaintiffs as his agents to procure a cargo for him, and the plaintiffs being liable as common carriers to pay the damages sustained by the owners from the injury to the property, and having paid the same, are entitled to indemnity therefor from the respondent as their principal. The conclusion of the counsel is correct. The difficulty is with the premises. The respondent never employed or authorized the plaintiffs to enter into contracts with third persons on his account for the carriage of goods. The case shows that the plaintiffs' business as common carriers was extensive. That it sometimes happened that the boats owned by them were insufficient for the transaction of their entire business; that on such occasions they employed others to carry for them. They did not thereby become agents for those thus employed. They could not as such bind them by contracts entered into with third persons. If the persons employed by the plaintiffs were common carriers, and contracted as such with the plaintiffs, they would be responsible in that character to the plaintiffs, but the plaintiffs could not make contracts with third persons as agents for them. This shows that the relation of principal and agent did not exist between the respondent and the plaintiffs. The respondent being wholly free from negligence was not liable to the plaintiff for the injury to the property. The order of the General Term reversing the judgment and directing a new trial must be affirmed, and judgment absolute given for the respondent upon the stipulation.

All concur.

Order affirmed, and judgment in accordance with opinion.

CHICAGO & E. I. RY. CO. v. CHICAGO HEIGHTS TERMINAL TRANSFER R. CO.

(Supreme Court of Illinois, 1925. 317 Ill. 65, 147 N. E. 666.)

STONE, J.[7] Appellant, the Chicago & Eastern Illinois Railway Company (hereinafter referred to as the railway company) filed its bill against the Chicago Heights Terminal Transfer Railroad Company (hereinafter referred to as the terminal company) seeking an injunc-

[7] Part of the opinion dealing with an auxiliary contract conceded by the parties to be illegal, is omitted.

tion against the violation of a certain contract entered into between them and asking for specific performance of the same. Upon a hearing the superior court of Cook county dismissed the bill for want of equity. Its decree was affirmed by the Appellate Court, and the cause comes here on a certificate of importance issued by that court.

The facts are not in dispute. As to most of them a stipulation has been filed. The railway company was organized in 1920 under the laws of the state of Illinois and succeeded to the rights, franchise, and property of the Chicago & Eastern Illinois Railroad Company. The terminal company is also a railroad corporation organized under the laws of this state in 1898, and is and has been operating and managing a railroad at Chicago Heights, consisting of 22 miles of track. Its business is to transport inbound and outbound freight to and from points on its line in and near the city of Chicago Heights to and from the tracks of four trunk line carriers, including appellant, at that place. Shipments originating on these trunk lines destined to points on the terminal company tracks are placed by the trunk line on a convenient track, and the terminal company by its own engines and crews places the same at the particular point of destination on its tracks. Outbound shipments are received from the shipper by the terminal company, as are requests from the industries for car placements. The terminal company bills the shipments out over the trunk line railway designated, and transports such shipments over its rails to a track used as an exchange track and there delivers them to the trunk line. Daily reports are made of this business. Outbound cars from Chicago Heights are sealed by the terminal company, regardless of the road to which they are to be delivered. Inbound and outbound cars received by the terminal company are first taken to its classification yards some distance from the trunk line tracks. These yards are about a mile and a half from the railway company's tracks. When placed in the classification yards the cars are classified as to the trunk line to which they are to be delivered if outbound, and as to the industry if inbound.

The evidence shows that the service of this character rendered by the terminal company to the railway company, and the manner of handling the cars connected therewith, are identical with the service rendered and methods used as to the other trunk lines. This service is the same whether the shipment be interstate or intrastate. The record shows that the railway company and the other trunk line railroads are all interstate carriers, and that shipments originating on the terminal company are both interstate and intrastate. Prior to April, 1900, the railway company's predecessor and two other railroad companies used the tracks of the terminal company to move freight to and from points on the latter's line to their own tracks. In so doing they used their own engines and crews, and confusion arose over the use of the tracks, and on April 16, 1900, the terminal company took over all control and operation of the tracks, and established the character of service hereinabove

referred to. This continued until May 14, 1907, when the agreement which is made the basis of this bill was entered into by appellant's predecessor and the terminal company. It may be styled an operating contract. * * *

The main contract in question provides that it is to run for a period of 99 years. By it the terminal company is to transport all cars between the tracks of the railroad company and the industries on the terminal company's lines, for which service it is to receive a compensation of $1 per car, and in addition thereto the proportion of the cost of operation and maintenance of the terminal company's road which the number of loaded cars transferred by the terminal company for the railroad company bears to the entire number of loaded cars handled by the terminal company. This service includes interchange of empty cars, with, however, an additional compensation to the terminal company of 25 cents for each empty car moved for the railroad company. Within the scope of the cost of operation are to be considered loss or damages paid for personal injuries, injury to property or cars while on industrial tracks, taxes, government charges, etc. The contract provides that in case of disagreement between the parties the subject-matter thereof shall be submitted to arbitrators. It also provides that if the services of any official or employee below the rank of general superintendent is unsatisfactory to the railroad company it shall have the right to require the discharge of such employee or officer.

Appellant, when organized took over the contract. Operations under this contract were carried on until July 22, 1922, when the terminal company filed its tariff of rates with the Interstate Commerce Commission and the Illinois Commerce Commission, which it here claims it was required to do under the Interstate Commerce Act (U. S. Comp. St. § 8563 et seq.) and the Illinois Public Utilities Act (Laws 1913, p. 455). These tariffs were higher than the compensation paid under the railway company's contract and similar contracts which the terminal company had with other trunk lines. The terminal company took the position that the compensation under the contract was entirely inadequate, and declared that the rates in the tariffs filed with the Interstate and Illinois Commerce Commissions must be paid. The record shows that the railway company sought to suspend the tariff by action before the Interstate Commerce Commission and the Illinois Commerce Commission, and, failing to secure favorable action by these bodies, it filed this bill for specific performance on the ground that the service rendered under the contract between it and the terminal company was that of an agent and not carrier service, and was therefore not subject to the tariff filed or the regulations prescribed by the commissions.

A number of questions have been raised and discussed by counsel in elaborate briefs filed. The question naturally first presenting itself is as to the legality of the contract. The railway company contends that it is merely an agency contract, and is not in conflict with the Trans-

portation Act, concerning filing of tariff rates and requiring compensation in accordance therewith, while appellee contends that the service rendered is carrier service; that both parties to the cause are engaged in interstate commerce, and so are subject to the jurisdiction of the Interstate Commerce Commission as well as the Illinois Commerce Commission; that appellee is bound to publish its tariffs as other carriers are required to do, and to charge for its services accordingly, and that the contract in question is wholly illegal and void.

Whether this service is within the purview of the Interstate Commerce and Illinois Public Utilities Acts depends in the first instance on whether the parties to the contract are to be here considered as common carriers. It is admitted that appellant is a common carrier, but it contends that as to the service rendered by appellee the latter is not. A common carrier is one who undertakes for hire to transport from place to place such persons or the goods of such as choose to employ it. A railway corporation exercising all its franchises is a common carrier. The reason for the existence of the law incorporating railway companies is that they may carry goods and passengers. Their franchises and property are affected with a public interest. The fact that their facilities are limited so as to enable them to serve only a few customers, or even a single customer, does not change the character of the corporations. Terminal railway companies are held in this state to be common carriers. Kenna v. Calumet, Hammond & Southeastern Railroad Co., 284 Ill. 301, 120 N. E. 259; Devine v. Chicago & Calumet River Railroad Co., 259 Ill. 449, 102 N. E. 803.

Sholl Bros. v. Peoria & Pekin Union Railway Co., 276 Ill. 267, 114 N. E. 529, is cited by appellant as authority for the contention that the terminal company here is not a common carrier. The railway track in that case was a private switchtrack, not owned by a railway company or operated by it as a part of its railroad. This was likewise true in the case of Koelle v. Knecht, 99 Ill. 396. These cases are not authority for the contention of appellant.

In United States v. Union Stockyards, 226 U. S. 286, 33 S. Ct. 83, 57 L. Ed. 226, modifying (Com. Ct.) 192 F. 330, it was contended, as appellant contends here, that the junction railway there involved was merely the agent of the appellant railway, and that it was not performing a transportation or carriage service but a mere switching service. The court there said (see 192 F. 337): "To call this service a switching service does not, in any respect, change its character; whether the work done be to switch a car 1 mile or to haul it 200 miles, it is none the less a transportation or carriage of the car and its contents by an independent operator." It was there held that the character of the service and not the designation of such service determined whether or not it was an act of transportation or carriage. It was also held that the junction railway was a common carrier. To the same effect is United States v.

Brooklyn Eastern District Terminal, 249 U. S. 296, 39 S. Ct. 283, 63 L. Ed. 613, 6 A. L. R. 527.

In this case the terminal company is engaged in the transportation and carriage of goods for hire. The mere fact that it has a contract in which the manner of rendering the service and the compensation therefor were specified in nowise changes the character of the service rendered. It was the service of a common carrier, and, this being true, the terminal company was subject to all rules and regulations to which common carriers are subject, including the provisions of the Interstate Commerce Act. By paragraph 3 of section 400, Transportation Act Feb. 28, 1920, 41 Stat. 474 (U. S. Comp. St. Ann. Supp. 1923, § 8563), amending section 1 of that act (24 Stat. 379) it is provided that wherever the word "carrier" is used in the act it shall mean "common carrier." Transportation under the act is defined to include locomotives, cars, and other vehicles and all instrumentalities and facilities for shipment or carriage, irrespective of ownership, or of any contract, either express or implied, for the use thereof, and all service connected with the receipt, delivery and handling of property transported. Paragraph 1 of section 6 of the act, as amended by Act June 29, 1906, c. 3591, 34 Stat. 586 (U. S. Comp. St. § 8569) provides as follows:

"That every common carrier subject to the provisions of this act shall file with the commission created by this act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, * * * when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation."

It will be noted that by the paragraph just quoted common carriers may establish a joint rate, which shall be filed with the tariff of rates, and if there be no joint rate agreement entered into or such rate established, each railroad shall file its own separate tariffs. It is not contended here that any attempt has been made to establish a joint rate between the parties to this proceeding. On the other hand, the evidence shows that the only rate published was that of the railway company, which included in its rates to points of delivery or origin upon the terminal company tracks. There was no such agreement as is required to constitute the establishment of a joint rate, and, moreover, to so contend would be inconsistent with the contention of appellant that this is an agency contract and not a contract for carriage. Paragraph 1 of section 6 imposes upon the common carrier the duty of filing and publishing rate tariffs. Other paragraphs of that section specify the manner of making such tariffs, and it seems clear that it was the duty of appellee to file a tariff, as was done in this case.

Section 2 of the Interstate Commerce Act of 1906 (U. S. Comp. St. § 8569) prohibits any carrier, unless otherwise provided, demanding, collecting, or receiving a greater, less, or different compensation for transportation of persons or property, or for any service in connection therewith, than the rates, fares, and charges specified in the tariff filed and in effect at the time. In Louisville & Nashville Railroad Co. v. Mottley, 219 U. S. 467, 31 S. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671, this section was construed as prohibiting the railroad company from lawfully issuing to Mottley and his wife a pass. It was there held that an interstate carrier cannot, since the enactment of the Interstate Commerce Act, make a valid contract to issue annual passes, and that Congress, in the exercise of its power over commerce, had a right to enact the provisions of said act which rendered unenforceable a prior contract valid when made, by which an interstate carrier agreed to issue annual passes for life in consideration of a release of claim for damages. It was there held that the constitutional provisions regarding the freedom of contract and inviolability of contract do not apply to contracts by common carriers where the same are affected by the regulations of the Interstate Commerce Commission under the Interstate Commerce Act.

It seems clear, therefore, that the terminal company had no power to contract with any person or railroad for a different compensation than published in its tariff. While it is urged that the contract is in form an agency contract, the service called for is the service of a carrier which that carrier may not lawfully give in any manner other than by its published tariff of rates. This contract conflicts with the Interstate Commerce Act, and is for that reason invalid. Counsel agree that this is the outstanding question in the case. The contract being invalid under the Interstate Commerce Act, it does not become necessary to discuss the application of similar requirements of the laws of our own state. Nor is it necessary to consider the numerous other questions raised on the record.

The superior and Appellate Courts did not err in holding this contract void. The judgment of the Appellate Court is therefore affirmed.

Judgment affirmed.[8]

[8] In Kenna v. Calumet H. & S. E. R. R. Co., 284 Ill. 301, 120 N. E. 259 (1918), it was held that a corporation chartered under the railroad laws of Illinois was necessarily a common carrier although it was engaged solely in transporting cars between trunk line railroads and the By-Products Coke Corporation. This decision was criticized in 32 Harv. Law Rev. 288. On the other hand, interplant railways and logging roads operated by industrial and lumber companies in order to move cars to and from trunk line railroads and points within the plant, have been held to be plant facilities and not common carriers. Industrial Railways Case, 29 Interst. Com. Com'n R. 212, 230 (1914); Solvay Process Co. v. Delaware L. & W. R. Co., 14 Interst. C. Com'n R. 246 (1908); General Electric Co. v. New York Cent. & H. R. R. Co., 14 Interst. Com. Com'n R. 237 (1908); Anderson v. Smith-Powers Logging Co., 71 Or. 276, 139 P. 736, L. R. A. 1916B, 1089 (1914); Edgar Lumber Co. v. Cornie Stave Co., 95 Ark. 449, 130 S. W. 452 (1910); Alfred Phosphate Co. v.

McCOY et al. v. PACIFIC SPRUCE CORPORATION.

(Circuit Court of Appeals, Ninth Circuit, 1924. 1 F. [2d] 853.)

RUDKIN, Circuit Judge. There is no controversy over the facts in this case. Prior to the 10th day of October, 1918, the United States, through its authorized officers and representatives, constructed, in large measure, a railroad extending from Yaquina Bay, near South Beach, to the town of Waldport and for a distance of about 7½ miles beyond, in the state of Oregon. The railroad was constructed as a war measure, to aid in spruce production for war purposes. Later the United States Spruce Production Corporation was organized under the laws of the state of Washington, by authority of the Act of July 9, 1918 (40 Stat. 888), which authorized the Director of Aircraft Production to form one or more corporations under the laws of any state, for the purchase, production, manufacture, and sale of aircraft and equipment and materials therefor, and to own and operate railroads in connection therewith, whenever in his judgment it would facilitate the production of aircraft for the United States and the governments allied with it in the prosecution of the war. On October 10, 1918, the United States conveyed the railroad, a sawmill then under construction, and other properties, to the corporation thus formed, and the latter entered into immediate possession. When the Armistice was signed work on the railroad ceased, except in so far as the corporation deemed it necessary to continue it in order to wind up its affairs. On May 29, 1919, the corporation granted one Doty a permit to operate the railroad from its north terminus to Waldport by the use of locomotives with flanged wheels, so constructed as to run upon the tracks and designed for the carriage of passengers and freight. Under this permit all rolling stock and equipment were to be furnished by the permittee, who, on his part, agreed to maintain the railroad and roadbed in good repair at his own expense, under the direction and supervision of the corporation, to reimburse the latter for any damage caused to the railroad or roadbed, and to return the property in as good condition and repair as at the time of its receipt. The permittee further agreed to comply in all things with the rulings and directions of the Public Service Commission of the state. The right to revoke the permit on one day's notice was expressly reserved; it being understood "that the corporation expects to advertise and to sell its railroad, and that the permit and license hereby granted is temporary in character, subject to revocation at any time, and that the corporation receives no consideration, benefit, or advantage

Duck River Phosphate Co., 120 Tenn. 274, 113 S. W. 413, 22 L. R. A. (N. S.) 701 (1907); Wade v. Lutcher & Moore Cypress Lumber Co., 74 F. 517, 20 C. C. A. 515, 33 L. R. A. 255 (1896). Furthermore, the fact that such railways are operated by a separate corporation has been held to be immaterial. Crane Iron Works v. United States, 1 U. S. Com. Ct. 453, 209 F. 238 (1912). See Industrial Railways Case, cited supra, 29 Interst. Com. Com'n R. 234; Matter of Split Rock Cable Road, 128 N. Y. 408, 28 N. E. 506 (1891).

from the operation of the railroad." This permit was revoked on December 19, 1921, but one Ashworth, who had operated the railroad under some arrangement with Doty, continued its operation until March 1, 1922, with the consent of the purchaser.

In the meantime, and on December 17, 1920, the United States Spruce Corporation entered into a contract with the Pacific Spruce Corporation, whereby the former agreed to sell and the latter agreed to buy the railroad, the sawmill, and other properties. By the terms of this contract the vendor retained title until the purchase price, extending over a long period of years, was fully paid. Upon the execution of the contract the purchaser entered into immediate possession of the properties, and, in operating the railroad, agreed to comply with all laws and lawful regulations. On March 1, 1922, the purchaser began active logging operations, and discontinued such common carrier service as had theretofore existed under the Doty permit and thereafter. A hearing was thereupon held, and the Public Service Commission of the state declared the Pacific Spruce Corporation to be a common carrier, subject to its jurisdiction, and required it to maintain and operate one combination baggage and passenger car, with necessary motive power and facilities for carrying freight, triweekly, from South Beach to Waldport and intermediate points. The Pacific Spruce Corporation thereupon instituted this suit against the commission to enjoin the enforcement of the order, and from a final decree in its favor the commission has appealed.

A common carrier is generally defined as one who, by virtue of his calling and as a regular business, undertakes to transport persons or commodities from place to place, offering his services to such as may choose to employ him and pay his charges. Anderson v. Smith-Powers Logging Co., 71 Or. 276, 139 P. 736, L. R. A. 1916B, 1089. If the appellee is not a common carrier as thus defined, it must be conceded that the order of the Public Service Commission declaring it such and regulating the use of its property is null and void. The claim that it is a common carrier is based upon the following contentions: That the right of way for the railroad was taken by the government under the war power or the right of eminent domain, and property thus acquired is charged with a public use and gives the public a right to demand a common carrier service; that, while the United States Spruce Production Corporation was owner of the railroad, it charged it with a common carrier use, and that use followed it into the hands of the appellee, as purchaser; and that the appellee itself devoted the railroad to a public use and is now under obligation to maintain the common carrier service.

The claim that property acquired by the United States during the war, for war purposes, was charged with a public use in the hands of the government, cannot be maintained. The property was acquired for a particular purpose and the government had an unquestionable

right to devote it to that purpose to the exclusion of every other. Its right and power to control and manage its own property in its own way rest upon the supremacy of its authority, and are neither limited nor controlled by the mode of acquisition. This would seem both elementary and fundamental. Nor did the conveyance to the United States Spruce Corporation change the situation. As said by the Supreme Court, in Clallam County v. U. S., 263 U. S. 341, 44 S. Ct. 121, 68 L. Ed. 328:

"In short, the Spruce Production Corporation was organized by the United States as an instrumentality for carrying on the war, all its property was conveyed to it by or bought with money coming from the United States, and was used by it solely as means to that end, and when the war was over it stopped its work, except so far as it found it necessary to go on in order to wind up its affairs."

Within less than a month after the conveyance was made the war ended; the corporation ceased to be an instrumentality for carrying on the war, and became a mere agent to wind up its own affairs, preparatory to going out of existence. For these reasons we are clearly satisfied that the railroad was charged with no public use while owned by the government and the Spruce Corporation. Nor did the temporary permit to operate the railway change its entire character. The permit was granted without consideration for a temporary purpose, as part of the winding-up process, and to hold that it had the broad effect now claimed for it would do violence to the intentions of all concerned. The same must be said of the temporary use made of the property after the appellee came into possession as purchaser.

Such were the conclusions of the court below, and its decree is affirmed.

MEISNER v. DETROIT, BELLE ISLE & WINDSOR FERRY CO.

(Supreme Court of Michigan, 1908. 154 Mich. 545, 118 N. W. 14, 19 L. R. A. [N. S.] 872, 129 Am. St. Rep. 493.)

Case by Samuel Meisner against the Detroit, Belle Isle & Windsor Ferry Company for refusing to accept plaintiff as a passenger. There was judgment for plaintiff for the amount paid for a ticket, on a verdict directed by the court, and he brings error.

The defendant is organized under Chapter 175, §§ 6646–6659, 2 Comp. Laws. Its articles of association declare its purpose to be "to own and operate ferries on the Detroit river, between the city of Detroit, and the towns of Walkerville, Windsor and Sandwich, Province of Ontario, and Belle Isle, and such other places on the Detroit river and St. Clair river as the business and interests of the public and said corporation may from time to time require." Belle Isle is a public park, comprising an island in the river, and owned by the city. Be-

tween the places mentioned it runs ferries, and, as to traffic between those places, is a public common carrier of passengers. The defendant purchased Bois Blanc Island, situated in Canadian waters, near the mouth of the Detroit river, opposite to and about a quarter of a mile from Amherstburg, Canada. It owns the entire island, except a tract reserved for lighthouse purposes and three small cottage lots. Upon its property defendant has erected a café, dance hall, cottage for women, shelters and amusement buildings of various kinds, laid out walks, drives, bicycle paths, baseball and athletic grounds, bathing beaches, etc. Upon these it has expended about $200,000. It owns and runs a boat from Detroit to its park on Bois Blanc Island twice daily. This boat, the steamer Columbia, will carry from 3,000 to 3,500 passengers. A smaller boat, the Papoose, licensed to carry 150 passengers, runs between Amherstburg and Bois Blanc. The island being located in Canadian territory, defendant's boat, the Columbia, is required to stop at Amherstburg, going and coming, to take on a customs inspector. It caters largely to women and children. It owns its own docks used on this route. No liquor is allowed to be sold on the island or on the boats. It provides special policemen to patrol the island, to prevent all conduct and disturbances which would annoy its patrons. Its boat, the Columbia, carries excursions of various societies to the island, selling tickets at a reduced rate to such societies, which make a profit by reselling them at the regular rate. During the season of 1906, there were about 176 of such special excursions. Plaintiff was refused passage from the city of Detroit to Bois Blanc on two occasions. He had purchased tickets for these trips from societies which gave these excursions. The contracts between the defendant and these organizations contained the following provision:

"The party of the first part reserves the right to refuse to accept tickets sold or furnished to any person whom they believe to be possible objectionable passengers. Tickets sold or furnished in violation of this contract will not be accepted."

The tickets also contained the following provision: "This ticket is sold subject to the agreement between the Detroit, Belle Isle & Windsor Ferry Company and the above organization, and must be exchanged for the excursion ticket at wharf on date of the excursion."

On attempting to pass the gate onto the steamer, plaintiff was refused admission. The reason given on each occasion was that on a former occasion he had engaged in a disturbance upon the boat to the annoyance of passengers and crew. He brought this suit to recover damages for refusal to carry him as a passenger. The action is in tort, alleging a breach of defendant's duty as a common carrier of passengers. The court directed a verdict for the defendant, except as to the price of the ticket which plaintiff had purchased. He was permitted to recover for this amount, with interest.

GRANT, C. J. (after stating the facts). Is the defendant, in its business between Detroit and its park on Bois Blanc Island, a public common carrier of passengers, obliged by law to accept any person who offers himself as a passenger? This is the important question in this suit. If it be answered in the affirmative, it follows that no person or corporation can own a private park, private docks, its own means of transportation, and control its pleasure grounds, and means of transportation thereto, without becoming a common carrier, obliged to transport anyone who presents himself as a passenger. The sole business in which the defendant is engaged with these two boats is carrying passengers to and from its private pleasure grounds. It caters to a particular class of people. It desires to keep out those whom, for reasons of its own, it deems objectionable. Unless it did this, it would not secure the class of patrons it desires. If it secures the better class of people, which its managers probably believe would make the enterprise a success, beneficial financially to themselves and attractive to respectable people, it must exclude the rough, boisterous, and rowdyish element from its boats and grounds. It is not engaged in the general carriage of passengers for business and pleasure. It invites such persons and parties as it chooses, and upon such terms as it chooses to make, to visit its own grounds, provided, as above stated, with the means of entertainment, amusement, and sport. It is in all essentials as private an enterprise as that of a theater, a circus, or a race track.

Counsel do not disagree as to the law of common carriers of passengers. Anyone, no matter what his character is or has been, presenting himself for transportation to such carrier, is, upon paying his fare, entitled to be transported, provided there is nothing in his condition or conduct when he presents himself to justify his exclusion. This rule does not apply to the owners of theaters, circuses, race tracks, private parks, and the like, unless there be some statute regulating their business, and providing the terms and conditions under which that company's business may be carried on. It appears to be settled by the authorities that these are private enterprises, under the control of private parties, and that they may license whomsoever they will to enter, and refuse admission to whomsoever they will. Their own interests prompt fair and just treatment to those whom they invite to their places of pleasure. The right given to enter such places is a mere license, and after the right to enter is granted, it may be revoked. So, also, the right to enter may be refused to anyone. People v. Flynn, 189 N. Y. 180, 82 N. E. 169, 12 Ann. Cas. 420; Collister v. Hayman, 183 N. Y. 250, 76 N. E. 20, 1 L. R. A. [N. S.] 1188, 111 Am. St. Rep. 740, 5 Ann. Cas. 344; Pearce v. Spalding, 12 Mo. App. 141; Purcell v. Daly, 19 Abb. N. C. (N. Y.) 301; Burton v. Scherpf, 1 Allen (Mass.) 133, 79 Am. Dec. 717; McCrea v. Marsh, 12 Gray (Mass.), 211, 71 Am. Dec. 745; Horney v. Nixon, 213 Pa. 20, 61 A. 1088, 1

L. R. A. (N. S.) 1184, 110 Am. St. Rep. 520, 5 Ann. Cas. 349; Wood v. Leadbitter, 13 M. & W. 838.

Wood v. Leadbitter, supra, is very similar in its facts to this case. It is cited with approval in several of the above-cited cases. Pleasure grounds of this character are not necessaries of life, any more than are theaters and race tracks; and, unless restrained by some provisions of their charters, their owners can impose any terms of admission they choose. No such restraints are imposed upon the defendant in this case. The defendant can exact an entrance fee at the park, or it can compensate itself by charging for transportation to it and admit its patrons otherwise free to the park. The ride upon the boat and the use of the grounds are part of the same scheme for pleasure furnished by the defendant to those whom it may choose to carry. It is perhaps due to the plaintiff to say that he denies the improper conduct charged against him, but his rights in no sense depend upon the reason given for his exclusion.

The judgment is affirmed.[9]

BLAIR, HOOKER, MOORE, and MCALVAY, JJ., concurred.

ROBERTS v. TURNER.

(Supreme Court of New York, 1815. 12 Johns. 232, 7 Am. Dec. 311.)

This was an action on the case, against the defendant, as a common carrier, and was tried at the Albany circuit, in April, 1814, before Mr. Justice Spencer.

The defendant resided at Utica, and pursued the business of forwarding merchandise and produce from Utica to Schenectady and Albany. The ordinary course of this business is, for the forwarder to receive the merchandise or produce at his store, and send it by the boatmen, who transport goods on the Mohawk river, or by wagons to Schenectady or Albany, for which he is paid at a certain rate per barrel, &c.: and his compensation consists in the difference between the sum which he is obliged to pay for transportation, and that which he receives from the owner of the goods.

The defendant received from the plaintiff, who resided in Cazenovia in Madison county, by Aldrich, his agent, twelve barrels of pot ashes, to be forwarded to Albany to Trotter; the ashes were put on board a

9 For collection of cases holding ferrymen to be common carriers, see note in 68 L. R. A. 153. In Reasor v. Paducah & I. Ferry Co., 152 Ky. 220, 153 S. W. 222, 43 L. R. A. (N. S.) 820 (1913), and McBride v. McNally, 243 Pa. 206, 89 A. 1131, 52 L. R. A. (N. S.) 259 (1914), it was held that the fact the ferryman was running a special excursion did not relieve him of the duties imposed upon him as a common carrier. In North American Acc. Ins. Co. v. Pitts (Ala. Sup.) 104 So. 21 (1925), it was decided that one who made a business of taking people for a ride in an aeroplane, in order to give them a thrill, was not a common carrier of passengers.

boat, to be carried down the Mohawk to Schenectady, and whilst proceeding down the river, the boat ran against a bridge and sunk, and the ashes were thereby lost.

The defendant's price for forwarding goods to Schenectady, was twelve shillings per barrel, and the price which he had agreed to pay for the transporting the goods in question to that place was eleven shillings; the defendant had no interest in the freight of the goods, and was not concerned as an owner in the boats employed in the carriage of merchandise.

The judge being of opinion that the testimony did not make out the defendant to be a common carrier, nonsuited the plaintiff; and a motion was made to set aside the nonsuit.

SPENCER, J. On the fullest reflection, I perceive no grounds for changing the opinion expressed at the circuit. The defendant is in no sense a common carrier, either from the nature of his business, or any community of interest with the carrier. Aldrich, who, as the agent of the plaintiff, delivered the ashes in question to the defendant, states the defendant to be a forwarder of merchandise and produce from Utica to Schenectady and Albany; and that he delivered the ashes, with instructions from the plaintiff to send them to Col. Trotter.

The case of a carrier stands upon peculiar grounds. He is held responsible as an insurer of the goods, to prevent combinations, chicanery and fraud. To extend this rigorous law to persons standing in the defendant's situation, it seems to me, would be unjust and unreasonable. The plaintiff knew, or might have known (for his agent knew), that the defendant had no interest in the freight of the goods, owned no part of the boats employed in the carriage of goods, and that his only business in relation to the carriage of goods consisted in forwarding them. That a person thus circumstanced should be deemed an insurer of goods forwarded by him, an insurer too without reward, would, in my judgment, be not only without a precedent, but against all legal principles. Lord Kenyon, in treating of the liability of a carrier, 5 T. R. 394, makes this the criterion to determine his character; whether, at the time when the accident happened, the goods were in the custody of the defendants as common carriers. In Garside v. Proprietors of the Trent & Mersey Navigation, 4 T. R. 581, the defendants, who were common carriers, undertook to carry goods from Stoneport to Manchester, and from thence to be forwarded to Stockport. The goods arrived at Manchester, and were put into the defendants' warehouse, and burnt up before an opportunity arrived to forward them. Lord Kenyon held, the defendants' character of carriers ceased when the goods were put into the warehouse. This case is an authority for saying, that the responsibilities of a common carrier and forwarder of goods rest on very different principles.

In the present case, the defendant performed his whole undertaking; he gave the ashes in charge to an experienced and faithful boatman.

It has been urged, that the defendant derived a benefit from the carriage of the goods, in receiving cash from the owners of produce, and paying the boatmen in goods, and also in charging more than he actually paid. The latter suggestion is doubted in point of fact; but admitting the facts to be so, these are advantages derived from the defendant's situation, as a warehouse keeper and forwarder of goods, and by no means implicate him as a carrier; for surely the defendant is entitled to some remuneration for the trouble in storing and forwarding goods. In any and every point of view, there is not the least pretext for charging the defendant with this loss as a common carrier.[10]

PER CURIAM. Motion denied.

BUCKLAND et al. v. ADAMS EXPRESS CO.

(Supreme Judicial Court of Massachusetts, 1867. 97 Mass. 124, 93 Am. Dec. 68.)

Contract to recover the value of a case of pistols. In the superior court judgment was entered for the plaintiffs on agreed facts, and the defendants appealed to this court.[11] * * *

BIGELOW, C. J. We are unable to see any valid reason for the suggestion that the defendants are not to be regarded as common carriers. The name or style under which they assume to carry on their business is wholly immaterial. The real nature of their occupation and of the legal duties and obligations which it imposes on them is to be ascertained from a consideration of the kind of service which they hold themselves out to the public as ready to render to those who may have occasion to employ them. Upon this point there is no room for doubt. They exercise the employment of receiving, carrying and delivering goods, wares and merchandise for hire on behalf of all persons who may see fit to require their services. In this capacity they take property from the custody of the owner, assume entire possession and control of it, transport it from place to place, and deliver it at a point of destination to some consignee or agent there authorized to receive it. This statement embraces all the elements essential to constitute the relation of common carriers on the part of the defendants towards the persons who employ them. Dwight v. Brewster, 1 Pick. 50, 53, 11 Am.

10 Accord: Blair v. American Forwarding Co., 159 Ill. App. 511 (1911); Export Shipping Co. v. Wabash Ry., 14 Interst. Com. Com'n R. 437 (1908); California Commercial Association v. Wells, Fargo & Co., 14 Interst. Com. Com'n R. 422 (1908); Barasch v. Richards, 113 N. Y. S. 1005 (1909). But where persons calling themselves forwarders are so conducting their business as to lead the public to believe that they are carriers and are employed as carriers to ship goods without any knowledge of their true character, the liability of a carrier will attach to them. Slutzkin v. Gerhard & Hey, 199 App. Div. 5, 191 N. Y. S. 104 (1921).

11 The statement of facts, other than that contained in the opinion, is omitted. Part of the opinion is omitted.

Dec. 133; Lowell Wire Fence Co. v. Sargent, 8 Allen, 189; 2 Redfield on Railways, 1–16.

But it is urged in behalf of the defendants that they ought not to be held to the strict liability of common carriers, for the reason that the contract of carriage is essentially modified by the peculiar mode in which the defendants undertake the performance of the service. The main ground on which this argument rests is, that persons exercising the employment of express carriers or messengers over railroads and by steamboats cannot, from the very nature of the case, exercise any care or control over the means of transportation which they are obliged to adopt; that the carriages and boats in which the merchandise intrusted to them is placed, and the agents or servants by whom they are managed, are not selected by them nor subject to their direction or supervision; and that the rules of the common law, regulating the duties and liabilities of carriers, having been adapted to a different mode of conducting business by which the carrier was enabled to select his own servants and vehicles and to exercise a personal care and oversight of them, are wholly inapplicable to a contract of carriage by which it is understood between the parties that the service is to be performed, in part at least, by means of agencies over which the carrier can exercise no management or control whatever. But this argument, though specious, is unsound. Its fallacy consists in the assumption that at common law, in the absence of any express stipulation, the contract with an owner or consignor of goods delivered to a carrier for transportation necessarily implies that they are to be carried by the party with whom the contract is made, or by servants or agents under his immediate direction and control. But such is not the undertaking of the carrier. The essence of the contract is that the goods are to be carried to their destination, unless the fullfilment of this undertaking is prevented by the act of God or the public enemy. This, indeed, is the whole contract, whether the goods are carried by land or water, by the carrier himself or by agents employed by him.

The contract does not imply a personal trust, which can be executed only by the contracting party himself or under his supervision by agents and means of transportation directly and absolutely within his control. Long before the discovery of steam power, a carrier who undertook to convey merchandise from one point to another was authorized to perform the service through agents exercising an independent employment, which they carried on by the use of their own vehicles and under the exclusive care of their own servants. It certainly never was supposed that a person who agreed to carry goods from one place to another by means of wagons or stages could escape liability for the safe carriage of the property over any part of the designated route by showing that a loss happened at a time when the goods were placed by him in vehicles which he did not own, or which were under the charge of agents whom he did not select or control. The truth is that the particular mode or agency by which the service is to be performed does not en-

ter into the contract of carriage with the owner or consignor. The liability of the carrier at common law continues during the transportation over the entire route or distance over which he has agreed to carry the property intrusted to him. And there is no good reason for making any distinction in the nature and extent of this liability attaching to carriers, as between those who undertake to transport property by the use of the modern methods of conveyance, and those who performed a like service in the modes formerly in use. If a person assumes to do the business of a common carrier, he can, if he sees fit, confine it within such limits that it may be done under his personal care and supervision or by agents whom he can select and control. But if he undertakes to extend it further, he must either restrict his liability by a special contract or bear the responsibility which the law affixes to the species of contract into which he voluntarily enters. There is certainly no hardship in this, because he is bound to take no greater risk than that which is imposed by law on those whom he employs as his agents to fulfill the contracts into which he has entered.

It is not denied that in the present case the goods were lost or destroyed while they were being carried over a portion of the route embraced in the contract with the plaintiffs, and before they had reached the point to which the defendants had agreed to carry them. It is not a case where the agreement between the parties was that the merchandise was to be delivered over by the defendants to other carriers at an intermediate point, thence to be transported over an independent route to the point of destination without further agency on the part of the defendants. The stipulation was that the defendants should carry the property from the place where they received it to the point where it was to be delivered into the hands of the consignee. The loss happened before the defendants had fulfilled their promise. * * *

Judgment for the plaintiffs.

KETTENHOFEN v. GLOBE TRANSFER & STORAGE CO.

(Supreme Court of Washington, 1912. 70 Wash. 645, 127 P. 295, 42 L. R. A. [N. S.] 902, Ann. Cas. 1914B, 776.)

ELLIS, J.[12] This is an action to recover the value of certain household goods and wearing apparel destroyed by fire while in the custody of the defendant, Globe Transfer & Storage Company. The defendant was engaged in the business, among other things, of soliciting goods from different persons having less than a car load lot for shipment from Seattle to other points. Its custom was to receive such lots and hold them at its warehouse until a car load destined to a common point had been assembled. It then arranged with some railroad company for a car to that point, placed the goods in the car, each piece marked for

[12] Parts of the opinion are omitted.

identification as to ownership, billed the car to its agent, and turned the car over to the railroad company for transportation to the given point. The placing of such goods in the warehouse was not for storage, but for the defendant's own convenience in assembling the car load lots as incidental to the carriage of the goods. No storage charge was made. The defendant usually charged a freight rate for such shipments higher than the railroad company's car load rate and lower than its less than car load rate, the defendant's compensation being the difference between its own charge and the car load rate paid by it to the railroad company. The defendant's manager testified that its agent at the point of destination pays the freight and collects the freight plus the defendant's commission, styled by him "our commission," unless it is paid in advance.

The plaintiffs delivered their goods to the defendant under an oral agreement for shipment from their residence in Seattle to Milwaukee, Wisconsin, the defendant having agreed to notify the plaintiffs as soon as it would be ready to load the car. On Saturday, January 28, 1911, the notification was given, and the defendant, in the afternoon of that day, sent its conveyances, transported the goods from the plaintiffs' residence to its warehouse, where they arrived at about six o'clock in the evening, too late for loading into the car. They were placed in the warehouse for weighing, sorting, listing and storage, till they could be placed in the car. While in the warehouse the goods were destroyed by fire. There was no evidence that the plaintiffs had any knowledge of the details of the defendant's business or that the goods would be stored in the warehouse at all. The cause was tried to the court without a jury. The court found the facts substantially as above condensed; also that the plaintiffs were damaged in the sum of $686, and that the reasonable value of the defendant's services in packing and carting the goods was the sum of $27.50. Judgment in favor of the plaintiffs was rendered for the difference of $658.50, and for costs. The defendant has appealed.

The appellant concedes that, if the goods when destroyed were in its possession as a common carrier, it is liable for their loss. It contends, however, that its possession was that of a forwarder or warehouseman, and not that of a common carrier. The duties and liabilities assumed by the appellant, in legal contemplation must be determined by the nature of the contract of the parties. A thorough examination of the evidence leads to the sure conclusion that the contract was one for a through shipment from the residence of the respondents in the city of Seattle to the city of Milwaukee. The means to that end were left entirely to the appellant's selection and control. The goods were delivered with no other direction expressed or implied. Neither the service on the one hand nor the compensation on the other was segregated, itemized, or separately considered. It was a contract for a through shipment at a rate to be fixed by the appellant. The goods were not delivered for mere forwarding to the railroad company, nor for storage

in a warehouse; they were delivered for shipment by whatever route the appellant might find most to its advantage, and in a car of its own procuring. In this branch of its business the appellant was exercising the employment of receiving, carrying, and delivering goods, wares, and merchandise as an occupation, and for all people indifferently. By its contract it assumed the entire control of the goods, severing the respondents' connection therewith until delivery at the place of destination. Such was the ordinary course of its business, and such was the plain purport of the contract. It was a contract for carriage and delivery for hire, pure and simple; and in so contracting, the appellant assumed the attributes, and took on the relation of, a common carrier for hire, with all of the duties and liabilities incident to that relation. It can make no manner of difference that in other branches of its business it may have been a mere forwarder or warehouseman, or that it so styled itself. Its character, as concerns the business here involved, must be determined by the nature of the service it contracted to perform, without regard to the name by which it has chosen to designate its general business. Bare v. American Forwarding Co., 146 Ill. App. 388; Mercantile Mut. Ins. Co. v. Chase, 1 E. D. Smith (N. Y.) 115; Lee v. Fidelity Storage and Transfer Co., 51 Wash. 208, 98 P. 658; Garberson v. Trans-Continental Freight Co., 51 Wash. 213, 98 P. 612. * * *

The appellant lays much stress upon the fact that it did not own a line of railway nor control the entire means of transportation. This is not material. It is sufficient that, in the ordinary course of its business, it made a contract by which it agreed to transport and deliver the goods. Cownie Glove Co. v. Merchants' Dispatch Transp. Co., 130 Iowa, 327, 106 N. W. 749, 4 L. R. A. (N. S.) 1060, 114 Am. St. 419; Buckland v. Adams Express Co., 97 Mass. 124, 93 Am. Dec. 68; Hutchinson, Carriers (3d Ed.) §§ 83, 84.

Nor is it material that the goods were destroyed while in the appellant's warehouse. They were delivered for transportation, not for storage. The storage was at the appellant's instance and for its own convenience. * * *

The reasoning of the court in the Illinois case of Bare v. American Forwarding Co., supra, seems to us unanswerable. The appellant claims that the later case of Blair v. American Forwarding Co., 159 Ill. App. 511, decided by the same court, counteracts the former decision, but we think not. It does not purport to overrule the former decision, but merely to distinguish the two cases on the facts. In any event, the earlier decision, as it seems to us, is the more logical and convincing. Nor are we impressed by the interstate commerce decisions —California Commercial Ass'n v. Wells Fargo & Co., 14 Interst. Com. Com'n R. 422, and Export Shipping Co. v. Wabash R. Co., 14 Interst. Com. Com'n R. 437—cited by the appellant. So far as applicable to the facts here, they seem to us unsound. On both reason and what we conceive to be the more logical authorities, we hold that, under the circum-

stances here shown, the appellant assumed the duties and liabilities of a common carrier. * * *

The judgment is affirmed.[13]

MOUNT, C. J., MAIN, MORRIS, and FULLERTON, JJ., concur.

MANN v. WHITE RIVER LOG & BOOMING CO.

(Supreme Court of Michigan, 1881. 46 Mich. 38, 8 N. W. 550, 41 Am. Rep. 141.)

Assumpsit on common and special counts. Plaintiff brings error.

CAMPBELL, J. Plaintiff sued defendant for not delivering part of a quantity of logs which the company had in charge to deliver at White Lake, after running them down from their place of reception on White river. As the case was passed upon by the jury they necessarily found that there had been no fault or negligence in defendant, and the only question before us is whether defendant was a common carrier, and liable at all events, except for the risks of a public enemy or inevitable casualty.

The duty undertaken by the defendant was in accordance with its statutory power to drive, run, raft and boom logs in White river for any person having logs to float down the stream, and the case shows that the work of all kinds was done at regular rates, and for all alike.

The dispute, therefore, is narrowed down to the single question whether the handling of logs, as managed by the log-driving and booming companies, is properly to be treated as common carriage.

It is admitted to be like common carriage in the universality of the duty, and by statute a lien is given for charges, not only on the specific logs for charges on each, but on a part to secure the whole charges. Comp. L. § 2788. The statute moreover gives a special remedy to enforce the lien. It also contemplates, by the section just referred to, that it is only in the absence of express contract that a uniform rate is provided for.

These rights resemble in important respects the rights of common carriers. But the statute contains no declaration that the companies shall be so treated, and the whole matter is left to be determined by legal analogies.

[13] Accord: Heath v. Judson Freight Forwarding Co., 47 Cal. App. 426, 190 P. 839 (1920); Ingram v. American Forwarding Co., 162 Ill. App. 476 (1911); Bare v. American Forwarding Co., 146 Ill. App. 388 (1909); Affd. 242 Ill. 298, 89 N. E. 1021 (1909); J. H. Cownie Glove Co. v. Merchants Dispatch, 130 Iowa, 327, 106 N. W. 749, 4 L. R. A. (N. S.) 1060 (1906); Merchants Dispatch Trans. Co. v. Bloch Bros., 86 Tenn. 392, 6 S. W. 881, 6 Am. St. Rep. 847 (1888); Chouteaux v. Leech, 18 Pa. 224, 57 Am. Dec. 602 (1852). In Ingram v. American Forwarding Co., supra, the defendant was held to be an insurer although the loss occurred after the goods had been delivered to the railroad, and the contract of shipment described the defendant as being a forwarder and not a carrier. But see discussion in Export Shipping Co. v. Wabash Ry., 14 Interst. Com. Com'n R. 437 (1908); California Commercial Ass'n v. Wells Fargo & Co., 14 Interst. Com. Com'n R. 422 (1908), and Interstate Commerce Commission v. Delaware L. & W. R. Co., 220 U. S. 235, 31 S. Ct. 392, 55 L. Ed. 448 (1910).

When we look at the business done, it will be found to resemble in some respects the business of carriage, and in some respects it is like different business, while in most things it is peculiar and subject to its own conditions. It has one peculiarity in which it differs entirely from common carriage, which was held by this court in Fitch v. Newberry, 1 Doug. 1, 40 Am. Dec. 33, to create no rights against property not voluntarily entrusted to the carrier. One important part of the compensated business of these companies includes the temporary control of logs interfering with the free running of the body of logs in the stream. Comp. L. § 2793.

The peculiarity which is most apparent is that there is no carriage whatever either in vehicles or by application of motive power, unless in some emergency. The logs of various owners are usually, as they were in the present case, set floating promiscuously, and only sorted and separated when the run is as to some portion at least substantially completed. The logs are floated down the streams by the force of the current, sometimes aided by dams and flooding, and if it were not for the risk of jams, no interference to any great extent would be needed. The chief work of the companies when running and driving logs is to see that they are kept in the way of floating down stream, and not allowed to accumulate in jams and obstruct the floatage. And it is to prevent this that the compulsory powers are exercised.

It is manifest that this kind of service differs very much from the possession and transfer of articles which are always in custody and which could not be moved except by the vehicles of the carrier. Among the somewhat fanciful reasons given for the peculiar duties and responsibilities of common carriers, we cannot always determine how far any of them actually operated in shaping the legal rules. But it is dangerous to run after supposed analogies and extend peculiar rules to new cases substantially different from the old. Courts have no doubt settled the law of common carriers as applying to all classes of carriage, however free from most of the special risks and temptations which were relied on to uphold the ancient doctrines. But when it is sought to extend the rules outside of the carrying business altogether, we should not do this unless on very plain reasons of fitness.

Taking heed to give no excessive force to resemblances, we may find, nevertheless, some other duties which are at least quite as analogous as carriage. Drovers—or as the common law calls them, agisters—perform functions not unlike those of log drivers. Their animals move themselves, while logs are moved by the stream, and the beasts have a species of intelligence, while logs and currents move unconsciously. Yet the chief business of the men in charge of both is to prevent the property from straying or stopping, and to guide it where it belongs. No one regards drovers as carriers. Angell on Carriers, §§ 24, 52; Story on Bailments, § 443. The entire absence of any motive power, and the function of guiding and regulating things which move themselves or are moved by some independent force, make it impossible to

treat these classes of business as carriage in fact, and it is difficult to see how, if involving no carriage, there is any propriety in calling them carriage.

There is always hardship and often wrong in holding persons liable for what they have done their best to avoid. While we are bound to respect established rules, we cannot wisely extend them beyond their reasonable application. We think the court below decided correctly that the extreme liabilities of common carriers did not apply to defendants.

The judgment must be affirmed with costs.[14]

The other Justices concurred.

HASKELL v. BOSTON DISTRICT MESSENGER CO.

(Supreme Judicial Court of Massachusetts, 1906. 190 Mass. 189, 76 N. E. 215, 2 L. R. A. [N. S.] 1091, 112 Am. St. Rep. 324, 5 Ann. Cas. 796.)

KNOWLTON, C. J.[15] The defendant is a corporation, organized under the laws of New Hampshire for the purpose of "carrying on a general messenger business, leasing, erecting and maintaining wires and fixtures for call boxes, telegraphs and other things relating to and useful in the receiving and transmitting and delivery of messages." For many years it has had a general office and branch offices in the city of Boston, and has been engaged in the business of furnishing messengers for hire. The ordinary method of doing the business has been for the company to send a messenger in response to a call, and to send with him a printed slip, with blank spaces for filling in the "Time started," "Name," "Address," "Messenger occupied" (time), "Expenses" (paid), "Total," "Messenger detained" (minutes), "By" (name of person employing messenger). There were other blanks to be filled, to show where the messenger was sent, by whom the message was received, where the answer was delivered, and by whom it was received. An advertising pamphlet, issued by the defendant, gave the rates of charges for a messenger between specified points in all parts of Boston, and also rates by the hour. At the bottom of one of its pages was a printed statement, "We employ bright, intelligent boys who are thoroughly experienced in messenger work." The rates stated are all without reference to the nature or importance of the work in which the particular messenger may be employed. The pamphlet contained numerous other advertising statements, all of which implied that the business done by the company was only in furnishing messengers for the service of others, except that at the bottom of one page there was this statement: "We deliver ad-

[14] In Weymouth v. Penobscot Log Driving Co., 71 Me. 29 (1880), it was held that a corporation which had been given the exclusive right to drive logs down the Penobscot river was bound to drive logs for all persons who applied, and therefore was liable to the plaintiff for its failure to drive logs which were tendered.

[15] The statement of facts, other than that contained in the opinion of the court, is omitted. Parts of the opinion are omitted.

dressed circular work, bills, monthly statements, catalogues, callendars, etc. Get our prices." It also appeared that for several years, shortly before Christmas, the defendant had distributed a card, saying that it made a specialty of delivering Christmas presents. In carrying on its business the defendant employed boys fifteen or sixteen years of age.

The plaintiff signalled to the defendant for a messenger by means of a call box, and delivered to the messenger sent in response to his call, a receipted bill for rent, amounting to $58.33, and sent him to a tenant to collect it. The messenger collected the money and failed to return it. The question is whether there was any evidence at the trial which would warrant the jury in finding for the plaintiff for the amount of this money which he seeks to recover.

The plaintiff contends that the defendant acted as a common carrier in receiving the bill and undertaking to bring back the money. We find nothing in the evidence tending to show this. It undertook to furnish messengers to be used by its employers in any way in which messengers could properly be employed. If special and peculiar service was wanted special arrangements were to be made for it. In the ordinary conduct of its business the defendant did not assume any control of the work in which the messengers were to be employed, and usually had no knowledge of it until after it was completed. Even then it had no knowledge of the nature of the message delivered, or the particulars of the service. The employer was left to direct the messenger, to determine what he should do and how he should do it, subject only to an implied understanding that he should not be called upon to render service of a different kind from that which can properly be performed by messengers. In this service the messenger became, for the time, a servant of the employer, while he was still in the general service of the defendant. Linnehan v. Rollins, 137 Mass. 123, 50 Am. Rep. 287; Hasty v. Sears, 157 Mass. 123, 31 N. E. 759, 34 Am. St. Rep. 267; Samuelian v. American Tool & Machine Co., 168 Mass. 12, 46 N. E. 98; Delory v. Blodgett, 185 Mass. 126, 69 N. E. 1078, 64 L. R. A. 114, 102 Am. St. Rep. 328.

It was shown that messengers had often been intrusted with money and property by those who called them. So far as appears, this was under the general arrangement already stated, which gave the defendant no knowledge nor any responsibility in regard to the way in which the messenger was used. The evidence tended to show that some of the agents of the company, and perhaps the general manager of the company, knew that sometimes messengers were so used. But this creates no liability for the money or property, so long as the messengers were furnished only to be used and controlled by the employer as he might choose.

What is the implied contract or duty of the defendant, growing out of this kind of business? Does the defendant become a common carrier and insurer of everything intrusted to the messengers? It seems quite plain that it does not. It impliedly contracts that the messengers whom

it furnishes are suitable and proper persons for the performance of the ordinary duties of messengers, so far as the exercise of ordinary care in the selection and employment of them will enable it to procure such persons. Its duty is not very unlike that of a stable keeper who furnishes a horse and carriage for the use of a hirer.[16] * * *

If, in the delivery of Christmas presents, or of bills, statements, catalogues, etc. the defendant becomes a common carrier, it is liable as such. But that can be only by an arrangement different from that made with this plaintiff. * * *

Exceptions overruled.[17]

ANDERSON v. FIDELITY & CASUALTY CO. OF NEW YORK.

(Court of Appeals of New York, 1920. 228 N. Y. 475, 127 N. E. 584, 9 A. L. R. 1544.)

Action by Henry B. Anderson against the Fidelity & Casualty Company of New York on a policy of accident insurance. From judgment for plaintiff in part (100 Misc. Rep. 411, 166 N. Y. S. 640), plaintiff appealed to the Appellate Division, which modified and affirmed (170 N. Y. S. 431), and defendant appeals.

HISCOCK, C. J.[18] (concurring). While plaintiff was alighting from a taxicab in the city of Albany, he met with an accidental injury. At the time he held a policy issued by the defendant insuring him against injury through accidental means which provided that the amount to be paid in case of such an injury should be doubled if it was sustained by the assured "while in or on a public conveyance * * * provided by a common carrier for passenger service." By the judgment which has been recovered for double payment under this clause, the question has been presented whether the taxicab in which plaintiff was riding was a public conveyance provided by a common carrier for passenger service. The important facts by which this question is to be determined are as follows:

[16] It has been generally held that liverymen, hiring vehicles and drivers from a stable, are not common carriers. Stanley v. Steele, 77 Conn. 688, 60 A. 640, 69 L. R. A. 561, 2 Ann. Cas. 342 (1905); McGregor v. Gill, 114 Tenn. 521, 86 S. W. 318, 108 Am. St. Rep. 919 (1905). The same result has been reached in the case of automobiles rented from a garage. Rathbun v. Ocean Accident & Guarantee Corp., 299 Ill. 562, 132 N. E. 754, 19 A. L. R. 140 (1921).

[17] Accord: Hirsch v. American Dist. Teleg. Co., 112 App. Div. 265, 98 N. Y. Supp. 371 (1906). But compare Murray v. Postal Tel.-Cable Co., 210 Mass. 188, 96 N E. 316, Ann. Cas. 1912C, 1183 (1911). In White v. Postal Tel. & Cable Co., 25 App. D. C. 364 (1905), the court said: "In passing, it may be said that in all the larger cities there are now companies engaged in this line of service, and undoubtedly they are in a certain sense and to a certain extent common carriers. They must serve all who require their services impartially, and undoubtedly they are liable upon proof of negligence, and under some circumstances, and always by special contract, they may make themselves insurers."

[18] The majority opinion of Elkus, J., is omitted.

The Yellow Taxicab Service, Incorporated, operated taxicabs in the city of Albany. It had a garage and part of its service was rendered by taxicabs on calls sent in to the garage. In addition to this, however, it stationed taxicabs in various public places in the city where they stood awaiting and desiring engagement by any person who was free from reasonable or legal objections and was able to pay the required fare. The taxicab in which plaintiff was riding was one of the latter class. When a person engaged one of these cabs on a public stand, it became subject to his orders as to destination and duration of service and the proffered engagement of any other person would not be accepted while it was engaged in carrying out the first engagement, even though there was room for other people. The company did not put in use the same number of cabs each day. It pursued with them no definite routes, had no schedule of any kind, the fares were fixed by it and were not in any way controlled or governed by the public service commission. There was in the city of Albany an ordinance which required a license fee for use of taxicabs and which imposed a penalty upon any driver who refused to convey any person within certain limits within the city and which limits included the service being rendered for plaintiff at the time of his accident. The taxicab company had taken out, and was operating under, such a license.

We think that upon these facts it has been properly held that the taxicab was a public conveyance and that the company which operated it was a common carrier.

In answer to the first question involved, it is difficult to see how the taxicab in use on this occasion can be regarded as other than a "public conveyance." We are not now considering the status of a cab which might be ordered by special call from the garage, as a conveyance might be ordered from a liveryman, but the case of one which was stationed upon the street for the purpose of securing business from any one who might come along who seemed to be an acceptable customer. Such a conveyance, stationed in a public place awaiting and accepting for carriage, subject to reasonable regulations which will be discussed later, any member of the public who desired it, and upon terms apparently uniform and common to all, seems clearly to be a public conveyance. It is a public conveyance because indiscriminately it conveys the public. It is not private because its use is not limited to certain persons and particular occasions or governed by special terms. If any persuasive authority is needed for this proposition, it is found in the case of Terminal Taxicab Co., Inc., v. Dist. of Columbia, 241 U. S. 252, 253, 36 S. Ct. 583, 584 (60 L. Ed. 984, Ann. Cas. 1916D, 765). This case considered a statute relating to public utilities which latter were defined as including "every corporation * * * controlling or managing any agency or agencies for public use for the conveyance of persons," and

it was held that the law applied to a company which carried passengers to and from hotels and railroad terminals, respectively, under contracts which gave it the exclusive right to solicit taxicab business from persons at either place. This was only part of the public, and it was assumed that there was the same feature of control by the first person engaging a taxicab as appears in this case, yet it was held that such cabs were for "public use for the conveyance of persons."

We then come to the remaining question whether the Yellow Taxicab Service was a "common carrier" for passenger service in respect of the taxicab in which plaintiff was riding at the time he received his injuries. And again in this connection it may be stated that the status of the company in respect of such a cab and in respect of those stationed in its garage and employed by and on special call for special purposes is not necessarily the same. I think, and for the purposes of this discussion shall assume, that as to such latter taxicabs it would more nearly have the character of a liveryman and would not be a common carrier. Stanley v. Steele, 77 Conn. 688, 60 A. 640, 69 L. R. A. 561, 2 Ann. Cas. 342; McGregor v. Gill, 114 Tenn. 521, 86 S. W. 318, 108 Am. St. Rep. 919; Siegrist v. Arnot, 86 Mo. 200, 205, 56 Am. Rep. 424; Erickson v. Barber, 83 Iowa, 367, 49 N. W. 838; Copeland v. Draper, 157 Mass. 558, 32 N. E. 944, 19 L. R. A. 283, 34 Am. St. Rep. 314; Conn v. Hunsberger, 224 Pa. 154, 73 A. 324, 25 L. R. A. (N. S.)372, 132 Am. St. Rep. 770, 16 Ann. Cas. 504.

This immediate question will be discussed on the theory that the taxicab which was used by the plaintiff was stationed upon a public street and in a public place intended to serve and serving indiscriminately whomsoever of the public might desire it under common conditions and upon common rates of fare. I am aware that it will be contended by the appellant that this is not an accurate statement of the situation, because the services were subject to certain conditions, limitations, and restrictions, and therefore there will be considered first these limitations for the purpose of determining whether in any substantial or legal sense they did change the status of the taxicab as I have stated it to be.

It is said that the taxicab company did not at all times furnish the same number of cabs for public service, that it would not receive for carriage persons subject to certain objections, that it fixed its own rates of fare and moved from no fixed termini on fixed routes or regular schedule, and lastly that when it had received for carriage one individual or one group of individuals it was not open to other engagement until that trip had been finished. It is also said in attempted solution of this question that the company operating the taxicab would not be subject to action if it refused to accept a passenger and that it was not subject to the high measure of liability which attaches to a common carrier. So far as concerns these last propositions, they seem to

me to involve an argument which moves backward and which attempts to determine a status by consideration of results which flow from the status if established. The liabilities which have been mentioned cannot be regarded as creating the status of a common carrier; they arise from the condition of being a common carrier if that is once established.

I do not think that any of the special conditions and limitations which have been mentioned destroy or impair the fundamental and substantial character of the operator of the taxicab in question. We can easily see that there is nothing decisive in the facts that the company did not at all times operate the same number of cabs, that it rejected undesirable persons, as those intoxicated or diseased, proposing to use its conveyances, and that it fixed its own rates of fare. These are all privileges commonly exercised by common carriers subject to statute or contract and to the modern device of regulation by public service commissions, and except for such control or regulation even a railroad company would not be regarded as losing or shedding its character of a common carrier if from day to day it varied the number of its trains, rejected undesirable persons as passengers or fixed its fares.

Neither has it ever been regarded or held to be indispensable to the creation of the status of common carrier that its conveyances should move between fixed termini upon fixed routes. It is true that until modern times common carriers, taking the ordinary stage coach as an illustration, did ordinarily thus move; but no case has been cited or found which holds that such characteristics are indispensable. In fact, the contrary has been held. Parmelee v. Lowitz, 74 Ill. 116, 24 Am. Rep. 276; Pennewill v. Cullen, 5 Har. (Del.) 238. It has even been held that fixed charges are not an essential attribute of a common carrier of goods. Jackson Agr. Iron Works v. Hurlbut, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432.

This leaves the limitation upon service which is most urgently emphasized by appellant, namely, the one that when the taxicab had been engaged by one member or group of members of the public no other person was received for carriage even though room was still left in the conveyance, until the first trip had been completed. This in our judgment did not take defendant out of the character of common carrier. As has been said in a thoughtful discussion of this general question in respect of this particular feature: "It would seem that in every case of general obligation to serve, the custom of service qualifies the nature of the duty." Columbia Law Review, Dec. 1917, pp. 710, 713.

The custom under which, as we know by ordinary observation, a taxicab, such as that in which plaintiff was riding, after having accepted from the public an individual or a group of individuals, refuses to receive others, is not only well-nigh universal, but is almost indispensable. Moving on no definite route, but having taken passengers for delivery at one destination, it could not well or conveniently discharge its service to them if it received other individuals desiring to go to another

destination or in an opposite direction. It does not absolutely and unqualifiedly refuse to serve these latter people, but simply relegates them to service by another conveyance. Its refusal to carry the public goes no farther than conditions and limitations which it can reasonably and conveniently make, and more than this a common carrier is not required to do.

While a company operating sleeping cars is not a common carrier, it still is engaged in rendering public and common service, and it has been held that such a company is not compelled to sell an upper berth, although unoccupied, when the entire section has been engaged by another occupant. Searles v. Mann Boudoir Car Co. (C. C.) 45 F. 330; Nevin v. Pullman, etc., Co., 106 Ill. 222, 46 Am. Rep. 688. An hotelkeeper is not compelled to accommodate a proposed guest by setting up an extra bed in a room already engaged although there is plenty of space in such apartment for such extra bed. Brown v. Brand, [1902] 1 K. B. 696. And as was said in the case of Terminal Taxicab Co., Inc., v. Dist. of Columbia, 241 U. S. 252, 36 S. Ct. 583, 60 L. Ed. 984, Ann. Cas. 1916D, 765, above cited, the status of a taxicab as a "public" conveyance is not impaired by the observance of a custom or regulation such as we are now commenting on, and of course the feature of indiscriminate public service, there said not to be impaired by such regulation, is the essence of and foundation upon which rest the character and status of a common carrier.

Therefore, as we think, subject to these particular features which regulated without destroying its service, the owner of this cab was engaged in indiscriminately carrying such members of the public as might apply on common terms and it came within the definition of a common carrier.

As we well know, the vocation of a common carrier of passengers is an evolution from that of a common carrier of goods. Classical definition of the latter is "any man undertaking for hire to carry the goods of all persons indiscriminately." Gisbourne v. Hurst (1710) 1 Salk. 249. And again: "To bring one within the description of a common carrier he must exercise it as a public employment; he must undertake to carry goods for persons generally and he must hold himself out as ready to engage in the transportation of goods for hire as a business, not as a casual occupation pro hac vice." Story on Bailments, § 495.

In extension of this definition the common carrier of passengers has been with accuracy defined as "one who undertakes for hire to carry all persons indifferently who may apply for passage. To constitute one a common carrier it is necessary that he should hold himself out as such. This may be done not only by advertising but by actually engaging in the business and pursuing the occupation as an employment." Thompson on Carriers of Passengers, p. 26, note 1.

The meaning and extent of these definitions of a common carrier are

emphasized by recognized definitions of a private carrier. "Private carriers for hire are such as make no public profession that they will carry for all who apply, but who occasionally, or upon the particular occasion undertake for compensation to carry the goods of others upon such terms as may be agreed upon. They are not common carriers because they do not make the carriage of goods for themselves or others a business and they do not hold themselves out to the public as ready and willing to carry indifferently for all persons any particular class of goods or goods of any kind whatever." Hutchinson on Carriers (3d Ed.) § 35.

The learned counsel for the appellant in his earnest and thorough argument for a different view calls to our attention many cases asserted to lead to a different conclusion. Some of these are in our opinion so readily distinguishable from the present one that it is unnecessary to comment on them at length. There are, however, cited four cases which merit brief comment for the purpose of distinguishing them from the present case.

In Darnell v. Fidelity & Casualty Co. (Sup. Ct. of Tenn. reported in 46 Ins. L. J. [O. S.] 523), the taxicab involved had been employed on a special call to the garage and the business of the owner and operator of it was described "as in the nature of a livery stable business." As has already been indicated, we think that the status of such a conveyance may readily be distinguished from that of the conveyance in which plaintiff was riding.

Oppenheimer v. Maryland Cas. Co., 70 Pa. Super. Ct. 383, dealt with an automobile which was hired under special contract from one who so far as appears kept a garage and did not station his cars upon the street for public service, and the court disposed of the case on the theory that it involved and was controlled by the principles applicable to a livery stable keeper.

The case of City of New York v. Hexamer, 59 App. Div. 4, 69 N. Y. S. 198, involved the consideration of a licensing ordinance, and it was simply held that the right to license the business of hackmen and to fix a license did not authorize the passage of an ordinance imposing a license fee upon a person engaged in conducting a livery stable in New Jersey and who at intervals sent his carriages into the city of New York for the purpose of meeting the steamers of the Trans-Atlantic Line and conveying the passengers to their respective destinations. It was the view of the court that such a person so conducting a livery stable and sending forth his hackmen was not "a public hackman."

The case of Brown v. N. Y. C. & H. R. R. Co., 75 Hun, 355, 27 N. Y. S. 69, involved the question whether an owner of two carriages with teams of horses which were used in the transportation of passengers about the city of Niagara Falls was a common carrier within the meaning of a statute regulating the admission of persons upon the sta-

tion premises of the defendant for the purpose of soliciting custom. There are contradictory expressions in the opinion upon the question of common carrier. It is stated that the plaintiff's business did come within the general definition of a common carrier, but that ordinarily, in speaking of common carriers, hackmen were not understood to be included therein. The important fact in respect of the decision, however, is that the question whether the plaintiff was a common carrier or not was not necessary to the disposition of the case which proceeded to the same conclusion whether he was or was not.

On the other hand, we think that there is quite an abundance of decisions, some of them accompanied by well-considered opinions, which support the view that the operator of the modern public taxicab or of its prototype, the old-fashioned public hack, was and is a common carrier. Cushing v. White, 101 Wash. 172, 172 P. 229, L. R. A. 1918F, 463; Carlton v. Boudar, 118 Va. 521, 88 S. E. 174, 4 A. L. R. 1480; Primrose v. Casualty Co., 232 Pa. 210, 81 A. 212, 37 L. R. A. (N. S.) 618; Ga. Life Ins. Co. v. Easter, 189 Ala. 472, 66 So. 514, L. R. A. 1915C, 456; Casualty Co. v. Joiner (Tex. Civ. App.) 178 S. W. 806; Lemon v. Chanslor, 68 Mo. 341, 30 Am. Rep. 799; Lewark v. Parkinson, 73 Kan. 553, 85 P. 601, 5 L. R. A. (N. S.) 1069.

We think also that the Terminal Taxicab Co. Case, above cited, when carefully considered, strongly tends to sustain the view which we have taken.

We therefore are led to the conclusion that the judgment appealed from should be affirmed, with costs.

CHASE, HOGAN, CARDOZO, MCLAUGHLIN, and CRANE, JJ., concur with ELKUS, J., and HISCOCK, C. J., concurs in opinion, in which all concur.

Judgment affirmed.[19]

[19] **Accord**: Anderson v. Yellow Cab Co., 179 Wis. 300, 191 N. W. 748, 31 A. L. R. 1197 (1923); Korner v. Cosgrove, 108 Ohio St. 484, 141 N. E. 267, 31 A. L. R. 1193 (1923); Melconian v. City of Grand Rapids, 218 Mich. 397, 188 N. W. 521 (1922); McKellar v. Yellow Cab Co., 148 Minn. 247, 181 N. W. 348 (1921); Burke v. Shaw Transfer Co., 211 Mo. App. 353, 243 S. W. 449 (1922) writ of certiorari quashed in State ex rel. Shaw Transfer Co. v. Trimble, 250 S. W. 384 (1923); Carlton v. Boudar, 118 Va. 521, 88 S. E. 174, 4 A. L. R. 1480 (1916); Cushing v. White, 101 Wash. 172, 172 P. 229, L. R. A. 1918F, 463 (1918); Primrose v. Casualty Co., 232 Pa. 210, 81 A. 212, 37 L. R. A. (N. S.) 618 (1911); Van Hoeffen v. Columbia Taxicab Co., 179 Mo. App. 591, 162 S. W. 694 (1913); Fidelity & Casualty Co. v. Joiner (Tex. Civ. App.) 178 S. W. 806 (1915); Lewark v. Parkinson, 73 Kan. 553, 85 P. 601, 5 L. R. A. (N. S.) 1069 (1906); Lemon v. Chanslor, 68 Mo. 341, 30 Am. Rep. 799 (1878). See discussion in 17 Col. Law Rev. 710.

CHENERY v. EMPLOYERS' LIABILITY ASSUR. CORPORATION, Limited.

(Circuit Court of Appeals, Ninth Circuit, 1925. 4 F. [2d] 826.)

Action by Leonard Chenery, as administrator with the will annexed of the estate of Edith P. Chenery, deceased, against the Employers' Liability Assurance Corporation. Judgment for defendant, and plaintiff brings error.

Before GILBERT, HUNT, and RUDKIN, Circuit Judges.

RUDKIN, Circuit Judge. This was an action by an administrator with the will annexed on a policy of insurance providing indemnity for the loss of life or injuries resulting through accidental means. At the close of the testimony on the part of the plaintiff, the court below directed a verdict in favor of the defendant; hence the present writ of error.

The sole question for our consideration is this: Did the intestate meet her death while a passenger in or on a public conveyance provided by a common carrier for passenger service? There was no controversy over the facts. For about five years prior to the date in question Roberts & Ward operated a motor bus line between the towns of Clevedon and Papakura, in New Zealand, for the transportation of passengers and light parcels for hire. The distance between the two points is about 8 miles and the busses made three trips daily, leaving Clevedon at 7 a. m., 8:30 a. m., and 3:30 p. m. The regular passenger fare was three shillings, single; six shillings, return. In addition to operating the bus line between the points in question, Roberts & Ward transported passengers to and from points beyond Clevedon by special arrangement. By special arrangement we mean simply a request for the transportation by telephone or otherwise and the payment of the compensation agreed upon. During the month of June, 1923, the intestate was visiting a sister at Sandspit, about nine miles east of Clevedon. On the afternoon of June 16, the intestate and three companions, desiring to take the train at Papakura that evening, made arrangements with Roberts & Ward, by telephone, to meet them at some point on the road between Sandspit and Clevedon and transport them to Papakura. Pursuant to this arrangement the four parties in question proceeded in a farm cart from Sandspit until they met Ward at Whakatiri, about six miles west of Sandspit. At that point they transferred from the farm cart to a Ford car driven by Ward and proceeded on to Clevedon. At Clevedon they transferred from the Ford car to a Dodge motor bus and proceeded on toward Papakura, but before reaching their destination the motor bus overturned and the intestate was killed. There were no passengers in the Ford car or in the motor bus, except the intestate and her three companions, and no baggage except that belonging to the intestate and her companions. No parcels were transported except one loaf of bread and one newspaper; but where these were taken up, or where they were to be delivered, the record does not disclose.

It is well settled by the authorities that the same person or corporation may be engaged in one line of business as a common carrier and in another line of business as a private carrier. Santa Fé Railway v. Grant Bros., 228 U. S. 177, 33 S. Ct. 474, 57 L. Ed. 787; Terminal Taxicab Co. v. Dist. of Col., 241 U. S. 252, 36 S. Ct. 583, 60 L. Ed. 984, Ann. Cas. 1916D, 765; Rathbun v. Ocean Accident & Guarantee Corporation, 299 Ill. 562, 132 N. E. 754, 19 A. L. R. 140; Forbes v. Reinman & Wolfort, 112 Ark. 417, 166 S. W. 563, 51 L. R. A. (N. S.) 1164; Georgia Life Ins. Co. v. Easter, 189 Ala. 472, 66 So. 514, L. R. A. 1915C, 456. Roberts & Ward were no doubt common carriers of passengers on their regular run between Papakura and Clevedon. It seems equally clear that they were mere private carriers when they undertook to carry passengers beyond their regular run by special arrangement or agreement. Had the carriers, in this case, transported the intestate and her companions under the special contract or agreement from Sandspit or Whakatiri to Papakura, without passing over any part of the main road from Clevedon to Papakura, it would seem clear that they were private carriers only; and if the intestate met her death while in the Ford car before reaching Clevedon, the same conclusion would follow. We do not think that the fact that a part of the trip was made over the main road from Clevedon to Papakura, or the fact that the passengers were transferred from the Ford car to the motor bus at Clevedon, changes the rule. The reason for the transfer is not disclosed by the record, but it does appear that the transfer at Clevedon was not made to one of the regular busses engaged in the common carrier service. In any event, the transportation was an entire one under an entire contract, and the carriers acted in the same capacity throughout. In our opinion, that capacity was a private one.

It is claimed by the plaintiff in error that the carrier did not testify that he could refuse to carry passengers beyond the main line under the private contract or arrangement. True, the witness did not so testify, nor would he have been permitted to do so. His answer would be a mere conclusion. If a common carrier, he had no right to refuse; but, if only a private carrier, he had that right. To permit him to answer the question would be to permit him to decide the main issue in the case, and that was the function of the court and jury. Nor can we agree with counsel for plaintiff in error that there was a question of fact for the consideration of the jury, for, under the admitted facts in the case, the carriers were either common carriers or private carriers, and it was the plain duty of the court to direct a verdict for either one or the other of the parties. The direction of a verdict in the favor of the defendant was, in our opinion, free from error.

This distinction between a common carrier and a private carrier may seem somewhat refined and technical, but the intestate was not insured unless she met her death while a passenger in or on a public conveyance provided by a common carrier for passenger service.

The judgment is affirmed.

KELLY et al. v. EXCISE COMMISSIONERS OF NEW YORK.

(Court of Common Pleas of New York, 1877. 54 How. Prac. 327.)

Motion for a mandamus to compel the excise commissioners to give a license to James S. Kelly and Edward Thompson, to sell strong liquors.

Mr. Kelly, in his petition, states that he keeps a hotel at No. 40 West Houston street, and has complied with all the requirements of law. He says that the commissioners, although expressing themselves satisfied with this fact, refuse to give him a license, solely on the ground that the cooking for the hotel is not done on the premises, which is claimed to be contrary to law.

VAN HOESEN, J.[20] It is admitted that Mr. Thompson is the keeper of a restaurant merely. The keeper of a restaurant, who has no beds for the accommodation of travelers, is not an innkeeper. Carpenter v. Taylor, 1 Hilton, 193.[21] Therefore he is not, under the act of 1857, entitled to a license. Mr. Kelly keeps the Centennial House, which is situated on the northeasterly corner of Houston and Greene streets. For five years last past he has kept in this house twenty beds for the accommodation of travelers or sojourners, whom he has entertained without any agreement as to the duration of their stay, or as to the terms of their entertainment. He has not, however, any means of cooking upon the premises, and when viands are ordered by the guests he has to send and buy them from neighboring victualers. * * * The question which both parties have requested me to decide, is whether Mr. Kelly be an inn-keeper or not? There have been many decisions in this state, as well as in England, respecting the accommodations a house must afford, in order to be entitled to the name of inn, tavern or hotel. Those decisions are all collected in the admirable opinion of Chief Justice Daly in Cromwell v. Stephens, 3 Abb. Prac. (N. S.) p. 26. In addition to collating the decisions, that accomplished scholar brought together in a compendious form his researches, philological and historical, into the origin and development of the words inn, tavern, hotel. It is sufficient for me to use the learning he has brought to my hand, and to take the law as I find it laid down in the decisions he has cited, and in the decision which he made. Chief Justice Daly said: "A mere lodging house, in which no provision is made for supplying the lodgers with their meals, wants one of the essential requisites of an inn." Again, he said: "We have in the cities houses of entertainment in which the guest pays so much per day for his room, and takes his meals or not, as he thinks proper, in the restaurant, paying separately for each meal as he takes it. Where

20 Part of the opinion is omitted.

21 Inns distinguished from restaurants. Sheffer v. Willoughby, 61 Ill. App. 263 (1895), affirmed 163 Ill. 518, 45 N. E. 253, 34 L. R. A. 464, 54 Am. St. Rep. 483 (1896); Merrill v. Hodson, 88 Conn. 314, 91 A. 533, L. R. A. 1915B, 481, Ann. Cas. 1916D, 917 (1914).

the restaurant forms a part of the establishment, and the house is kept under one general management for the reception of all travelers that may come, it is an inn, there being no material difference between it and the Elizabethan inn, in which the traveler paid separately for his apartment, and for each meal."

It seems to me a waste of time to argue that a lodging-house-keeper is an inn-keeper, because he may send out and procure cooked food for his guests. As well may it be contended that Mr. Thompson who keeps an eating-house is an inn-keeper, because he could, if requested, send out and get the requisite bedding and bedclothing for the accommodation of guests, who might wish to pass the night in his dining room. No rule can be laid down as to the extent and resources of the kitchen, but it seems to me that the board must be satisfied that the furnishing of meals is a regular part of the business of the applicant for a license. A free lunch at the bar, or the occasional bringing of victuals from a neighboring restaurant will not transform a drinking saloon into a hotel. Every man's experience teaches him that no man who expected to keep a hotel would seriously think of sending out to a neighboring dining room for every article of cooked food that a guest might order. The good faith of any person who professed to have such a business plan would be suspected at once. In short, a house which does not contain the means of preparing food for the table in the ordinary way has not, to use the language of the act, "the necessary accommodations to entertain travelers."

The application for the mandamus must be denied.[22]

KROHN v. SWEENEY.

(Court of Common Pleas, of New York, 1867. 2 Daly 200.)

Appeal by the defendant from a judgment of the general term of the Marine Court.

The action was brought to recover the value of a watch, and a sum of money ($50), stolen from the plaintiff's room, while a guest at defendant's house, known as Sweeney's Hotel.

The defendant denied his liability as an innkeeper. It appeared in evidence that he kept a public house, at No. 68 Chatham street, New York, upon what is called the European plan. There was in the base-

[22]Accord: Quigley v. Southwick, 76 Misc. Rep. 539, 135 N. Y. S. 565 (1912). For an exhaustive discussion of the history of inns, see Cromwell v. Stephens 2 Daly (N. Y.) 15 (1867). Although innkeepers formerly provided stables for their guests, it has long since been settled that the maintenance of such facilities is not a prerequisite to a common inn. Thompson v. Lacy, 3 B. & Ald. 283 (1820); Kisten v. Hildebrand, 48 Ky. (9 B. Mon.) 72, 48 Am. Dec. 416 (1848); Commonwealth v. Wetherbee, 101 Mass. 214 (1869). One who entertains travelers only occasionally is not an innkeeper: State v. Mathews, 19 N. C. 424 (1837); Lyon v. Smith, 1 Morris (Iowa) 184 (1843).

ment of the building a refectory, or dining room, kept by the defendant, in which meals were served at all hours of the day and evening, and, those guests who took their meals there, paid at once for what they ordered, but, for their lodging and other charges, they paid at the office of the hotel when they took their departure. * * *

The defendant's counsel moved to dismiss the complaint, on the ground that the defendant was not a hotel or innkeeper, but a lodging-house keeper, and, therefore, not responsible to the plaintiff for the alleged loss. * * * The judge denied the motion, and the defendant excepted. The jury rendered a verdict for the plaintiff.

CARDOZO, J.[23] The plaintiff claimed to recover the value of a gold watch, and about $50 cash, which had been stolen from him at night, during his stay at the defendant's premises, in this city. The defendant denies any liability. He claims that he is not an innkeeper, and that his house is not an inn. I think that is an error. He is the proprietor of the premises Nos. 64, 66, and 68 Chatham street, which he designates "Sweeney's Hôtel," and its only variation from ordinary hotels is, that on part of the same premises he keeps a refectory, at which his guests take their meals, if they please, paying for them then and there. His house is open to all persons, and he receives them without any express agreement. Travelers go to his premises, and find the ordinary appearances and arrangements of a hotel; they register their names on a book of arrivals, as in hotels generally, and are assigned rooms, which they occupy, with their baggage, as long as they choose to remain. Although no written opinion was prepared, the point has been distinctly ruled, in the general term of this court, that, under such circumstances, the defendant is an innkeeper, and his premises an inn (Barnard v. French, Gen. T. Com. Pleas. June, 1864). It may very well be that the defendant occupies a twofold character, namely, that of a mere restaurant keeper, so far as relates to persons resorting to his refectory only, for the purpose of taking their meals, while he is an innkeeper, with all the responsibilities attaching to such as respects travelers, who, like the plaintiff, are received by the defendant and accommodated as guests with lodging, in that portion of the building arranged as lodging places, for an uncertain period, and under no express engagement. See Carpenter v. Taylor, 1 Hilt. 193; Willard v. Reinhardt, 2 E. D. Smith, 148; Wintermute v. Clark, 7 N. Y. Super. Ct. 243. But at present, it is enough to say, that on the point involved in this case, the liability of the defendant as an innkeeper must be considered as settled by the general term decision in Barnard v. French, supra. * * *

The judgment should be affirmed, with costs.[24]

[23] Part of the statement of facts and part of the opinion are omitted.

[24] Accord: Bullock v. Adair, 63 Ill. App. 30 (1896).

ALSBERG v. LUCERNE HOTEL CO.

(Supreme Court of New York, Appellate Term, 1905. 46 Misc. Rep. 617, 92 N. Y. S. 851.)

Appeal by the plaintiff from a judgment rendered in favor of the defendant in the Municipal Court of the City of New York, Eleventh District, Borough of Manhattan.

BLANCHARD, J. The plaintiff brings this action to recover a penalty of $500 for an alleged violation by the defendant of chapter 1042 of the Laws of 1895, which provides that "all persons within the jurisdiction of this state shall be entitled to the full and equal accommodations, advantages, facilities and privileges of inns, restaurants, hotels, * * * and all other places of public accommodation."

It appears from the prospectus of the defendant company, put in evidence by the plaintiff, that it controls and manages what is known as an apartment or family hotel called "The Lucerne" in the borough of Manhattan, city of New York.

The apartments are arranged in small suites differing in no essential respect from those in an ordinary apartment-house furnishing similar accommodations for small families. These apartments are rented upon annual leases and transient tenants are not solicited.

The plaintiff desired to rent apartments in this building for the term of one year at the rental of $750. The defendant received her written application for this lease and two days thereafter notified her in writing to the effect, in substance, that it declined to accept her as a tenant because she was a Hebrew. Thereupon the plaintiff brought this action. At the trial the complaint was dismissed for failure of proof. This was a proper disposition of the issue. The defendant does not keep an hotel within the meaning of the statute. The legal definition of an hotel or inn is "A house where all who conduct themselves properly, and who are able and ready to pay for their entertainment, are received, if there is accommodation for them, and who, without any stipulated engagement as to the duration of their stay, or as to the rate of compensation, are, while there, supplied at a reasonable charge with their meals, their lodging, and such services and attention as are necessarily incident to the use of the house as a temporary home." Cromwell v. Stephens, 3 Abb. Prac. (N. S.) 26; Matter of Brewster, 39 Misc. Rep. 689, 80 N. Y. S. 666.

Tested by this definition "The Lucerne" is certainly not an hotel, and when the defendant refused to lease apartments to the plaintiff it exercised only the right which every landlord undoubtedly has to make his own selection of tenants.

In the recent case of Shearman v. Iroquois Hotel Apartment Co., 42 Misc. Rep. 217, 85 N. Y. Supp. 365, the Appellate Term of this court held that the relations between a lessee of apartments in an apartment hotel and the lessors were those of landlord and tenant,

and, therefore, the landlord of such an hotel could not have a lien for unpaid rent on the tenant's property upon the premises.

The judgment should be affirmed, with costs.

SCOTT and O'GORMAN, JJ., concur.

Judgment affirmed, with costs.[25]

GILBERT v. WILLIAMS.

(Supreme Court of New York, Appellate Term, 1907. 107 N. Y. S. 715.)

Action by Samuel Gilbert against Belle W. Williams. From a judgment in favor of defendant, plaintiff appeals.

GILDERSLEEVE, P. J.[26] Defendant kept a boarding house at Nos. 5, 7, 9, and 11 East Thirty-First street. The principal entrance was in No. 7, and there was a boy in charge of that entrance. Plaintiff had a room in No. 5. The boarders, or at least some of them, had latch keys to the entrance door of No. 5, at which entrance there was no hall boy. On May 3, 1907, plaintiff left his room in the morning and was absent, as usual, most of the day. He claims he locked his door, upon leaving the room, and placed the key under the carpet in the hall, as he had been requested to do by the chambermaid. It seems that there was but one key to each room, and the chambermaid, not having any pass key, was obliged to use plaintiff's key, and that the custom was for the boarders, upon leaving their rooms and locking their doors, to put their keys under the carpet of the hall, so that the chambermaid could find them and get into the rooms for the purpose of putting them in order. While plaintiff was so absent from his room on May 3, 1907, some one entered his room and stole certain articles of wearing apparel; and upon returning to his room in the evening plaintiff found his door partly open, with the key in the lock, and the articles of clothing gone. * * *

Although, as pointed out by Judge Loew in the case of Smith v. Read, 6 Daly, 33, a decision of the former General Term of the Court of Common Pleas, it is somewhat difficult to see, under present conditions, why any distinction should be made between the liability of an innkeeper and that of a keeper of a boarding house or lodging house with respect to loss by a guest, such a distinction is nevertheless made by the great weight of authority. While the innkeeper is compelled to receive practically every one, the boarding house keeper may refuse whom he chooses to refuse, thereby exercising more care in the selection of his clients, and the statute now gives to the boarding house keeper the same lien on the property of his clients that the innkeeper has (Jones v. Morrill, 42 Barb. 623); so that, as was said

[25] Accord: Roberts v. Case Hotel Co., 106 Misc. Rep. 481, 175 N. Y. S. 123 (1919).

[26] Parts of the opinion are omitted.

in the case of Smith v. Read, "it is difficult to see why, on principle merely, the boarding house keeper should not be required to take at least as much care of the goods of the guest as the innkeeper." Be this as it may, however, the common law holds the innkeeper absolutely liable for all thefts from within or unexplained losses of property in his charge belonging to his guest, although he may be discharged from liability by the contributory negligence of the guest. 11 Am. & Eng. Ency. of Law, pp. 51, 53; Metzger v. Schnabel, 23 Misc. Rep. 699, 52 N. Y. S. 105; Mowers v. Fethers, 61 N. Y. 37, 19 Am. Rep. 244. The innkeeper is deemed an insurer of the property of his guests, and is bound to make good any loss, with some few exceptions. Hulett v. Swift, 33 N. Y. 571, 88 Am. Dec. 405. This rigid liability does not extend to the boarding house keeper, whose duty to his boarders with respect to their property is merely to exercise such care as a prudent person would exercise over his own property, under similar circumstances. Metzger v. Schnabel, supra. The boarding house keeper is, of course, responsible for the negligence of his servants in the case of a boarder's property (Smith v. Read, supra), and, like the innkeeper, may be discharged from liability by the contributory negligence of the guest. * * * We are of opinion that the judgment should be affirmed, with costs.

Judgment affirmed, with costs. All concur.[27]

NELSON v. JOHNSON.

(Supreme Court of Minnesota, 1908. 104 Minn. 440, 116 N. W. 828, 17 L. R. A. [N. S.] 1259.)

Action in the municipal court of Minneapolis to recover $96, of which sum $95 was alleged to have been stolen from plaintiff while lodging in defendant's hotel. The case was tried before Waite, J., who made findings, and ordered judgment in favor of plaintiff. From the judgment entered pursuant to the order, defendant appealed.

START, C. J. The facts in this case, as found by the trial judge, are substantially these: The defendant, on and prior to November 16, 1907, was the keeper of a house for the entertainment of travelers and transient lodgers known as the "Bridge Square Hotel," in the city of Minneapolis. There was publicly displayed upon the front of the building the name "Bridge Square Hotel," and a sign advertising to the public that furnished rooms were there to let for a single night. There were thirty-six rooms so to let in the building, in which there was an office for the reception of guests seeking to hire rooms for the

[27] Inns and boarding houses distinguished. McIntosh v. Schops, 92 Or. 307, 180 P. 593 (1919); McClaugherty v. Cline, 128 Tenn. 605, 163 S. W. 801 (1913); Birmingham Light & Power Co. v. Drennen, 175 Ala. 338, 57 So. 876, Ann. Cas. 1914C, 1037 (1912); Beall v. Beck, 3 Cranch, C. C. 666, Fed. Cas. No. 1,161 (1829).

purpose of lodging therein. The defendant, in the due and regular course of his business, let the rooms to such persons who were in fit condition to be received therein and who paid therefor certain stipulated prices, without special contract, for a single night, or such longer period as they might desire, and the persons so hiring the rooms customarily inscribed their names and addresses in a register kept in the office for that purpose. The defendant employed two clerks to have charge of the office and keep the same open for the reception of such guests at all hours of the day and night. There was not maintained at or in connection with the place any dining room or other place where food was customarily supplied to the lodgers, or to other persons beside the defendant and his family and employees. On the day named the plaintiff, who was then a traveler temporarily sojourning in the city, hired of one of defendant's clerks in the office a room to be used by him for the purpose of lodging therein on the night of that day and the following night, paying therefor the sum of fifty cents. At the time of such hiring he was invited to write his name in the register, and so did, and thereupon a room was assigned to his use, without examination thereof on his part or special contract therefor. While the plaintiff was so occupying the room, and during the night, there was stolen from his clothing therein $95, without negligence on the part of either him or the defendant.

Upon these facts the trial judge found as a conclusion of law that at the time of the loss of the money the defendant and plaintiff stood in the respective relations to each other of common innkeeper and guest, and that the plaintiff was entitled to judgment against the defendant for $95. Judgment was so entered, from which the defendant appealed.

The sole question for our decision is whether the facts found sustain the conclusions of law. It is the contention of the defendant that the facts found do not sustain the conclusions of law, because no provision was made in his house for serving meals to his guests. Therefore it was not an inn or hotel, but a mere lodging house, and the extraordinary liability of a common innkeeper was not imposed upon him. The plaintiff's loss was not due to any negligence on the part of the defendant; hence if he was not an innkeeper he is not liable for the loss, but if he was he is so liable. The question, then, in its last analysis, is: Was the defendant's house a hotel or inn?

There is no substantial difference, as to the rights and liabilities of the keepers thereof, between an inn and a hotel; for in this country the legal definition of each is practically the same. If the defendant had furnished his guests with food, his house would have been, without question, an inn, within the present legal meaning of that term. In early days and under primitive conditions it was necessary, in order to bring a place within the legal definition of an inn, and to

charge the keeper thereof with liability as such, that lodging, food, drink, and stabling should be furnished to travelers. But as cities grew, and modes of living, travel, and transportation of persons changed, the legal definition of an inn was modified thereby, and a bar to supply guests with drink and a stable for the care of their horses are now no longer essential requisites of an inn. Why, then, should a dining room, or a café or a restaurant, to supply guests with food, be now held an essential requisite of an inn or hotel? The reason for holding that the supplying of guests with food is a necessary requisite of an inn has as effectually ceased as it has with reference to the supplying of drink and stabling. On the other hand, the reason for imposing the liability of a common innkeeper upon a hotel keeper who furnishes lodgings only is still just as potent as it ever was for imposing it in any case. Therefore the justice and necessity of enforcing the liability against the proprietor of a house at which no meals are served, but which he holds out to the public as a hotel, and not as a private lodging house, are just as imperative as they would be if meals were served therein.

The reasons for this conclusion cannot be better stated than they were by the learned trial judge in his able and helpful memorandum: "It seems to me impossible to suggest any reason why, upon principle, the extreme degree of liability should or should not be imposed upon the keeper of a place where the traveling public are offered lodging, according as he does or does not furnish meals for his lodgers. * * * The need for protection to the traveler's property is incident to his lodging, and not to his eating. It is while he is asleep in his bed, and his personal belongings are unguarded by his own watchfulness, that for the security of his property he needs to invoke the most stringent rules of the law of bailment. Especially in large cities does he need this protection. The exigencies of travel bring him often to unfamiliar places, and at hours and under conditions when investigation is impracticable. He must go for bed and shelter to the place which he finds open for his accommodation, trust himself and his property to a stranger, and accept, practically without opportunity for selection, the quarters assigned to him. The rush and turmoil of the city afford to the thief his most attractive field of operation, and the stranger more than others is exposed to his depredations. * * * These considerations lead to the conclusion that the necessities of modern life demand that the extreme degree of responsibility for the property of the guest be applied to the keeper of a place of entertainment for travelers according to the essential features of the relation, and not in fixed adherence to old definitions, or according to the name by which the place is known—whether 'inn,' 'hotel,' or 'lodging house.'"

It is, however, stated in many of the text-books and encyclopedias that a place which does not furnish the traveler with both lodging

and food is not an inn. Nearly all of the adjudged cases cited in support of this proposition rely upon the very interesting opinion of Judge Daly in the case of Cromwell v. Stephens, 2 Daly (N. Y.) 15, in which it is stated that a mere lodging house, in which no provision is made for supplying lodgers with their meals, wants one of the essential requisites of an inn. The question at issue in that case was, not whether the proprietor of the house was liable to his guests as a keeper of a common inn, but whether the house was a hotel within the meaning of an ordinance fixing water rates for hotels. An examination of the cases cited in that opinion raises a grave doubt whether facilities for furnishing guests with meals was, even at the time the decision was made, an essential requisite of a hotel. However this may be, the question is an open one. Mr. Schouler says: "Whether the utter omission to provide a place for meals on the premises is enough to take a house for transient lodgers out of the legal fellowship of inns, is not clearly determined." Schouler, Bail. § 278. The question here under consideration was before this court in the case of Johnson v. Chadbourn Finance Co., 89 Minn. 310, 94 N. W. 874, 99 Am. St. Rep. 571, but was not directly decided, for the reason that there was a restaurant connected with the hotel in question in that case, although it was not owned or controlled by the proprietor of the hotel. The logic of that case, however, leads directly to the conclusion that supplying guests with meals is not now one of the essential requisites of a hotel, in order to charge the proprietor thereof with the liability of a keeper of a common inn; and we so hold.

There is a clear distinction between a mere private lodging house and a hotel where no meals are served. Such a hotel or inn is a house the proprietor of which "holds out that he will receive all travelers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received." The keeper of such a house is bound, without making any special contract therefor, to provide for all, to the limit of his facilities, at a reasonable price; but the proprietor of a private lodging house is not bound to receive all who apply, but he has the right to select his guests, contracting specially with each. The facts found in this case clearly justify the conclusion of law that the defendant was liable as the keeper of an inn or hotel.

Judgment affirmed.[28]

[28]Accord: Kanelles v. Locke, 12 Ohio App. 210 (1919); Huntley v. Stanchfield, 168 Wis. 119, 169 N. W. 276, 19 A. L. R. 513 (1918); Metzler v. Hotel Co., 135 Mo. App. 410, 115 S. W. 1037 (1909). See Comment, 21 Col. Law Rev. 96.

ALLNUTT et al. v. INGLIS, Treasurer of the London Dock Co.

(King's Bench, 1810. 12 East, 527, 104 Reprint, 206.)

The declaration stated, that after the passing of the Stat. 39 & 40 Geo. III, c. 47, (the London dock act,) and the Stat. 43 Geo. III, c. 132, (the general warehousing act,) and the Stat. 44 Geo. III, c. 100, (the act for warehousing in the London dock warehouses,) and after the docks, quays, and wharves made by the London dock company, according to the first act, were fit for the reception of ships and landing of goods, and after 15 warehouses were erected by the company upon their premises, and in the judgment of the commissioners of the treasury the same warehouses were fit for the reception of goods described in the act, and the same goods might safely be deposited and remain there under the regulations and directions of the act, and after three of those commissioners, by the permission and with the consent of the company, had certified their approbation of such warehouses, and such certificate had been duly published as required by the act, the plaintiffs imported into the port of London 40 pipes of wine, being goods enumerated in table B of the act, and which might lawfully be secured in the said warehouses so certified, without the duties due being first paid on importation, according to the provisions of the act, with intent and for the purpose of securing the same in those warehouses, and thereby taking the benefit of those statutes; and with the same intent and purpose caused the same goods to be duly entered with the proper officer of the customs, and to be regularly landed, and duly entered with the proper collector of excise, etc., and did all things necessary and required to legalize the lodging of the said goods so imported by the plaintiffs in the said warehouses so certified: of all which premises the company had notice, and were required by the plaintiffs to receive the said goods into their said warehouses, and to permit the same to be there lodged and secured, without the duties due on importation being first paid, according to the statutes, etc., for reasonable hire and reward in that behalf to be paid by the plaintiffs to the company, and then and at all times were ready and willing to pay the company such reasonable hire and reward, and tendered the goods to the company for the purpose aforesaid. And then the plaintiffs averred, that at the time of such importation and tender of the goods, and when the company were so required as aforesaid, there was sufficient room vacant in the said warehouses to have conveniently and lawfully lodged and secured the same goods, if the company had been minded to have received the same; whereby it became and was the duty of the company to admit and receive the said goods into the said warehouses, and to permit the same to be there lodged and secured as aforesaid. Yet the company, not regarding their duty in this behalf, did not when so required, or at any time, admit or receive the

said goods into the said warehouses, or into any warehouses, or permit them to be there lodged or secured according to the said statutes, but then and at all times wholly refused so to do, and wholly rejected and excluded the same; whereby the plaintiffs were deprived of the benefit which would otherwise have accrued to them from lodging and warehousing the said goods, without payment of the said duties, and have been obliged to advance and pay the said duties thereon to the amount of £500, and have thereby lost the interest and profits they would otherwise have made of the said sum, and also their goods remained unhoused a long time, and were injured, etc.

The defendant, by his plea, protesting that the hire and reward offered by the plaintiffs to the company for warehousing the goods was reasonable, pleaded that before the time when the company was so required by the plaintiffs to admit and receive the said goods, and to permit the same to be lodged and secured as aforesaid, to wit, on the 1st of September, 1809, the company published a table, containing the terms of hire and reward for which alone they would receive the goods of any person into their warehouses, or permit the same to be there lodged or secured; which terms of hire and reward exceeded the terms of hire and reward in the declaration mentioned: of all which premises the plaintiffs had notice: and that the plaintiffs, at the time when they required the company to admit and receive the said goods, and permit the same to be lodged and secured as aforesaid, refused to pay and to agree to pay the company hire and reward in respect of the said goods according to the terms contained in the table so published: and because the plaintiffs refused so to do, the company refused to admit or receive the said goods into their warehouses, or permit the same to be there lodged or secured, as it was lawful for them to do in that behalf, etc. To this there was a general demurrer.

Lord Ellenborough, C. J. The question on this record is, whether the London Dock Company have a right to insist upon receiving wines into their warehouses for a hire and reward arbitrary, and at their will and pleasure, or whether they were bound to receive them there for a reasonable reward only. There is no doubt that the general principle is favoured both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it: but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms. The question then is, whether, circumstanced as this company is by the combination of the warehousing act with the act by which they were originally constituted, and with the actually existing state of things in the port of London, whereby they alone have the warehousing of these wines, they be not, according to the doctrine of Lord Hale, obliged to limit themselves to a reasonable compensation for such warehousing? And according to him, wherever the accident of time

casts upon a party the benefit of having a legal monopoly of landing goods in a public port, as where he is the owner of the only wharf authorized to receive goods which happens to be built in a port newly erected, he is confined to take reasonable compensation only for the use of the wharf. Lord Hale puts the case either way; where the king or a subject have a public wharf to which all persons must come, who come to that port to unlade their goods, either "because they are the wharves only licensed by the queen, or because there is no other wharf in that port, as it may fall out: in that case, (he says,) there cannot be taken arbitrary and excessive duties for cranage, wharfage, etc.: neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the king's license or charter." And then he assigns this reason, "for now the wharf and crane and other conveniences are affected with a public interest, and they cease to be juris privati only." Then were the company's warehouses juris privati only at this time? The legislature had said, that these goods should only be warehoused there; and the act was passed not merely for the benefit of the company, but for the good of trade. The first clause says, that it would greatly tend to the encouragement of the trade and commerce of G. B., and to the accommodation of merchants and others, if certain goods were permitted to be entered and landed and secured in the port of London without payment of duties at the time of the first entry; and then it says, that it shall be lawful for the importer of certain goods enumerated in table A. to secure the same in the West India dock warehouses; and then by section 2, other goods enumerated in table B. may in like manner be secured in the London dock warehouses. And there are no other places at present lawfully authorized for the warehousing of wines (such as were imported in this case) except these warehouses within the London dock premises, or such others as are in the hands of this company. But if those other warehouses were licensed in other hands, it would not cease to be a monopoly of the privilege of bonding there, if the right of the public were still narrowed and restricted to bond their goods in those particular warehouses, though they might be in the hands of one or two others besides the company's. Here, then, the company's warehouses were invested with the monopoly of a public privilege, and therefore they must by law confine themselves to take reasonable rates for the use of them for that purpose. If the crown should hereafter think it advisable to extend the privilege more generally to other persons and places, so far as that the public will not be restrained from exercising a choice of warehouses for the purpose, the company may be enfranchised from the restriction which attaches upon a monopoly: but at present, while the public are so restricted to warehouse their goods with them for the purpose of bonding, they must submit to that restriction: and it is enough, that there exists in the place and for the commodity in question a virtual monopoly of the warehousing for this purpose, on

which the principle of law attaches, as laid down by Lord Hale in the passage referred to, which includes the good sense as well as the law of the subject. Whether the company be bound to continue to apply their warehouses to this purpose may be a nice question, and I will not say to what extent it may go; but as long as their warehouses are the only places which can be resorted to for this purpose, they are bound to let the trade have the use of them for a reasonable hire and reward.

Judgment for the plaintiff.[29]

LUMBARD v. STEARNS.

(Supreme Judicial Court of Massachusetts, 1849. 4 Cush. 60.)

SHAW, C. J. This bill was originally brought by the plaintiff as an owner of mills on the lower part of Townbrook, in Springfield, against the defendant Stearns, alleging that by means of an aqueduct, on his own land, he had diverted some portion of the water of two springs, being some of the sources of said brook, and thereby diminished the plaintiff's water power. Whilst this bill was pending and before answer filed, an act was passed by the legislature on the 10th of May, 1848, (St. 1848, c. 303,) entitled "An act to incorporate the Springfield Aqueduct Company."

This act authorized the taking of the springs before mentioned of Stearns, by purchase, and with certain other springs, the laying of an aqueduct for the purpose, expressed in the act, of supplying the village of Springfield with pure water. The act contains the provisions usual in such acts, for forming a company and raising a capital; for taking springs and lands, paying all damages; for digging up roads and ways; providing hydrants; for a gratuitous supply of water, in case of fire; a penalty for corrupting the water; and vesting certain superintending powers in the board of health of Springfield, and the county commissioners of Hampden, respectively. After the passage of this act, a supplemental bill was filed, making the aqueduct company a party, and insisting on the same grounds against them, as stated in the original bill.

It is contended, that this act is unconstitutional and void, because it in effect authorizes the corporation to take private rights of property for a use which is not a public one, and, therefore, not within the authority of the legislature, even though provision is therein made for a compensation for any such damage. It may be very questionable, whether the plaintiff, taking the use of the brook for a mill power, does not take it subject to the reasonable use of all proprietors above, in or near

[29] The concurring opinions of Grose, Le Blanc, and Bayley, JJ., are omitted.

whose premises it passes, for domestic purposes, for such ordinary trades as require the use of water, such as tanning, bleaching, dyeing, and the like, and also for the extinguishment of fires. If such be the right of the inhabitants to the use of the water, it may be a question, whether it is a greater encroachment on the plaintiff's rights, to take water by conduits and hydrants, than by buckets and engines. But as this right may involve a question of fact, which this case has not reached, in its present stage, we lay no stress on this consideration, but merely suggest it in passing.

But we can perceive no ground, on which to sustain the argument, that this act does not declare a public use. It is so expressed in its title, and in the first enacting clause, and the entire act is conformable to this view. The supply of a large number of inhabitants with pure water is a public purpose. But it is urged, as an objection to the constitutionality of the act, that there is no express provision therein requiring the corporation to supply all families and persons who should apply for water, on reasonable terms; that they may act capriciously and oppressively; and that by furnishing some houses and lots, and refusing a supply to others, they may thus give a value to some lots, and deny it to others. This would be a plain abuse of their franchise. By accepting the act of incorporation, they undertake to do all the public duties required by it. When an individual or a corporation is guilty of a breach of public duty, by misfeasance or nonfeasance, and the law has provided no other specific punishment for the breach, an indictment will lie. Perhaps also, in a suitable case, a process to revoke and annul the franchise might be maintained. But it is the less important to determine this question, because this charter is subject to the provision in the Rev. Sts. c. 44, § 23; by which it is competent for the legislature to make such alterations and amendments, as more effectually to carry into effect all the purposes of the act.

The court are of opinion that this act is not open to the objections made to it, and that it is not unconstitutional.

Bill dismissed.[30]

[30] Accord: Kennebec Water District v. City of Waterville, 97 Me. 201, 54 A. 12, 60 L. R. A. 856 (1902); City of Mobile v. Bienville Water Supply Co., 130 Ala. 384, 30 So. 447 (1900); Haugen v. Albina Light & Power Co., 21 Or. 411, 28 P. 244, 14 L. R. A. 424 (1891); Griffin v. Water Co., 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240 (1898). For further collection of cases dealing with the regulation of waterworks as a public utility, see note in 61 L. R. A. 99. Similarly it has been held that irrigation companies are engaged in a public service. See collection of cases in 8 A. L. R. 270; 15 A. L. R. 1227; 12 L. R. A. (N. S.) 711; L. R. A. 1915D, 1205. See, also, articles by S. C. Weil, Public Control of Irrigation, 10 Col. Law Rev. 506; Public Service Irrigation Companies, 16 Col. Law Rev. 37.

McCUNE v. NORWICH CITY GAS CO.

(Supreme Court of Errors of Connecticut, 1862. 30 Conn. 521, 79 Am. Dec. 278.)

Action on the case, for maliciously shutting off the gas from the plaintiff's rooms, which were furnished with gas fixtures connected with the main pipes of the defendants, and were dependent on the gas supplied by the defendants. The plaintiff obtained a verdict in the superior court, and the defendants moved in arrest of judgment for the insufficiency of the declaration, which motion was reserved for the advice of this court. The allegations of the declaration are sufficiently stated in the opinion.

SANFORD, J.[31] This is a motion in arrest for the insufficiency of the declaration. There are two counts, but in all their material allegations they are substantially alike, and the same questions arise on both of them.

The plaintiff alleges that the defendants were a corporation, created for the purpose, and engaged in the business, of making, distributing and selling illuminating gas, and that they had laid down their main pipes in the streets and lanes of the city for the conveyance of gas to their customers; that the plaintiff's rooms had been fitted up with gas-pipes and fixtures, connected with the defendants' main pipes, and that for sometime immediately prior to the 15th November, 1858, the defendants had by means of said pipes supplied the plaintiff with gas for lighting said rooms for a certain reasonable compensation paid therefor, and that the plaintiff desired to continue to light his said rooms with gas as aforesaid, and was ready and willing to pay to the defendants a reasonable compensation for the same, and to abide by all the reasonable rules and regulations of said company, and requested the defendants to continue to supply said rooms with gas; and that it then became and was the duty of the defendants to continue to supply the plaintiff with gas for the purposes aforesaid on the conditions aforesaid; yet that the defendants, not regarding their said duty, but contriving and intending to vex and annoy the plaintiff in the use and enjoyment of his said premises, maliciously, wantonly, and without any justifiable cause, and contrary to the mind and will of the plaintiff, refused to supply the plaintiff with gas, and shut off the same from entering the gas pipes of said rooms, etc.; by reason whereof the plaintiff has been deprived of the means of lighting said rooms with gas, and of the use and enjoyment of said gas fixtures, and has been put to great expense in providing other means of lighting said rooms, etc." No contract for the supply of gas for any definite period is alleged to have been made by the defendants, nor indeed any contract at all. The

31 Parts of the opinion are omitted.

entire foundation of the plaintiff's claim, as it is set out in this declaration, rests upon the supposed legal duty or obligation, independent of any contract, to continue the supply. But no facts are stated from which such duty or obligation arises, and the allegation of a duty or liability is of no avail, and will not help a declaration, unless the facts necessary to raise it are stated. It is but the statement of a legal inference, never traversable, and of no avail in pleading. Bailey v. Bussing, 29 Conn. 1, and authorities there cited; Hayden v. Smithville Manufacturing Co., 29 Conn. 548. * * *

The manufacture and sale of gas is a business which may be prosecuted or discontinued at the will of the party engaged in it. The relations between the maker and the consumer originate in the contract between them, and their respective rights and obligations are controlled entirely by the stipulations of such contract, and as, (where no contract prohibits,) the one may refuse to take the article at his pleasure, so may the other at his pleasure refuse to supply it. We discover no reason for subjecting the maker of gas to duties or liabilities beyond those to which the manufacturers and vendors of other commodities are subjected by the rules of law.

The articles of association under which the defendants are organized and exist as a corporate body, confer upon them no peculiar powers, and impose no peculiar duties or obligations, affecting the question now before us.

The allegation that the defendants cut off the supply of gas maliciously and wantonly, and with intent to injure the plaintiff, is of no importance in the determination of this question. Where a party has a legal right to do a particular act at pleasure, the motive which induced the doing of the act at the time in question can never affect his legal liability for the act, whatever effect such motive may have upon the quantum of damages, when his liability is fixed. * * *

We think the motion in arrest ought to prevail, and we advise accordingly.

In this opinion the other judges concurred.[32]

[32] Accord: Paterson Gaslight Co. v. Brady, 27 N. J. Law, 245, 72 Am. Dec. 360 (1858). In the later case of Olmstead v. Morris Aqueduct, 47 N. J. Law, 311 (1885), the court, in commenting upon the Paterson Case, supra, declared: "This decision fails, however, to give due effect to the purpose of the Legislature in creating the company, and to the implied obligation assumed by the company in accepting the grant. If it were a grant for mere private uses, empowering the corporate body to withhold service at pleasure from all persons, the company would be without the right to occupy the public streets for the laying of its pipes, and, of course, the grant of eminent domain for such private purposes would be void. In this respect, in my judgment, the conclusion in the Paterson Case was erroneous, and in conflict with the views expressed in Tidewater Co. v. Coster, 18 N. J. Eq. 518, 90 Am. Dec. 634 (1866), and in National Docks Ry. Co. v. Central R. R. Co., 32 N. J. Eq. 755 (1880)."

SHEPARD v. MILWAUKEE GAS LIGHT CO.

(Supreme Court of Wisconsin, 1858. 6 Wis. 539, 70 Am. Dec. 479.)

SMITH, J.[33] The material facts in this case are as follows:

The defendant is a chartered company, or corporation, having the exclusive right to manufacture and sell gas for the purpose of lighting the city of Milwaukee, and the places of business and residences of the inhabitants of said city, according to the terms of a contract entered into originally between John Lockwood and said city, and in conformity with the duties and obligations resulting from the act of its incorporation.

The plaintiff was a merchant doing business on East Water street, in said city, along which the gas pipes of the company were laid, and had fitted up his store with the necessary pipes, tubes, burners, and apparatus for lighting it with gas. He then applied to the company to furnish him with gas, and tendered five dollars in advance payment therefor. The company, before they would furnish the gas, required the plaintiff to sign what purported to be an agreement, and was, at least, a promise to take gas according to the terms and conditions contained in the printed "rules and regulations" of the company, which were introduced in evidence. This the plaintiff refused to sign, and for that reason, and none other, the company refused to furnish him with gas. The plaintiff then brought his action to recover damages of the said company for such refusal in a justice's court, claiming damages to the amount of $100, where the defendant obtained judgment, and the plaintiff appealed. The county court reversed the judgment of the justice, and gave judgment for the amount claimed and costs. The defendant now brings the case here by appeal to be reviewed.

We understand that this case comes before the court in entire good faith, and with a sincere desire to arrive at the just rights of the parties. It has been argued with great ability and candor on both sides, and we have given the question involved a consideration beyond what was necessary to determine this particular appeal. Indeed, we were informed upon the argument that it was the desire particularly of the appellants that this court should review their regulations, and pass upon their validity. We therefore enter upon an examination of these "regulations," so far as we deem it necessary, not only without embarrassment, but greatly aided by the full and candid arguments which have been submitted.

It is conceded that there are but two questions necessary to be determined:

First. Was the gas company bound to furnish the plaintiff with gas, under the circumstances of preparation and fixtures admitted to have

[33] The statement of facts and part of the opinion are omitted.

been made, upon his complying with such conditions as the company might rightfully impose? and

Second. If so, whether the company could rightfully require the plaintiff to sign the agreement, promise or regulations mentioned, before he was entitled to demand and have gas supplied by them, upon a tender of the usual rates?

It must be recollected that the fixtures and all apparatus of the plaintiff for receiving and using the gas were perfect, and the only reason for refusing to furnish the gas was, that the plaintiff refused to sign the "regulations" prescribed by the company.

Although the county judge says that the point involved in the first question was conceded in favor of the plaintiff on the trial below, yet we do not understand it to be conceded here, and we therefore proceed to examine the question.

That the company were empowered to impose reasonable regulations upon such of the citizens of the city of Milwaukee as might desire to be furnished with gas, we have no doubt. But the question is, whether the citizen, willing to submit and conform to all such regulations as the company might rightfully impose, was entitled to demand of and be supplied with gas by the company? In other words, was not the company bound to sell their gas at the usual rates to all and every citizen of Milwaukee who was prepared by pipes and the necessary fixtures for its consumption and use, upon compliance with such conditions and regulations as the company might rightfully impose?

In considering this question it is not deemed necessary to examine critically the contract of Lockwood with the city, or the charter of the gas company in detail. It is sufficient for the purposes of this case to know that the company had the exclusive right to manufacture and sell gas, and that, hence, the only means of supply available to the citizens was through the agency of the company. It is within the every day experience of us all, and, hence, within the judicial knowledge of the court, that the manufacture and supply of inflammable gas for the purpose of lighting cities, stores and dwellings, is not a domestic or family manufacture. It is carried on either by public or associated capital, and is dependent for its profit upon general consumption. Corporations of this kind are not like trading or manufacturing corporations, the purview of whose operations is as extensive as commerce itself, and whose productions may be transported from market to market throughout the world. Their product is designed for the consumption of the immediate community in which the manufacture is wrought. It is not a trading corporation, for its product depends exclusively upon home consumption. If gas were an article of merchandise, and could be bottled or packed up, and imported or exported like "soap, candles or hats," to be distributed to the various markets of commerce, there might possibly be claimed for it the character of merchandise, or manufactures partaking of that attribute.

But such is not the fact. Its manufacture depends upon the consumption of the immediate neighborhood for its profit and success, and upon no other place. It is local, and hence not commercial. It is consumed upon the spot of its manufacture, and hence can have no affinity with articles of trade. Its success necessarily depends upon its general use in the vicinity of its manufacture, and seriously affects the public policy and individual convenience of the immediate community. The gas is not sold to whomsoever will buy, but is offered to be, and is, furnished to whomsoever is prepared to, and will, take and use it. It is not an article of trade, because it is not bought, measured and delivered in quantity, but is furnished, used and to be paid for after it is used, because it cannot be measured before. From the nature of the article, the objects of the company, their relations to the community, and from all the considerations before mentioned, it is to me apparent that the company is not at all analogous to an ordinary manufacturing or trading corporation.

But it is asked, would a soap and candle factory, or a hat or carriage factory, with the privilege of laying pipes in the public streets, make it a public corporation, and oblige the company to furnish soap, candles or carriages to any citizen upon tender of a fair compensation? Perhaps not. The citizen could procure his soap, candles and carriages elsewhere. These are all articles of trade, capable of transportation from place to place, and, as is sometimes alleged, the incorporation of companies for their manufacture, does not interfere with the rights or privileges of private citizens. But suppose the citizen was prohibited from obtaining soap, candles or carriages from any other than the particular corporation, how would the case stand? could such company wantonly refuse to sell to the citizen upon the usual terms?

However, if these reasons are insufficient to distinguish the character of this corporation, we proceed to examine another already in part considered, which to our mind is conclusive; viz. the exclusive privilege conferred upon the company to manufacture and furnish or sell the gas.

The very fact of this exclusive right conferred upon the company to manufacture and sell gas in the city, to be consumed therein by the citizens thereof, would imply an obligation on the part of the company to furnish the city and citizens with a reasonable supply on reasonable terms. And when the nature and objects of the corporation are considered, viz.: the exclusive right to manufacture and sell gas, for the purpose of lighting the city of Milwaukee, and the dwellings and business places of its inhabitants, how can it be urged that this is a mere private corporation for the manufacture and sale of a commercial commodity. The very term is incompatible with the idea of trade and commerce. It is not in its nature interchangeable, but merely consumable, and consumable only at the place of delivery in the immediate vicinity of its production. If a company were chartered with the exclusive privilege of manufacturing and selling bread in the city of Milwaukee, would it

be contended that the company were under no obligation to supply or sell bread to any but such person or persons as the company should capriciously select? Odious as were monopolies to the common law, they are still more repugnant to the genius and spirit of our republican institutions, and are only to be tolerated on the occasion of great public convenience or necessity; and they always imply a corresponding duty to the public to meet the convenience or necessity which tolerates their existence.

The successful operation of this gas company worked a radical change in the mode of lighting the streets, dwellings and places of business in the city, and created thereby a sort of necessity for the article, to produce which, the exclusive privilege was conferred upon them, and hence they assumed the correlative duty of supplying this necessity.

We think there can be no doubt, that the company were bound to furnish the gas to the plaintiff, upon his complying with such reasonable conditions or terms as they might rightfully impose. * * *

Without recapitulation, we have no doubt that the judgment of the county court was right, and that the judgment ought to be, and it is, affirmed, with costs.[34]

[34] While, in the principal case, the defendant had been given an exclusive franchise, it has been held that the supply of gas is a public service even though there be no exclusive franchise. Williams v. Mutual Gas Co., 52 Mich. 499, 18 N. W. 236, 50 Am. Rep. 266 (1884). Concerning the nature of the business of supplying gas, both artificial and natural, see Indiana Natural & Illuminating Gas Co. v. State, 158 Ind. 516, 63 N. E. 221, 57 L. R. A. 761 (1901); State v. Columbus Gas Light & Coke Co., 34 Ohio St. 572, 32 Am. Rep. 390 (1878); Zanesville v. Zanesville Gaslight Co., 47 Ohio St. 1, 23 N. E. 55 (1889); Baltimore Gaslight Co. v. Colliday, 25 Md. 1 (1886); Rushville v. Rushville Natural Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321 (1892); Charleston Natural Gas Co. v. Lowe, 52 W. Va. 662, 44 S. E. 413 (1901). In State ex rel. City of Marion v. Marion Light & Heating Co., 174 Ind. 622, 92 N. E. 731 (1910), it was held that a corporation engaged in the business of supplying heat through pipes laid in the public streets was a public utility and bound to serve. But compare Cawker v. Meyer, 147 Wis. 320, 133 N. W. 157, 37 L. R. A. (N. S.) 510 (1911), holding that a building owner who supplied his tenants and three neighbors with heat was not operating a public utility. Corporations engaged in the business of generating and supplying electrical power to the public at large have uniformly been held to be engaged in the business of a public utility. Light & Power Co. v. Hobbs, 72 N. H. 531, 58 A. 46, 66 L. R. A. 581 (1904); Jones v. North Georgia Electric Co., 125 Ga. 618, 54 S. E. 85, 6 L. R. A. (N. S.) 122, 5 Ann. Cas. 526 (1906); Minnesota Canal & Power Co. v. Pratt, 101 Minn. 197, 112 N. W. 395, 11 L. R. A. (N. S.) 105 (1907); Public Service Co. v. Recktenwald, 290 Ill. 314, 125 N. E. 271, 8 A. L. R. 466 (1919). Concerning the power of a state to regulate the rates to consumers of gas or electricity piped or transmitted across state lines, see Mill Creek Coal & Coke Co. v. Public Service Commission, 84 W. Va. 662, 100 S. E. 557, and annotation in 7 A. L. R. 1094 (1919). In the case of Reed v. City of Seattle, 124 Wash. 185, 213 P. 923, 29 A. L. R. 446 (1923), it was held that one engaged in operating a gasoline station for the purpose of supplying gasoline to the public was not entitled to exercise the power of eminent domain.

STATE v. NEBRASKA TELEPHONE CO.

(Supreme Court of Nebraska, 1885. 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404.)

REESE, J.[35] This is an original application for a mandamus to compel the respondent to place and maintain in the office of the relator a telephone and transmitter, such as are usually furnished to the subscribers of the respondent. The respondent has refused to furnish the instruments. * * *

The pleadings and proofs show that the relator is an attorney at law in Lincoln, Nebraska; that he is somewhat extensively engaged in the business of his profession, which extends to Lincoln and Omaha, and surrounding cities and county seats, including quite a number of the principal towns in southeastern Nebraska; that this territory is occupied by respondent exclusively, together with a large portion of southwestern Iowa, including in all about fifteen hundred different instruments.

By the testimony of one of the principal witnesses for respondent we learn that the company is incorporated for the purpose of furnishing individual subscribers telephone connection with each other under the patents owned by the American Telephone Company; instruments to be furnished by said company and sublet by the Nebraska Telephone Company to the subscribers to it. This is clearly the purpose of the organization. While it is true, as claimed by respondent, that it has been organized under the general corporation laws of the state, and in some matters has no higher or greater right than an ordinary corporation, yet it is also true that it has assumed to act in a capacity which is to a great extent public, and has, in the large territory covered by it, undertaken to satisfy a public want or necessity. This public demand can only be supplied by complying with the necessity which has sprung into existence by the introduction of the instrument known as the telephone, and which new demand or necessity in commerce the respondent proposes satisfying. It is also true that the respondent is not possessed of any special privileges under the statutes of the state, and that it is not under quite so heavy obligations, legally, to the public as it would be, had it been favored in that way, but we fail to see just how that fact relieves it.

While there is no law giving it a monopoly of the business in the territory covered by its wires, yet it must be apparent to all that the mere fact of this territory being covered by the "plant" of respondent, from the very nature and character of its business gives it a monopoly of the business which it transacts. No two companies will try to cover this same territory. The demands of the commerce of the present day makes the telephone a necessity. All the people upon complying with the reasonable rules and demands of the owners of the commodity—patented as it is—should have the benefits of this new commerce. The

[35] Parts of the opinion are omitted.

wires of respondent pass the office of the relator. Its posts are planted in the street in front of his door. In the very nature of things no other wires or posts will be placed there while those of respondent remain. The relator never can be supplied with this new element of commerce so necessary in the prosecution of all kinds of business, unless supplied by the respondent. He has tendered to it all the money required by it from its other subscribers in Lincoln for putting in an instrument. He has proven, and it is conceded by respondent, that he is able, financially, to meet all the payments which may become due in the future. It is shown that his office can be supplied with less expense and trouble to respondent than many others which are furnished by it. No reason can be assigned why respondent should not furnish the required instruments, except that it does not want to. There could, and doubtless does, exist in many cases sufficient reason for failing to comply with such a demand, but they are not shown to exist in this case. It is shown to be essential to the business interests of relator that his office be furnished with a telephone. The value of such property is, of course, conceded by respondent, but by its attitude it says it will destroy those interests and give to some one in the same business, who may have been more friendly, this advantage over him.

It is said by respondent that it has public telephone stations in Lincoln, some of which are near relator's office, and that he is entitled to and may use such telephone to its full extent by coming there. That, like the telegraph, it is bound to send the messages of relator, but it can as well do it from these public stations, that it is willing to do so, and that is all that can be required of it. Were it true that respondent had not undertaken to supply a public demand beyond that undertaken by the telegraph, then its obligations would extend no further. But as the telegraph has undertaken to the public to send dispatches from its offices, so the telephone has undertaken with the public to send messages from its instruments, one of which it proposes to supply to each person or interest requiring it, if conditions are reasonably favorable. This is the basis upon which it proposes to operate the demand which it proposes to supply. It has so assumed and undertaken to the public.

That the telephone, by the necessities of commerce and public use, has become a public servant, a factor in the commerce of the nation and of a great portion of the civilized world, cannot be questioned. It is to all intents and purposes a part of the telegraphic system of the country, and in so far as it has been introduced for public use and has been undertaken by the respondent, so far should the respondent be held to the same obligation as the telegraph and other public servants. It has assumed the responsibilities of a common carrier of news. Its wires and poles line our public streets and thoroughfares. It has, and must be held to have taken its place by the side of the telegraph as such common carrier.

The views herein expressed are not new. Similar questions have arisen in, and have been frequently discussed and decided by, the

courts, and no statute has been deemed necessary to aid the courts in holding that when a person or company undertakes to supply a demand which is "affected with a public interest," it must supply all alike who are like situated, and not discriminate in favor of, nor against any. This reasoning is not met by saying that the rules laid down by the courts as applicable to railroads, express companies, telegraphs, and other older servants of the public, do not apply to telephones, for the reason that they are of recent invention and were not thought of at the time the decisions were made, and hence are not affected by them, and can only be reached by legislation. The principles established and declared by the courts, and which were and are demanded by the highest material interests of the country, are not confined to the instrumentalities of commerce nor to the particular kinds of service known or in use at the time when those principles were enunciated, "but they keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph," and from the telegraph to the telephone; "as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances." Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S. 9, 24 L. Ed. 708. * * *

A peremptory writ of mandamus must be awarded. Writ allowed.[36]

LADD v. SOUTHERN COTTON PRESS & MFG. CO.

(Supreme Court of Texas, 1880. 53 Tex. 172.)

MOORE, Chief Justice.[37] This suit was brought in the district court of Galveston county, August 3, 1877, by Alexander H. Ladd, the appellant, against appellee, The Southern Cotton Press & Manufacturing Company, a corporation under the laws of Texas, carrying on the business of receiving, storing and compressing cotton for such parties as might employ its services in that behalf, to recover back moneys alleged to have been paid by appellant at various times for

[36] Telegraph companies were at an early date subjected to public control. The earlier cases regarded them as common carriers of news. See Parks v. Alta California Tel. Co., 13 Cal. 423, 73 Am. Dec. 589 (1859). But the later cases hold that they are not common carriers, although they are public utilities. Fowler v. Western Union Telegraph Co., 80 Me. 381, 15 A. 29, 6 Am. St. Rep. 211 (1888). Telephone companies were included in the category of public utilities by analogy to telegraph service, and are to-day everywhere regarded as such. As to whether a mutual telephone company is a public utility, see collection of cases in note, L. R. A. 1918C, 827.

[37] The statement of facts and parts of the opinion are omitted.

charges which were uniformly and notoriously demanded and collected by appellee on all cotton entrusted to it.

The right to recover back the money thus paid, is claimed in the petition on the ground that upon the facts stated therein the property and services of appellee had been submitted to public use and had become affected with a public interest; that the charges demanded by appellee were unlawful and without consideration, and that the payments had been made involuntarily and under duress.

The appellee demurred generally and specially, that the facts stated in the petition showed that the business carried on by appellee was a private enterprise and occupation, and not a public employment. * * * The demurrer was sustained, and, appellant declining to amend, judgment was rendered for appellee. From this judgment an appeal was prosecuted, and appellants assign as error that the court should have overruled, instead of sustaining the demurrer to his petition. In support of this assignment, his counsel make in their brief these propositions, viz.: First. The petition shows that appellee had submitted its property and services to public use. (1) By becoming incorporated by the legislature for the purpose of carrying on the business designated. (2) By virtue of the nature and extent of the business. (3) Because by combination with others in the same line of business, it became a virtual monopoly, the exercise of which enabled them to exact fictitious charges, and charges without consideration, as a substantial toll on nearly all of the chief commodity of the state, and thereby its services and property became affected with a public interest. * * * Are these propositions, or any one of them, applicable to the facts averred in appellant's petition, and, if so, should the judgment be reversed? We will consider them in the order in which they are presented.

1. Did appellee, by becoming incorporated by the legislature for the purpose of carrying on a warehouse and compress business, submit its property and services to public use? We are cited to no authority tending to support this proposition, and we are unable to perceive any principle or reason upon which it can be maintained. The petition shows that appellee is a mere private corporation, with no privilege or franchise beyond that of carrying on in a corporate capacity the business in which it is engaged. It is by reason of the nature and character of the business, and not from the fact that it is carried on by an individual or corporation, that the law holds that the property or services of the owner have been submitted to public use.

2. The business of warehousing and compressing cotton, is free to every one who wishes to engage in it. No grant or franchise need be obtained from the state to authorize those desiring to do so to embark in this character of business. It is not one of the employments which the common law declares public. Coggs v. Barnard, 2 Ld. Raym. 909; 2 Pars. on Cont. 139; Story on Bail. § 442. Nor is it claimed to have been made so by statute. And we know of no authority, and

none has been shown us, for saying that a business strictly juris privati will become juris publici, merely by reason of its extent. If the magnitude of a particular business is such, and the persons affected by it so numerous, that the interest of society demands that the rules and principles applicable to public employments should be applied to it, this would have to be done by the legislature (if not restrained from doing so by the constitution) before a demand for such an use could be enforced by the courts.

If the right to regulate property and the character of its employment is, by reason of its extent, and the number of persons interested in or affected by the manner or circumstances of its use, as counsel for appellant forcibly declares, "of the very essence of government," the exercise of this right or power pertains to the legislative and not the judicial department.

3. Evidently appellant does not intend to assert that appellee, by combination with others engaged in like business, acquired a monopoly or "virtual monopoly" of the character declared by the constitution of the state to be "contrary to the genius of a free government," and never to be allowed. Article 1, § 26. But the import of his proposition, as we understand it, is that appellee and others engaged in the same business, though this business was a legitimate and lawful one, had, without any exclusive right to conduct it, by combination virtually acquired the exclusive control of the business in the city and port of Galveston, which enabled them "to exact fictitious charges and charges without consideration," and thereby to collect "toll on nearly all the chief commodity of the state." And that by reason of this fact the property and service employed in such business became affected with a public interest. But conceding the premises, the conclusion sought to be deduced seems to us to be a non sequitur.

It will readily be admitted that in many instances combinations may be made by parties engaged in a particular trade, or by those who, at the time, have the control of the market for some article of prime necessity, to make most unconceivable exactions for their services or demand a most extortionate price for their commodities. But certainly this does not change the nature of the employment in which they are engaged, or authorize the court to say, when the business of the parties is strictly private, that it has become public. If the combination is illegal, the parties to it will subject themselves to such penalties as the law imposes; and if the injury to society to be apprehended from such combinations is of a character demanding it, the legislature may, by adequate provision, regulate or prohibit persons from engaging in them. Nor do we say that there may not be instances where, by combination, or even without it, some particular business, by reason of its extent and magnitude and the great number of persons affected by it, though strictly privati juris under the common law and previous statutes, which may be declared publici juris by the legislature. This

seems in effect what was held by the supreme court of the United States to have been done by the legislature of Illinois. 94 U. S. 125, 24 L. Ed. 77.[38] But as this is not the character of this case, we are not called upon to express an authoritative opinion on the point. It is sufficient for us to say that in the absence of legislation to that effect, a party who has not subjected his property and services to public use by the character of the business in which he is engaged, does not do so by reason of combination with others in a like business, though he is enabled thereby to exact from those who may employ him unreasonable and extortionate charges for the services rendered. Whether payments made under such circumstances may not be held to have been paid under duress, is another question to be considered hereafter. Nor can it justly be held that the mere extent and magnitude of the business changes a private charge for services into a toll to be regulated by law. Nor if so, that the court may, in the absence of legislation upon the subject, substitute its judgment as to the proper amount of such toll for the contract of the parties.

But although none of the grounds urged by appellant in support of his proposition, "that appellees had submitted its property and services to public use," taken severally and of themselves warrant his conclusion, a fair consideration of the argument of his counsel requires us to consider the effect, not only of each of the positions, standing alone, upon the business of appellee, but also their effect in the aggregate, in connection with all the facts and circumstances connected with or relating to the business in which appellee was engaged and the manner in which it was conducted and carried on.

In doing this it must be conceded, as alleged in appellant's petition, that appellee and those engaged in the same business at the port of Galveston, with the exception of one small establishment capable of doing but a limited business, had combined and fixed the charges complained of; that the business in which appellee and his confederates were engaged was necessary to the public, in reference to the transit of cotton from the producer to the manufacturer and consumer; that the charges complained of were a common charge against all comers and upon every bale of cotton, and was also a charge demanded and enforced without consideration, a compliance with which was, under the circumstances, essential to the business life of, and the only escape from business ruin by all who follow the business of brokerage in cotton in the city of Galveston.

Now, giving the fullest scope and import to these and other allegations made in the petition, how is it shown that appellee's business

[38] In Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77 (1876), the court, in referring to the business of elevating grain, said: "Certainly, if any business can be clothed 'with a public interest, and cease to be juris privati only,' this has been. It may not be made so by the operation of the Constitution of Illinois or this statute, but it is by the facts."

is of a character with which the courts of the country have the right to interfere; or from what source, we ask, do they derive their authority to regulate the conditions and terms upon which it shall be conducted? It is not contended by appellant, that, as ordinarily conducted, the business of receiving, storing, compressing and delivering cotton is privati juris, which those engaged in it have not the right to fix the rates and conditions upon which it will be conducted. But the argument seems to be, that, in view of the necessities of trade, its magnitude and effect upon the interest of the people throughout the state, as well as of those engaged in the business of appellant, it has become of like public interest as other occupations and trades which the law pronounces and holds to be juris publici. The conclusion sought to be maintained rests upon the hypothesis that whenever it is made to appear that any particular business is of so general public interest as that which the law holds to be juris publici, the courts have the power to so declare and hold it. The case of Munn v. Illinois, 94 U. S. 125, 24 L. Ed. 77, seems to be the authority mainly relied on to support this position. We cannot regard this case as authority for such a doctrine. It was brought to enforce the statute law of the state. The conclusion to be drawn from it is, as we think, that the legislature may declare a particular business publici juris, if the facts and circumstances under which it is conducted justifies and the good of society requires it; but not that the court may so treat it in advance of legislative recognition or declaration. Whether this may be done, even by the legislature, without infringing upon the constitution, need not now be considered. Neither is it necessary for us at present to determine whether the submission of property and service to public use (as there is high authority for holding) is solely dependent upon the fact that those engaged in such business enjoy some franchise, privilege or immunity from the state, or did so in the early days of the common law when this character was impressed upon their property or service. Dissenting opinion of Field, J., in Munn v. Illinois, supra, and authorities cited. * * *

The judgment is affirmed.[39]

39 Similarly, in Delaware, L. & W. R. R. v. Central Stockyard & Transit Co., 45 N. J. Eq. 50, 17 A. 146, 6 L. R. A. 855 (1889); Id., 46 N. J. Eq. 280, 19 A. 185 (1889) a court of equity declined to compel a stockyards company to serve the plaintiff railroad, in the absence of a statute declaring stockyards to be public utilities. Compare, however, the subsequent case of McCarter v. Firemen's Fund Insurance Co., 74 N. J. Eq. 372, 73 A. 80, 414, 29 L. R. A. (N. S.) 1194, 135 Am. St. Rep. 708, 18 Ann. Cas. 1048 (1909), in which a court of equity, without the aid of a statute, enjoined certain fire insurance companies from raising rates and declared a certain agreement between them to be void. But see Queen Ins. Co. v. State, 86 Tex. 250, 24 S. W. 397, 22 L. R. A. 483 (1893).

INTER-OCEAN PUB. CO. v. ASSOCIATED PRESS.

(Supreme Court of Illinois, 1900. 184 Ill. 438, 56 N. E. 822, 48 L. R. A. 568, 75 Am. St. Rep. 184.)

Mr. Justice PHILLIPS delivered the opinion of the court:[40]

The Inter-Ocean Publishing Company, a corporation organized under the laws of the state of Illinois, is engaged in publishing two newspapers in the city of Chicago, known as "The Daily Inter-Ocean" and "The Weekly Inter-Ocean," which have a wide circulation in the states and territories of the United States. The Associated Press is a corporation organized under the laws of the state of Illinois in 1892. The object of its creation was, "to buy, gather and accumulate information and news; to vend, supply, distribute and publish the same; to purchase, erect, lease, operate and sell telegraph and telephone lines and other means of transmitting news; to publish periodicals; to make and deal in periodicals and other goods, wares and merchandise." It has about eighteen by-laws with about seventy-five subdivisions thereof. The stockholders of the Associated Press are the proprietors of newspapers, and the only business of the corporation is that enunciated in its charter, and is mainly buying, gathering and accumulating news and furnishing the same to persons and corporations who have entered into contract therefor. It may furnish news to persons and corporations other than those who are its stockholders, and the term "members," used in its by-laws, applies to proprietors of newspapers, other than its stockholders, who have entered into contracts with it for procuring news. It does not appear that it has availed itself of any of the powers conferred by its charter other than that of gathering news and distributing the same to its members. Under the by-laws of appellee the Inter-Ocean Publishing Company became a stockholder. Among the by-laws having reference to stockholders are the following:

"Article 11.—Sec. 8. *Sale or Purchase of Specials.*—No member shall furnish, or permit any one to furnish, its special or other news to, or shall receive news from, any person, firm or corporation which shall have been declared by the board of directors or the stockholders to be antagonistic to the association; and no member shall furnish news to any other person, firm or corporation engaged in the business of collecting or transmitting news, except with the written consent of the board of directors."

"Article 14.—Sec. 1. *Board may Suspend.*—The board of directors shall have the power, by a two-thirds vote of the whole board, to suspend a member or impose upon him a fine of not exceeding $1,000 for furnishing news to any person or association antagonistic or in opposition to the Associated Press, or for purchasing news from any person or organization formally declared by the board of directors or by the stockholders of the association, at any annual or special meeting, to be

[40] Parts of the opinion are omitted.

in such antagonism or opposition, or for any other violation of the by-laws or his contract: Provided, always, that ten days' notice, in writing, of a complaint be first served upon the offending member; and said member shall have an opportunity to be heard in his own defense, and if said member shows that the offense was unintentional, and shall have discontinued the same, he shall not be suspended."

On March 2, 1893, the Associated Press entered into an agreement with the Inter-Ocean Publishing Company, by which it sold to the latter its night news report for publication in the two newspapers for the term of ninety-two years, which the Inter-Ocean company agreed to receive and pay for at the rate of $102 per week, which sum was liable to be increased fifty per cent. The Associated Press agreed to furnish to the Inter-Ocean company local and telegraphic news within a radius of sixty miles of Chicago, in accordance with its by-laws. The contract between the Inter-Ocean company and the Associated Press, among other provisions, contained the following:

"Sixth.—Said party of the second part covenants and agrees that it will not furnish, before publication, any news to any person or corporation engaged in the business of collecting or transmitting news, except upon the written consent of the board of directors of the party of the first part first had and obtained; and that it will not furnish to any person any of the news received by it under this contract before publication by it; and that it will not furnish its special or other news to or receive news from any person or corporation which shall have been declared by the board of directors of said party of the first part antagonistic to said party of the first part, after having received notice of such declaration.

"Seventh—It is further mutually agreed between the parties hereto, that the rights, duties and obligations of the respective parties hereto, except as hereinbefore specifically provided for, shall be controlled and governed by the by-laws of said party of the first part now, or hereafter in force, during the life of this contract; and that the right to receive news under this contract may be suspended or terminated in the manner and for the causes specified in said by-laws. * * *"

Contracts of substantially the same character have been entered into from time to time between the Associated Press and most of the leading newspapers throughout the United States, to whom, under its charter and by-laws and under its contracts, it sells and vends its news. Similar associations for gathering and selling and vending news, to a limited extent, exist in other cities than Chicago, but none of them so widely extended. Among these are the Sun Printing & Publishing Association of New York City, the New York Sun of New York City, and the Laffan News Bureau of New York City. These three latter associations have been declared to be antagonistic to the Associated Press by the board of directors of the latter. News of an important character not gathered by the Associated Press was gathered by a certain alleged antagonistic association, and the Inter-Ocean Publishing Company, for the purpose of furnishing its readers with information and news gathered from vari-

ous points and sources, in addition to the news purchased by it from the Associated Press also purchased and published news obtained by it from the Sun Printing & Publishing Association of New York City, but did not furnish news to the latter association or to any of the associations antagonistic to the Associated Press. The Chicago Herald Company and the Chicago Daily News Company made complaint to the Associated Press that the Inter-Ocean Publishing Company was publishing news procured by it from the Sun Printing & Publishing Association of New York, the New York Sun of New York City and the Laffan News Bureau of New York City, and asked that the Inter-Ocean Publishing Company's contract and section 8 of article 11 of the by-laws should be enforced. The Associated Press gave notice to the Inter-Ocean Publishing Company that a meeting of its board of directors would be held at a time and place mentioned, to take action on the complaints of the Chicago Herald Company and the Chicago Daily News Company. Before the time set for hearing the Inter-Ocean Publishing Company filed its bill for an injunction against the Associated Press from suspending or expelling it from its membership and from refusing to furnish it news according to the terms of its contract, and from doing any act or thing tending to deprive it of the news gathered by appellee, and for such other relief, general and special, as might be just and equitable.

The bill set up the facts hereinbefore stated, and set out the by-laws of the appellee in full, and alleged that the appellee had been able to control the business of buying and accumulating news in Chicago and selling the same, and has thus created in itself an exclusive monopoly in that business, and to preserve such monopoly had declared the Sun Printing & Publishing Association a rival or competitor in business and antagonistic to it, and sought to prohibit its members from buying news therefrom under pain of suspension or expulsion; alleged that appellee had at various times, by threats of suspension and expulsion, compelled divers of its members to cease buying the special news of the Sun Printing & Publishing Association under its contracts with its members. The bill set out the contracts and names of such members, and alleged that the notice served on appellant for a hearing on the complaints against it is similar to the action of appellee against other members who were forced to cease buying special news from the Sun Printing & Publishing Association; that appellant is in duty bound, both to its patrons and to the public, to publish all the news it can gather, and if not able to obtain such news from one source, it must, in justice to its patrons and the public, resort to other sources; that the news which it obtained from appellee it was unable to obtain from any other source, and appellee would not furnish the same to appellant unless it executed the contract hereinbefore mentioned, because of which appellant was forced to and did execute such contract; that appellee does not furnish all the news obtainable and desired by appellant under that contract, and to obtain such other news appellant was forced to resort to the Sun Printing &

Publishing Association of New York; that the right to receive the news gathered by appellee and publish the same in its newspaper is a valuable property and property right, and appellant is forced to obtain the news not obtainable from appellee, and which is absolutely needed in publishing its newspapers, from the Sun Printing & Publishing Association; that the appellee is attempting to force appellant to cease taking news from the latter association, but to do so would work irreparable damage and injury to appellant, and would prevent it from furnishing needed, important and necessary news to the public, and would tend to create in favor of appellee a monopoly.

The appellee filed an answer to the bill. A hearing was had upon the bill and answer, both of which were sworn to, and certain affidavits which were read and used as depositions, and a decree was rendered dismissing the bill for want of equity. On appeal to the Appellate Court for the First District the decree was affirmed, and this appeal is prosecuted.

It has been uniformly held that a telegraph or telephone company is bound to treat all persons and corporations alike, and without discrimination in its business of receiving and transmitting messages. The business of such a company is public in its nature, and a public interest is impressed thereon to such an extent that no discrimination can be made against persons or corporations. People v. Western Union Tel. Co., 166 Ill. 15, 46 N. E. 731, 36 L. R. A. 637. Where one is the owner of property which is devoted to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public for the common good as long as such use is maintained. The manner in which it is devoted to a use in which the public has an interest may be very diverse and the public interest in such use may be of a widely variant character; but where the use is one in which the public is interested or has an interest, public control is necessary for the common good. Munn v. People, 94 U. S. 113, 24 L. Ed. 77. The appellee corporation voluntarily sought corporate existence to engage in an enterprise which invested it with, among others, the power of eminent domain. It was organized, among other things, to purchase, erect, lease, operate and sell telegraph and telephone lines,—a business which is essentially public in its nature and renders a corporation so engaged amenable to public control. Whilst, under the averments of the bill and answer and affidavits, the appellee corporation has only engaged in business to the extent of its power "to buy, gather and accumulate information and news; to vend, supply, distribute and publish the same," and has not attempted to purchase, erect, lease or sell telegraph and telephone lines, it is important to determine the character of the corporation under its charter and under the business in which it is actually engaged.

The organization of such a method of gathering information and news from so wide an extent of territory as is done by the appellee cor-

poration, and the dissemination of that news, requires the expenditure of vast sums of money. It reaches out to the various parts of the United States, where its agents gather news which is wired to it, and through it such news is received by the various important newspapers of the country. Scarcely any newspaper could organize and conduct the means of gathering the information that is centered in an association of the character of the appellee because of the enormous expense, and no paper could be regarded as a newspaper of the day unless it had access to and published the reports from such an association as appellee. For news gathered from all parts of the country the various newspapers are almost solely dependent on such an association, and if they are prohibited from publishing it or its use is refused to them, their character as newspapers is destroyed and they would soon become practically worthless publications. The Associated Press, from the time of its organization and establishment in business, sold its news reports to various newspapers who became members, and the publication of that news became of vast importance to the public, so that public interest is attached to the dissemination of that news. The manner in which that corporation has used its franchise has charged its business with a public interest. It has devoted its property to a public use, and has, in effect, granted to the public such an interest in its use that it must submit to be controlled by the public for the common good, to the extent of the interest it has thus created in the public in its private property. The sole purpose for which news was gathered was that the same should be sold, and all newspaper publishers desiring to purchase such news for publication are entitled to purchase the same without discrimination against them.

It was held in New York and Chicago Grain and Stock Exchange v. Board of Trade, 127 Ill. 153, on page 163, 19 N. E. 855, 859 (2 L. R. A. 411, 11 Am. St. Rep. 107): "Assuming these market quotations and reports are property and the private property of the board of trade, yet if they have been so used by the board, and by the telegraph company with the knowledge and consent of the board, as to become affected with a public interest, then they are subject to such public regulation by the legislature and the courts as is necessary to prevent injury to such public interest. The doctrine in question has application both to the property of individuals and of corporations, and it is therefore immaterial that any such corporation may be a mere private corporation. If the interest is public, then it is necessarily, to all alike, common to all and upon equal terms. The doctrine, as applied to the matter of these market quotations, would forbid that a monopoly should be made of them by furnishing them to some and refusing them to others who are equally willing to pay for them and be governed by all reasonable rules and regulations, and would prevent the board of trade or the telegraph companies from unjustly discriminating in respect to the parties who will be allowed to receive them." This principle is sustained in Friedman v.

Telegraph Co., 32 Hun (N. Y.) 4, and Smith v. Telegraph Co., 42 Hun (N. Y.) 454. The appellee corporation being engaged in a business upon which a public interest is engrafted, upon principles of justice it can make no distinction with respect to persons who wish to purchase information and news, for purposes of publication, which it was created to furnish.

It is urged, however, that by the terms of the contract appellant cannot retain its membership and stock in the Associated Press, and have the right to purchase news accumulated by it at contract price, without complying with that part of the contract which requires appellant to refrain from receiving news from any person or corporation which has been declared by the board of directors of appellee to be antagonistic to the latter, and without appellant being controlled or governed by the by-law of appellee to the same effect. The character of appellee's business is not to be determined by the contract which it made respecting the liabilities which would attend it, but by the nature of the business, its fixed legal character, growing out of the manner in which that business is conducted, and the purpose of its creation. The legal character of the corporation and its duties cannot be disregarded because of any stipulation incorporated in a contract that it should not be liable to discharge a public duty. Its obligation to serve the public is not one resting on contract, but grows out of the fact that it is in the discharge of a public duty, or a private duty which has been so conducted that a public interest has attached thereto. * * *

We hold that the circuit court of Cook county erred in entering a decree dismissing the bill for want of equity, and the Appellate Court for the First District erred in affirming the same. The judgment of the Appellate Court for the First District and the decree of the circuit court of Cook county are each reversed, and the cause is remanded to the circuit court of Cook county, with directions to enter a decree as prayed for in the bill.

Reversed and remanded.[41]

41 Contra: State ex rel. Star Publishing Co. v. Associated Press, 159 Mo. 410, 60 S. W. 91, 51 L. R. A. 151, 81 Am. St. Rep. 368 (1901). In News Publishing Co. v. Associated Press, 114 Ill. App. 241 (1904), it was held that the Associated Press was engaged in a public service and was under a duty to render news service which it had contracted to give to one of its members upon the same terms and conditions that it rendered like service to other newspaper publishers. This question was again raised in News Publishing Co. v. Associated Press, 190 Ill. App. 77 (1914), in which case it appeared that the contract was made in New York and was to be there performed. The court held that the case should be decided according to New York law and interpreted the case of Matthews v. Associated Press, 136 N. Y. 333, 32 N. E. 981, 32 Am. St. Rep. 741 (1893), as holding the by-law in question to be a reasonable regulation. In matter of Renville, 46 App. Div. 37, 61 N. Y. S. 549 (1899), it was held that a telegraph company, engaged in the business of obtaining market quotations from the New York Stock Exchange and, subject to the approval of the Exchange, supplying the information by tickers to subscribers, could not be compelled to supply such information to a person in violation of its agreement with the Exchange. But see, and compare, New York & Chicago Grain &

SECTION 2.—BY LEGISLATION

I. Constitutional Limitations

MUNN v. ILLINOIS.

(Supreme Court of the United States, 1876. 94 U. S. 113, 24 L. Ed. 77.)

Error to the Supreme Court of the State of Illinois.

[The Constitution of Illinois, adopted in 1870, declared all elevators or storehouses where grain or other property is stored for a compensation, to be public warehouses, and provided that the general assembly should pass laws for the inspection of grain, for the protection of producers, shippers, and receivers of grain and produce. Pursuant to this constitutional provision the general assembly in 1871 enacted a law which, among other things, fixed maximum rates for the storage of grain in warehouses located in cities having not less than one hundred thousand inhabitants, "in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved."

On the 29th day of June, 1872, an information was filed in the criminal court of Cook county, Ill., against Munn & Scott, alleging violations of the statute.]

To this information a plea of not guilty was interposed.

From an agreed statement of facts, made a part of the record, it appears that Munn & Scott leased of the owner, in 1862, the ground occupied by the "Northwestern Elevator," and erected thereon the grain warehouse or elevator in that year, with their own capital and means; that they ever since carried on, in said elevator, the business of storing and handling grain for hire, for which they charged and received, as a compensation, the rates of storage which had been, from year to year, agreed upon and established by the different elevators and ware-

Stock Exchange v. Board of Trade, 127 Ill. 153, 19 N. E. 855, 2 L. R. A. 411, 11 Am. St. Rep. 107 (1889); National Tel. News Co. v. Western Union Tel. Co., 119 F. 294, 56 C. C. A. 198, 60 L. R. A. 805 (1902); Western Union Tel. Co. v. State ex rel. Hammond Elevator Co., 165 Ind. 492, 76 N. E. 100, 3 L. R. A. (N. S.) 153, 6 Ann. Cas. 880 (1905); 6 Col. Law Rev. 259. For a collection of cases dealing with the ticker service, see note 1 A. L. R. 1286. In view of section 92, New York Public Service Commission Law (Consol. Laws, c. 48), it is doubtful whether the decision in Matter of Renville, supra, represents the present law in New York. See Tucker v. Western Union Tel. Co., 95 Misc. Rep. 287, 158 N. Y. S. 959 (1915). In Western Union Tel. Co. v. Foster, 247 U. S. 105, 38 S. Ct. 438, 62 L. Ed. 1006, 1 A. L. R. 1278 (1918), it was held that the transmission of such information from one state to another is interstate commerce, and not subject to a regulation by a state utility commission seeking to prevent discrimination.

houses in the city of Chicago, and published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication. On the twenty-eighth day of June, 1872, Munn & Scott were the managers and proprietors of the grain warehouse known as "The Northwestern Elevator," in Chicago, Ill., wherein grain of different owners was stored in bulk and mixed together; and they then and there carried on the business of receiving, storing, and delivering grain for hire, without having taken a license from the circuit court of Cook county, permitting them, as managers, to transact business as public warehousemen, and without having filed with the clerk of the circuit court a bond to the people of the state of Illinois, as required by sections 3 and 4 of the Act of April 25, 1871. The city of Chicago then, and for more than two years before, had more than one hundred thousand inhabitants. Munn & Scott had stored and mixed grain of different owners together, only by and with the express consent and permission of such owners, or of the consignee of such grain, they having agreed that the compensation should be the published rates of storage.

Munn & Scott had complied in all respects with said act, except in two particulars: First, they had not taken out a license, nor given a bond, as required by sections 3 and 4; and, second, they had charged for storage and handling grain the rates established and published in January, 1872, which were higher than those fixed by section 15.

The defendants were found guilty, and fined $100. The judgment of the criminal court of Cook county having been affirmed by the Supreme Court of the state, Munn & Scott sued out this writ, and assigned for error:

1. Sections 3, 4, 5, and 15 of the statute are unconstitutional and void.

2. Said sections are repugnant to the third clause of section 8 of article 1, and the sixth clause of section 9, art. 1, of the Constitution of the United States, and to the Fifth and Fourteenth Amendments.[42]

Mr. Chief Justice WAITE delivered the opinion of the court.[43]

The question to be determined in this case is whether the general assembly of Illinois can, under the limitations upon the legislative power of the states imposed by the Constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the state having not less than one hundred thousand inhabitants, "in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved."

[42] The statement of facts is abbreviated.

[43] Parts of the opinion are omitted. The dissenting opinion of Mr. Justice Field, in which Mr. Justice Strong concurred, is also omitted.

It is claimed that such a law is repugnant—

1. To that part of section 8, art. 1, of the Constitution of the United States, which confers upon Congress the power "to regulate commerce with foreign nations and among the several states;"

2. To that part of section 9 of the same article which provides that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another;" and

3. To that part of amendment 14 which ordains that no state shall "deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

We will consider the last of these objections first.

Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained.

The Constitution contains no definition of the word "deprive," as used in the Fourteenth Amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection.

While this provision of the amendment is new in the Constitution of the United States, as a limitation upon the powers of the states, it is old as a principle of civilized government. It is found in Magna Charta, and, in substance if not in form, in nearly or quite all the Constitutions that have been from time to time adopted by the several states of the Union. By the Fifth Amendment, it was introduced into the Constitution of the United States as a limitation upon the powers of the national government, and by the Fourteenth, as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the states.

When the people of the united colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, and through their state constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective states, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the states and of the people of the states was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the states, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the Constitutions.

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the Constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private, Thorpe v. R. & B. Railroad Co., 27 Vt. 143, 62 Am. Dec. 625; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim sic utere tuo ut alienum non lædas. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the License Cases, 5 How. 583, 12 L. Ed. 256, "are nothing more or less than the powers of government inherent in every sovereignty; * * * that is to say, * * * the power to govern men and things." Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the states upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the Fifth Amendment in force, Congress, in 1820, conferred power upon the city of Washington "to regulate * * * the rates of wharfage at private wharves, * * * the sweeping of chimneys, and to fix the rates of fees therefor, * * * and the weight and quality of bread," 3 Stat. 587, § 7; and, in 1848, "to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen, and draymen, and the rates of commission of auctioneers," 9 Stat. 224, § 2.

From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the states from doing that which will operate as such a deprivation.

This brings us to inquire as to the principles upon which this power

of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be juris privati only." This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise De Portibus Maris, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control. * * *

In later times, the same principle came under consideration in the Supreme Court of Alabama. That court was called upon, in 1841, to decide whether the power granted to the city of Mobile to regulate the weight and price of bread was unconstitutional, and it was contended that "it would interfere with the right of the citizen to pursue his lawful trade or calling in the mode his judgment might dictate;" but the court said, "there is no motive * * * for this interference on the part of the legislature with the lawful actions of individuals, or the mode in which private property shall be enjoyed, unless such calling affects the public interest, or private property is employed in a manner which directly affects the body of the people. Upon this principle, in this State, tavern-keepers are licensed; * * * and the county court is required, at least once a year, to settle the rates of innkeepers. Upon the same principle is founded the control which the legislature has always exercised in the establishment and regulation of mills, ferries, bridges, turnpike roads, and other kindred subjects." Mobile v. Yuille, 3 Ala. 140, 36 Am. Dec. 441.

From the same source comes the power to regulate the charges of common carriers, which was done in England as long ago as the third year of the reign of William and Mary, and continued until within a comparatively recent period. And in the first statute we find the following suggestive preamble, to wit:

"And whereas divers wagoners and other carriers, by combination amongst themselves, have raised the prices of carriage of goods in many places to excessive rates, to the great injury of the trade: Be it, therefore, enacted," etc. 3 W. & M. c. 12, § 24; 3 Stat. at Large (Great Britain), 481.

Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. New Jersey Nav. Co. v. Merchants' Bank, 6 How. 382, 12 L. Ed. 465. Their business is,

therefore, "affected with a public interest," within the meaning of the doctrine which Lord Hale has so forcibly stated.

But we need not go further. Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle.

For this purpose we accept as true the statements of fact contained in the elaborate brief of one of the counsel of the plaintiffs in error. From these it appears that "the great producing region of the West and Northwest sends its grain by water and rail to Chicago, where the greater part of it is shipped by vessel for transportation to the seaboard by the Great Lakes, and some of it is forwarded by railway to the Eastern ports. * * * Vessels, to some extent, are loaded in the Chicago harbor, and sailed through the St. Lawrence directly to Europe. * * * The quantity [of grain] received in Chicago has made it the greatest grain market in the world. This business has created a demand for means by which the immense quantity of grain can be handled or stored, and these have been found in grain warehouses, which are commonly called elevators, because the grain is elevated from the boat or car, by machinery operated by steam, into the bins prepared for its reception, and elevated from the bins, by a like process, into the vessel or car which is to carry it on. * * * In this way the largest traffic between the citizens of the country north and west of Chicago and the citizens of the country lying on the Atlantic coast north of Washington is in grain which passes through the elevators of Chicago. In this way the trade in grain is carried on by the inhabitants of seven or eight of the great states of the West with four or five of the states lying on the sea-shore, and forms the largest part of interstate commerce in these states. The grain warehouses or elevators in Chicago are immense structures, holding from 300,000 to 1,000,000 bushels at one time, according to size. They are divided into bins of large capacity and great strength. * * * They are located with the river harbor on one side and the railway tracks on the other; and the grain is run through them from car to vessel, or boat to car, as may be demanded in the course of business. It has been found impossible to preserve each owner's grain separate, and this has given rise to a system of inspection and grading, by which the grain of different owners is mixed, and receipts issued for the number of bushels which are negotiable, and redeemable in like kind, upon demand. This mode of conducting the business was inaugurated more than twenty years ago, and has grown to immense proportions. The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the carrier; the ownership has, therefore, been by private individuals, who have embarked their capital and devoted their industry to such business as a private pursuit."

In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such "as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication." Thus it is apparent that all the elevating facilities through which these vast productions "of seven or eight great states of the West" must pass on the way "to four or five of the states on the seashore" may be a "virtual" monopoly.

Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney coachman, pursues a public employment and exercises "a sort of public office," these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very "gateway of commerce," and take toll from all who pass. Their business most certainly "tends to a common charge, and is become a thing of public interest and use." Every bushel of grain for its passage "pays a toll, which is a common charge," and, therefore, according to Lord Hale, every such warehouseman "ought to be under public regulation, viz., that he * * * take but reasonable toll." Certainly, if any business can be clothed "with a public interest, and cease to be juris privati only," this has been. It may not be made so by the operation of the Constitution of Illinois or this statute, but it is by the facts.

We also are not permitted to overlook the fact that, for some reason, the people of Illinois, when they revised their Constitution in 1870, saw fit to make it the duty of the general assembly to pass laws "for the protection of producers, shippers, and receivers of grain and produce" (article 13, § 7); and by section 5 of the same article, to require all railroad companies receiving and transporting grain in bulk or otherwise to deliver the same at any elevator to which it might be consigned, that could be reached by any track that was or could be used by such company, and that all railroad companies should permit connections to be made with their tracks, so that any public warehouse, etc., might be reached by the cars on their railroads. This indicates very clearly that during the twenty years in which this peculiar business had been assuming its present "immense proportions," something had occurred which led the whole body of the people to suppose that remedies such as are usually employed to prevent abuses by virtual monopolies might not be inappropriate here. For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under

consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the state. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge.

Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner.

It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. If they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns. The same principle applies to them that does to the proprietor of a hackney-carriage, and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses and carriage and established his business before the statute or the ordinance was adopted.

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if

there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.

But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts. * * *

The judgment is affirmed.

Mr. Justice FIELD and Mr. Justice STRONG dissented.

BUDD v. NEW YORK.

(Supreme Court of the United States, 1892. 143 U. S. 517, 12 S. Ct. 468; 36 L. Ed. 247.)

Mr. Justice BREWER, with whom concurred Mr. Justice FIELD and Mr. Justice BROWN, dissenting.[44]

I dissent from the opinion and judgment in these cases. The main proposition upon which they rest is, in my judgment radically unsound. It is the doctrine of Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, reaffirmed. That is, as declared in the syllabus and stated in the opinion

[44] The question involved in this appeal was whether the Supreme Court would adhere to its decision in Munn v. Illinois. After an elaborate review of the cases and a discussion of the principles involved, the court followed Munn v. Illinois and affirmed the judgment of the Court of Appeals of New York in People v. Budd, 117 N. Y. 1, 22 N. E. 670, 682, 5 L. R. A. 559, 15 Am. St. Rep. 460 (1889), holding constitutional a state statute similar to that in the Munn case. The majority opinion delivered by Mr. Justice Blatchford is omitted. Part of the dissenting opinion is also omitted.

P. UTIL.

in that case: "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created." The elaborate discussions of the question in the dissenting opinions in that case, and the present cases when under consideration in the Court of Appeals of the State of New York, seem to forbid anything more than a general declaration of dissent. The vice of the doctrine is, that it places a public interest in the use of property upon the same basis as a public use of property. Property is devoted to a public use when, and only when, the use is one which the public in its organized capacity, to wit, the state, has a right to create and maintain, and, therefore, one which all the public have a right to demand and share in. The use is public because the public may create it, and the individual creating it is doing thereby and pro tanto the work of the state. The creation of all highways is a public duty. Railroads are highways. The state may build them. If an individual does that work, he is pro tanto doing the work of the state. He devotes his property to a public use. The state doing the work fixes the price for the use. It does not lose the right to fix the price, because an individual voluntarily undertakes to do the work. But this public use is very different from a public interest in the use. There is scarcely any property in whose use the public has no interest. No man liveth unto himself alone, and no man's property is beyond the touch of another's welfare. Everything, the manner and extent of whose use affects the well-being of others, is property in whose use the public has an interest. Take, for instance, the only store in a little village. All the public of that village are interested in it; interested in the quantity and quality of the goods on its shelves, and their prices, in the time at which it opens and closes, and, generally, in the way in which it is managed; in short, interested in the use. Does it follow that that village public has a right to control these matters? That which is true of the single small store in the village, is also true of the largest mercantile establishment in the great city. The magnitude of the business does not change the principle. There may be more individuals interested, a larger public, but still the public. The country merchant who has a small warehouse in which the neighboring farmers are wont to store their potatoes and grain preparatory to shipment occupies the same position as the proprietor of the largest elevator in New York. The public has in each case an interest in the use, and the same interest, no more and no less. I cannot bring myself to believe that when the owner of property has by his industry, skill and money made a certain piece of his property of large value to many, he has thereby deprived himself of the full dominion over it which he had when it was of comparatively little value; nor can I believe that the control of the public over one's property or business is at all dependent upon the extent to which the public is benefited by it.

Surely the matters in which the public has the most interest, are the

supplies of food and clothing; yet can it be that by reason of this interest the state may fix the price at which the butcher must sell his meat, or the vendor of boots and shoes his goods? Men are endowed by their Creator with certain unalienable rights, "life, liberty and the pursuit of happiness;" and to "secure," not grant or create, these rights governments are instituted. That property which a man has honestly acquired he retains full control of, subject to these limitations: First, that he shall not use it to his neighbor's injury, and that does not mean that he must use it for his neighbor's benefit; second, that if he devotes it to a public use, he gives to the public a right to control that use; and, third, that whenever the public needs require, the public may take it upon payment of due compensation.

It is suggested that there is a monopoly, and that that justifies legislative interference. There are two kinds of monopoly; one of law, the other of fact. The one exists when exclusive privileges are granted. Such a monopoly, the law which creates alone can break; and being the creation of law justifies legislative control. A monopoly of fact any one can break, and there is no necessity for legislative interference. It exists where any one by his money and labor furnishes facilities for business which no one else has. A man puts up in a city the only building suitable for offices. He has therefore a monopoly of that business; but it is a monopoly of fact, which any one can break who, with like business courage puts his means into a similar building. Because of the monopoly feature, subject thus easily to be broken, may the legislature regulate the price at which he will lease his offices? So, here, there are no exclusive privileges given to these elevators. They are not upon public ground. If the business is profitable, any one can build another; the field is open for all the elevators, and all the competition that may be desired. If there be a monopoly, it is one of fact and not of law, and one which any individual can break.

The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government. If it may regulate the price of one service, which is not a public service, or the compensation for the use of one kind of property which is not devoted to a public use, why may it not with equal reason regulate the price of all service, and the compensation to be paid for the use of all property? And if so, "Looking Backward" is nearer than a dream. * * *

Mr. Justice FIELD and Mr. Justice BROWN concur with me in this dissent.[45]

[45] For a powerful historical argument in favor of the constitutionality of the statute in this case see the opinion of Andrews, J., in People v. Budd, cited supra.

BRASS v. NORTH DAKOTA ex rel. STOESER.

(Supreme Court of the United States, 1894. 153 U. S. 391, 14 S. Ct. 857, 38 L. Ed. 757.)

[Norman Brass, the plaintiff in error, owned and operated a grain elevator in the village of Grand Harbor, North Dakota, for the purpose of buying, selling, storing, and shipping grain for profit. Louis W. Stoeser, the defendant in error, owned a farm adjoining the village, on which in the year 1891 he raised about 4,000 bushels of wheat. Not having sufficient storage capacity on his farm or elsewhere for said grain, Stoeser tendered part of his grain to Brass for storage, and requested that Brass receive, elevate, insure and store said grain for twenty days, and at the time tendered to Brass the compensation fixed by section 11 of chapter 126 of the Laws of North Dakota for the year 1891, which Brass refused to do unless paid therefor at a rate in excess of that fixed by the statute. Stoeser endeavored to secure storage for said grain at the only other elevator in operation at said railroad station but was refused upon the same ground, it appearing that the owners of elevators and warehouses within a radius of 50 miles of Grand Harbor refused to receive grain for storage at the rates prescribed by law. Stoeser then filed in the district court of Ramsey county, North Dakota, a petition for an alternative writ of mandamus against Brass which was granted, the writ setting forth the above facts and ordering Brass to store and insure the grain tendered by Stoeser at the statutory rates so long as the capacity of said elevator was sufficient for the purpose, or to show cause to the contrary. To this writ Brass made return by answer in which he admitted the truth of the facts pleaded, but for further return alleged, among other things, that his principal business was that of buying and selling grain to which business that of storing grain for third persons had been a mere incident; that if he were compelled to receive all grain that might be tendered to him for storage, without reference to the necessities or conditions of his business at any particular time, the entire storage capacity of his elevator would be exhausted in storing grain for third persons, and his principal business, to conduct which his capital was invested in the elevator, would be utterly ruined; that he owned only the one elevator which had a capacity of 30,000 bushels and cost three thousand dollars; that there were 2 other elevators at Grand Harbor, and there were about 600 elevators and warehouses in North Dakota, owned and operated by over 125 different owners independent of and in competition with each other; that these elevators varied in capacity from 5,000 to 50,000 bushels and cost from $500 to $5,000; that land upon which it was practical to erect other elevators at every station in North Dakota at which grain was marketed was unlimited in area and could be readily purchased at prices varying from $1.25 per acre to $40 per acre; and that he refused to comply with the provisions of said chapter 126 on the ground that it abridged his

privileges and immunities as a citizen of the United States, that it deprived him of his liberty and property without due process of law, and denied him the equal protection of the laws, and amounted to a regulation of commerce between the states.

To this return Stoeser interposed a general demurrer, which was sustained, and Brass electing in open court to stand on his return, a peremptory writ of mandamus was allowed. From this judgment an appeal was taken to the Supreme Court of North Dakota, which court affirmed the order and judgment of the district court. Whereupon Brass sued out a writ of error to this court.] [46]

Mr. Justice SHIRAS delivered the opinion of the court.[47] * * *

The legislature of the state of North Dakota, by an Act approved March 7, 1891, c. 126, Laws of 1891, p. 321, and entitled "An act to regulate grain warehouses and the weighing and handling of grain, and defining the duties of the railroad commissioners in relation thereto," enacted, in the fourth section thereof, that "all buildings, elevators, or warehouses in this state, erected and operated, or which may hereafter be erected and operated by any person or persons, association, copartnership, corporation, or trust, for the purpose of buying, selling, storing, shipping, or handling grain for profit, are hereby declared public warehouses, and the person or persons, association, copartnership, or trust owning or operating said building or buildings, elevator or elevators, warehouse or warehouses, which are now or may hereafter be located or doing business within this state, as above described, whether said owners or operators reside within this state or not, are public warehousemen within the meaning of this act, and none of the provisions of this act shall be construed so as to permit discrimination with reference to the buying, receiving, and handling of grain of standard grades, or in regard to parties offering such grain for sale, storage, or handling at such public warehouses, while the same are in operation;" and in the fifth section, "that the proprietor, lessee, or manager of any public warehouse or elevator in this state shall file with the railroad commissioners of the state a bond to the state of North Dakota, with good and sufficient sureties, to be approved by said commissioners of railroads, in the penal sum of not less than $5,000 nor more than $75,000, in the discretion of said commissioners, conditioned for the faithful performance of duty as public warehousemen, and a compliance with all the laws of the state in relation thereto;" and in the eleventh section thereof, "the charges for storing and handling of grain shall not be greater than the following schedule: For receiving, elevating, insuring, delivering, and twenty days' storage, two cents per bushel. Storage rates, after the first twenty days, one-half cent for each fifteen days or fraction thereof, and shall not exceed five cents for six months. The grain

[46] Statement of facts by the authors.

[47] Part of the opinion is omitted.

shall be kept insured at the expense of the warehousemen for the benefit of the owner;" and by the twelfth section it is provided that "any person, firm, or association, or any representative thereof, who shall fail to do and keep the requirements as herein provided, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be subject to a fine of not less than two hundred dollars nor more than one thousand dollars, and be liable in addition thereto to imprisonment for not more than one year in the state penitentiary, at the discretion of the court."

In October, 1891, in the district court of the Second judicial district of the state of North Dakota, in proceedings the nature of which sufficiently appears in the previous statement of facts, the validity of this statute was sustained, and the judgment of that court was, on error, duly affirmed by the Supreme Court of the state. State v. Brass, 2 N. D. 482, 52 N. W. 408.

In the cases thus brought to this court from the states of Illinois and New York, we were asked to declare void statutes regulating the affairs of grain warehouses and elevators within those states, and held valid by their highest courts, because it was claimed that such legislation was repugnant to that clause of the eighth section of article 1 of the Constitution of the United States, which confers upon Congress power to regulate commerce with foreign nations and among the several states, and to the Fourteenth Amendment, which ordains that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

In the case now before us the same contentions are made, but we are not asked to review our decisions made in the previous cases. Indeed, their soundness is tacitly admitted in the briefs and argument of the counsel of the plaintiff in error. But it is said that those cases arose out of facts so peculiar and exceptional, and so different from those of the present case, as to render the reasoning there used, and the conclusions reached, now inapplicable.

The concession, then, is that, upon the facts found to exist by the legislatures of Illinois and New York, their enactments were by the courts properly declared valid, and the contention is that the facts upon which the legislature of North Dakota proceeded, and of which we can take notice in the present case, are so different as to call for the application of other principles, and to render an opposite conclusion necessary.

The differences in the facts of the respective cases, to which we are pointed, are mainly as follows: In the first place, what may be called a geographical difference is suggested, in that the operation of the Illinois and New York statutes is said to be restricted to the city of Chicago in the one case, and to the cities of Buffalo, New York, and Brooklyn in the other, while the North Dakota statute is applicable to the territory of the entire state.

It is, indeed, true that while the terms of the Illinois and New York statutes embrace in both cases the entire state, yet their behests are restricted to cities having not less than a prescribed number of inhabitants, and that there is no such restriction in the North Dakota law.

Upon this it is argued that the statutes of Illinois and New York are intended to operate in great trade centres, where, on account of the business being localized in the hands of a few persons in close proximity to each other, great opportunities for combinations to raise and control elevating and storage charges are afforded, while the wide extent of the state of North Dakota and the small population of its country towns and villages are said to present no such opportunities.

The considerations mentioned are obviously addressed to the legislative discretion. It can scarcely be meant to contend that the statutes of Illinois and New York, valid in their present form, would become illegal if the lawmakers thought fit to repeal the clauses limiting their operation to cities of a certain size, or that the statute of North Dakota would at once be validated if one or more of her towns were to reach a population of 100,000, and her legislature were to restrict the operation of the statute to such cities.

Again, it is said that the modes of carrying on the business of elevating and storing grain in North Dakota are not similar to those pursued in the Eastern cities; that the great elevators used in transshipping grain from the Lakes to the railroads are essential; and that those who own them, if uncontrolled by law, could extort such charges as they pleased; and great stress is laid upon expressions used in our previous opinions, in which this business, as carried on at Chicago and Buffalo, is spoken of as a practical monopoly, to which shippers and owners of grain are compelled to resort. The surroundings in an agricultural state, where land is cheap in price and limitless in quantity, are thought to be widely different, and to demand different regulations.

These arguments are disposed of, as we think, by the simple observation, already made, that the facts rehearsed are matters for those who make, not for those who interpret, the laws. When it is once admitted, as it is admitted here, that it is competent for the legislative power to control the business of elevating and storing grain, whether carried on by individuals or associations, in cities of one size and in some circumstances, it follows that such power may be legally exerted over the same business when carried on in smaller cities and in other circumstances. It may be conceded that that would not be wise legislation which provided the same regulations in every case, and overlooked differences in the facts that called for regulations. But, as we have no right to revise the wisdom or expediency of the law in question, so we would not be justified in imputing an improper exercise of discretion to the legislature of North Dakota. It may be true that, in the cases cited, the judges who expressed the conclusions of

the court entered, at some length, into a defence of the propriety of the laws which they were considering, and that some of the reasons given for sustaining them went rather to their expediency than to their validity. Such efforts, on the part of judges, to justify to citizens the ways of legislatures are not without value, though they are liable to be met by the assertion of opposite views as to the practical wisdom of the law, and thus the real question at issue, namely, the power of the legislature to act at all, is obscured. Still, in the present instance, the obvious aim of the reasoning that prevailed was to show that the subject-matter of these enactments fell within the legitimate sphere of legislative power, and that, so far as the laws and Constitution of the United States were concerned, the legislation in question deprived no person of his property without due process of law, and did not interfere with federal jurisdiction over interstate commerce.

Another argument advanced is based on the admitted allegation that the principal business of the plaintiff in error, in connection with his warehouse, is in storing his own grain, and that the storage of the grain of other persons is and always has been a mere incident, and it is said that the effect of this law will be to compel him to renounce his principal business and become a mere warehouseman for others. We do not understand this law to require the owner of a warehouse, built and used by him only to store his own grain, to receive and store the grain of others. Such a duty only arises when he chooses to enter upon the business of elevating and storing the grain of other persons for profit. Then he becomes subject to the statutory regulations, and he cannot escape them by asserting that he also elevates and stores his own grain in the same warehouse. As well might a person accused of selling liquor without a license urge that the larger part of his liquors were designed for his own consumption, and that he only sold the surplus as a mere incident.

Another objection to the law is found in its provision that the warehouseman shall insure the grain of others at his own expense. This may be burdensome, but it affects alike all engaged in the business, and, if it be regarded as contrary to sound public policy, those affected must instruct their representatives in general assembly met to provide a remedy.

The plaintiff in error, in his answer to the writ of mandamus, based his defence wholly upon grounds arising under the constitution of the state and of the United States. We are limited by this record to the questions whether the legislature of North Dakota, in regulating by a general law the business and charges of public warehousemen engaged in elevating and storing grain for profit, denies to the plaintiff in error the equal protection of the laws or deprives him of his property without due process of law, and whether such statutory regulations amount to a regulation of commerce between the states. The allegations and arguments of the plaintiff in error have failed to satisfy us that any solid distinction can be found between the cases

in which those questions have been heretofore determined by this court and the present one. The judgment of the court below is accordingly affirmed.[48]

Mr. Justice BREWER, with whom concurred Mr. Justice FIELD, Mr. Justice JACKSON, and Mr. Justice WHITE, dissenting.

I dissent from the opinion and judgment of the court in this case. Reliance is placed in that opinion on Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, and Budd v. New York, 143 U. S. 517, 12 S. Ct. 468, 36 L. Ed. 247. In the dissenting opinion I filed in the latter case, I expressed, so far as was necessary, my views in reference to the general propositions laid down in the two cases, and I do not desire to repeat what I there said. It is a significant fact that in Sinking Fund Cases, 99 U. S. 700, 747, 25 L. Ed. 504, 511, and in Wabash, St. Louis & Pacific Railway v. Illinois, 118 U. S. 557, 569, 7 S. Ct. 4, 30 L. Ed. 244, Mr. Justice Bradley and Mr. Justice Miller, who concurred in the judgment in Munn v. Illinois, each sought to limit and qualify the scope of the language used by the Chief Justice in that case. These are the words of Mr. Justice Bradley:

"The inquiry there was as to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power."

And this is the language of Mr. Justice Miller, delivering the opinion of the court:

"And in that case the court was presented with the question, which it decided, whether any one engaged in a public business, in which all the public had a right to require his service, could be regulated by acts of the legislature in the exercise of this public function and public duty, so far as to limit the amount of charges that should be made for such services."

I desire, however, specially to notice the facts disclosed by this record, and to point out to what extent the decision of this court now goes. The case, coming from the Supreme Court of the state of North Dakota, must be determined upon the record as it is presented. Noth-

[48] Compare the reasoning of the majority of the court in this case with that in the subsequent case of Michigan Public Utilities Commission v. Duke, 45 S. Ct. 191, 266 U. S. 570, 69 L. Ed. 445, 36 A. L. R. 1105 (1925), in which the Supreme Court declared: "Moreover, it is beyond the power of the state by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the 14th Amendment."

ing can be added to or taken from the facts as established by that record. The case was heard and determined upon a demurrer to the return made by the defendant to the petition and writ of mandamus, and of course upon such demurrer the facts stated in the return are to be taken as true. * * *

It appears from these admissions that the principal business of defendant was that of buying wheat and shipping it to Minneapolis and Duluth for sale, and that he operated and maintained his elevator for the exclusive purpose of purchasing grain to fill his contracts; and while at the time the elevator was not full and there was room for the storage of the grain tendered by the petitioner, and the defendant had at times used vacant space in his elevator for the storage of grain of others, yet such use was a mere incident to and subordinate to his principal business of buying and selling grain, for which principal business he exclusively maintained and operated his elevator.

Now, my first objection is that by this decision a party is compelled by the mandate of the court to engage in a business which he never intended to engage in, and which he does not desire to engage in, to wit, the business of maintaining a public elevator. His business is that of buying and selling grain, and he operates and maintains the elevator, which he owns, for the exclusive purpose of carrying on that business. That he may have sometimes accommodated his neighbors by the use of his elevator for the storage of their grain, and thus to a limited extent engaged in that business, does not change the fact, as admitted, that his principal business was that of buying and selling, and that he operated and maintained that elevator exclusively for the carrying on of that business, or the other admitted fact that, if he is compelled, as he is compelled by this mandate, to receive grain as tendered so long as he has storage capacity unoccupied in his elevator, his principal business and that for which he built the elevator will be utterly ruined and destroyed.

The question is not whether, if he should receive and store in his elevator grain for others, he might not so far bring himself within the scope of the law as to be deemed for that transaction engaged in the business of maintaining a public elevator, and thus bound by the charges fixed by statute; but whether, when he maintains an elevator exclusively for his own business, the fact that at times he has used vacant room in it for the storage of the grain of other persons, compels him to receive grain when tendered irrespective of the injury which it does to his own business. And it is admitted that, at the time of this tender, there was not sufficient storage capacity in his elevator to hold and store the grain purchased by him in the conduct of his business. And this is a matter of no trifling moment to one engaged in the business of buying and selling grain. He cannot know in advance when grain will be tendered at a price which will justify his purchase with a view to profit. The fact that to-day there may be storage capacity does not

prove that to-morrow he may not need the entire capacity of his elevator. And yet, if, because to-day there is room in his elevator, he is bound to receive any grain that shall be tendered, he may to-morrow be unable to make purchase of the offered grain. It is a matter of common knowledge that grain is not put into and taken out of an elevator in an instant. And if once deposited the owner cannot be compelled to remove it, merely for the accommodation of the warehouseman, but may leave it there indefinitely so long as he pays the legal charges. The petition was for a writ of mandamus commanding the defendant "so long as the capacity of his said elevator is sufficient for the purpose, to store such grain as may be tendered to him by the relator," and the decree of the court was that the "writ issue as prayed for," and that is the decision which is affirmed by this court.

I dissent in the second place because the facts show, in the words of Mr. Justice Bradley, no "practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community." Along the line of this single road within the limits of this state there are about 600 of these elevators, owned and operated by over 125 different persons, varying in cost of construction from $500 to $5,000; at every station there is land purchasable by any one at prices varying from $1.25 to $40 per acre, and a granary sufficient to store the average product of an ordinary Dakota farm can be erected at a cost of not exceeding $150. So it is that when any farmer on other individual can at a cost of less than $200 provide himself with all the facilities for storing and shipping the entire product of an ordinary farm, when along the line of a single railroad there are 600 elevators already constructed, owned, and operated by 125 different persons, when at every station at which grain is marketed there are from 2 to 10 such elevators, it is held that there exists a monopoly such as justifies control by the public of the prices at which grain shall be stored in any one of these many elevators. If this be a monopoly, justifying public control of prices for service, I am at a loss to perceive at what point the fact of monopoly will cease and freedom of business commence. For obviously elevators along the line of that road were as plentiful as other institutions of industry, and as easily and cheaply constructed, and therefore savoring no more of monopoly.

I dissent in the third place because by this law the elevator man is bound not merely to receive, store, and discharge the grain which is tendered to him, but also to insure and pay the cost of insurance, it matters not what that cost may be, whether more or less than he receives for the whole service. I do not care to enlarge upon this matter. If the legislature can compel a party, though confessedly to the disadvantage, injury, and even destruction of his own special business of buying and selling grain, to receive and store grain for whoever may demand it in an elevator which he is maintaining and operating for the exclusive carrying on of his own business at any price which it sees fit to

allow, and at the same time compel him to advance the money to insure the property thus forced upon him, I can only say that it seems to me that the country is rapidly travelling the road which leads to that point where all freedom of contract and conduct will be lost. For these reasons, thus briefly stated, I am constrained to dissent from this opinion and judgment.

I am authorized to say that Mr. Justice FIELD, Mr. Justice JACKSON, and Mr. Justice WHITE concur in this dissent.[49]

NOBLE STATE BANK v. HASKELL.

(Supreme Court of the United States, 1911. 219 U. S. 104, 31 S. Ct. 186, 55 L. Ed. 112, 32 L. R. A. [N. S.] 1062, Ann. Cas. 1912A, 487.)

Mr. Justice HOLMES delivered the opinion of the court.

This is a proceeding against the Governor of the state of Oklahoma and other officials who constitute the state banking board, to prevent them from levying and collecting an assessment from the plaintiff under an act approved December 17, 1907. This act creates the board and directs it to levy upon every bank existing under the laws of the state an assessment of one per cent. of the bank's average daily deposits, with certain deductions, for the purpose of creating a depositors' guaranty fund. There are provisos for keeping up the fund, and by an act passed March 11, 1909, since the suit was begun, the assessment is to be 5 per cent. The purpose of the fund is shown by its name. It is to secure the full repayment of deposits. When a bank becomes insolvent and goes into the hands of the bank commissioner, if its cash immediately available is not enough to pay depositors in full, the banking board is to draw from the depositors' guaranty fund (and from additional assessments if required) the amount needed to make up the deficiency. A lien is reserved upon the assets of the failing bank to make good the sum thus taken from the fund. The plaintiff says that it is solvent and does not want the help of the guaranty fund, and that it cannot be called upon to contribute toward securing or paying the depositors in other banks consistently with article 1, § 10, and the Fourteenth Amendment of the Constitution of the United States. The

[49] In Ratcliff v. Wichita Union Stockyard Co., 74 Kan. 1, 86 P. 150, 6 L. R. A. (N. S.) 834, 118 Am. St. Rep. 298, 10 Ann. Cas. 1016 (1906), a statute fixing the rates which might be charged by stockyards was upheld. See Stafford v. Wallace, 258 U. S. 495, 42 S. Ct. 397, 66 L. Ed. 735, 23 A. L. R. 229 (1922). Statutes regulating tobacco warehouses were upheld in Nash v. Page, 80 Ky. 539, 44 Am. Rep. 490 (1882); Louisville Tobacco Warehouse Co. v. Commonwealth, 106 Ky. 173, 49 S. W. 1071, 57 L. R. A. 33 (1899). In Tallahassee Oil & Fertilizer Co. v. H. S. & J. L. Holloway, 200 Ala. 492, 76 So. 434, L. R. A. 1918A, 280 (1917) and Sims v. State, 80 Okl. 254, 196 P. 132, 23 A. L. R. 1475 (1921) statutes regulating cotton gins were upheld. See note, 23 A. L. R. 1478.

petition was dismissed on demurrer by the Supreme Court of the state. 22 Okl. 48, 97 P. 590.

The reference to article 1, § 10, does not strengthen the plaintiff's bill. The only contract that it relies upon is its charter. That is subject to alteration or repeal, as usual, so that the obligation hardly could be said to be impaired by the act of 1907 before us, unless that statute deprives the plaintiff of liberty or property without due process of law. See Sherman v. Smith, 1 Black, 587, 17 L. Ed. 163. Whether it does so or not is the only question in the case.

In answering that question we must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a nolumus mutare as against the law-making power.

The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. And while we should assume that the plaintiff would retain a reversionary interest in its contribution to the fund so as to be entitled to a return of what remained of it if the purpose were given up (see Receiver of Danby Bank v. State Treasurer, 39 Vt. 92, 98), still there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. Clark v. Nash, 198 U. S. 361, 25 S. Ct. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171; Strickley v. Highland Boy Mining Co., 200 U. S. 527, 531, 26 S. Ct. 301, 50 L. Ed. 581, 4 Ann. Cas. 1174; Offield v. New York, New Haven & Hartford R. R. Co., 203 U. S. 372, 27 S. Ct. 72, 51 L. Ed. 231; Bacon v. Walker, 204 U. S. 311, 315, 27 S. Ct. 289, 51 L. Ed. 499. And in the next, it would seem that there may be other cases beside the every day one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. See Ohio Oil Co. v. Indiana, 177 U. S. 190, 20 S. Ct. 576, 44 L. Ed. 729. At least, if we have a case within the reasonable exercise of the police power as above explained, no more need be said.

It may be said in a general way that the police power extends to all the great public needs. Camfield v. United States, 167 U. S. 518, 17

S. Ct. 864, 42 L. Ed. 260. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If then the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. Even the primary object of the required assessment is not a private benefit as it was in the cases above cited of a ditch for irrigation or a railway to a mine, but it is to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand. The priority of claim given to depositors is incidental to the same object and is justified in the same way. The power to restrict liberty by fixing a minimum of capital required of those who would engage in banking is not denied. The power to restrict investments to securities regarded as relatively safe seems equally plain. It has been held, we do not doubt rightly, that inspections may be required and the cost thrown on the bank. See Charlotte, Columbia & Augusta R. R. Co. v. Gibbes, 142 U. S. 386, 12 S. Ct. 255, 35 L. Ed. 1051. The power to compel, beforehand, coöperation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized, if government is to do its proper work, unless we can say that the means have no reasonable relation to the end. Gundling v. Chicago, 177 U. S. 183, 188, 20 S. Ct. 633, 44 L. Ed. 725. So far is that from being the case that the device is a familiar one. It was adopted by some states the better part of a century ago, and seems never to have been questioned until now. Receiver of Danby Bank v. State Treasurer, 39 Vt. 92; People v. Walker, 17 N. Y. 502. Recent cases going not less far are Lemieux v. Young, 211 U. S. 489, 496, 29 S. Ct. 174, 53 L. Ed. 295; Kidd, Dater & Price Co. v. Musselman Grocer Co., 217 U. S. 461, 30 S. Ct. 606, 54 L. Ed. 839.

It is asked whether the state could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise. With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides. Hudson County Water Co. v. McCarter, 209 U. S. 349, 355, 28 S. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560. It will serve as a datum on this side, that in our opinion the statute before us is well within the state's constitutional power, while the use of the public credit on a large scale to help individuals

in business has been held to be beyond the line. Loan Association v. Topeka, 20 Wall. 655, 22 L. Ed. 455; Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39.

The question that we have decided is not much helped by propounding the further one, whether the right to engage in banking is or can be made a franchise. But as the latter question has some bearing on the former and as it will have to be considered in the following cases, if not here, we will dispose of it now. It is not answered by citing authorities for the existence of the right at common law. There are many things that a man might do at common law that the states may forbid. He might embezzle until a statute cut down his liberty. We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the State in taking the whole business of banking under its control. On the contrary we are of opinion that it may go on from regulation to prohibition except upon such conditions as it may prescribe. In short, when the Oklahoma legislature declares by implication that free banking is a public danger, and that incorporation, inspection and the above-described cooperation are necessary safeguards, this court certainly cannot say that it is wrong. North Dakota v. Woodmansee, 1 N. D. 246, 46 N. W. 970, 11 L. R. A. 420; Brady v. Mattern, 125 Iowa, 158, 100 N. W. 358, 106 Am. St. Rep. 291; Weed v. Bergh, 141 Wis. 569, 124 N. W. 664, 25 L. R. A. (N. S.) 1217; Commonwealth v. Vrooman, 164 Pa. 306, 30 A. 217, 25 L. R. A. 250, 44 Am. St. Rep. 603; Myers v. Irwin, 2 Serg. & R. (Pa.) 368; Myers v. Manhattan Bank, 20 Ohio, 283, 302; Attorney General v. Utica Insurance Co., 2 Johns. Ch. (N. Y.) 371, 377. Some further details might be mentioned, but we deem them unnecessary. Of course objections under the state constitution are not open here.

Judgment affirmed.[50]

AMERICAN SURETY CO. OF NEW YORK v. SHALLENBERGER.

(Circuit Court of the United States, District of Nebraska, 1910. 183 F. 636.)

In Equity. Suit by the American Surety Company of New York against Ashton C. Shallenberger, Governor, William T. Thompson, Attorney General, and Silas R. Barton, Auditor of Public Accounts, of the State of Nebraska.

50A motion for leave to file a petition for a rehearing was made and denied. See 219 U. S. 575, 31 S. Ct. 299, 55 L. Ed. 341 (1910). For a collection of cases dealing with the regulation of banks, see notes, 5 L. R. A. (N. S.) 874, 32 L. R. A. (N. S.) 1065. See, also, interesting articles by Warren, The Progressiveness of the United States Supreme Court, 13 Col. Law Rev. 294. A Bulwark to the State Police Power—the United States Supreme Court, 13 Col. Law Rev. 667.

T. C. MUNGER, District Judge.[51] The Legislature of Nebraska passed an act, approved April 1, 1909 (Laws 1909, c. 27), which declared it to be the duty of certain state officers to fix the maximum rates of premiums that any fidelity or surety company transacting business in the state might charge for furnishing each and all of the different kinds of bonds, contracts, recognizances, stipulations, and undertakings. The act also makes it unlawful for any such company to charge or receive any larger rate of premium than the rates so fixed, and any agent or officer charging or receiving such premium is chargeable with a misdemeanor. The state auditor is also commanded to revoke the authority of the offending company to transact business in the state, and it shall not be permitted to transact business within the state for a period of one year. * * *

The complainant is a company organized under the laws of New York, and a part of its business is the furnishing of surety bonds. For many years it has been authorized to conduct this business in Nebraska and has been furnishing such bonds, charging such rates of premium therefor as it deemed a proper compensation. There are other corporations, some of them organized under the laws of this state, which are engaged in similar business in this state. The state officers named in the act have fixed a maximum rate of premium to be charged for many kinds of surety bonds, and admit that it is their intention to enforce the rates so fixed. The complainant, by this action, seeks to enjoin the enforcement of this act of the Legislature. The defendants' answer alleged that the complainant has not complied with the terms of the act of the Legislature of this state, commonly known as the "Junkin Act." Comp. St. Neb. c. 91a, art. 2, § 4. This act requires the filing of certain sworn statements in the office of the Attorney General of this state. It is sufficient to say that there is no proof that the complainant has not filed such a statement.

Coming to the real question in the case, viz., the validity of the act of the Legislature of 1909, it will be seen that the act applies, in express terms, to both foreign and domestic companies. Therefore the act cannot be sustained upon the doctrine that the state has the right to exclude foreign insurance companies from doing business in the state, as declared in Doyle v. Continental Ins. Co., 94 U. S. 535–542, 24 L. Ed. 148; Security Mut. Life Ins. Co. v. Prewitt, 202 U. S. 246–257, 26 Sup. Ct. 619, 50 L. Ed. 1013, 6 Ann. Cas. 317. * * *

The real controversy in the case is over the power of the state to fix the rates to be charged for insurance. No case has been cited where such a question has previously arisen, although acts somewhat to the same effect have been passed in other states. Laws of New Hampshire 1899, c. 85, § 1; Laws of Kansas, 1909, c. 152, § 3. May the state exercise this power, in view of the fourteenth amendment to the Constitu-

[51] Parts of the opinion are omitted.

tion of the United States which declares that no state shall "deprive any person of life, liberty, or property, without due process of law."

The liberty to enter into contracts is not an unrestricted liberty, but is subject to the police power of the state. The extent to which the state may go, in the exercise of this power, in regulating or prescribing the prices of goods or services is not clearly defined. In earlier days, it was usual for Parliament to fix the rates which lawfully could be charged even by those who were engaged in private business, and such legislation also existed in the colonies before the adoption of our Constitution. Freund on Police Power, § 318. The right to regulate the charges for services of those whose business is devoted to a public use has been thoroughly established. It is also well settled that the right exists in the state to regulate the charges to be made by those whose business is affected by a public interest. Munn v. Illinois, 94 U. S. 113–125, 24 L. Ed. 77; Budd v. New York, 143 U. S. 517–544, 12 S. Ct. 468, 36 L. Ed. 247; Brass v. North Dakota, 153 U. S. 391, 14 S. Ct. 857, 38 L. Ed. 757. The three cases just cited involved the validity of statutes regulating the charges which lawfully might be made by those owning grain elevators, and in each case it was declared that the business conducted by them was so affected with a public interest that the state could regulate the charges imposed by them. Some of the characteristics of that business which led the court to declare it to be affected with a public interest were: The practical monopoly of the business at the places where it was carried on, and the consequent power to levy tribute upon the community; its relation to the business of transportation, and to the business of common carriers—thus being of a quasi public character. The business of the companies engaged in furnishing surety bonds has none of these characteristics. It is in no way a monopoly, for individuals and partnerships are free to furnish such bonds in competition with them, and to make any charge or no charge for assuming such risks. No one is compelled to resort to the surety companies as practically the only source from which may be obtained surety bonds. The public interest in the business of such companies is no different in kind, from its interest in the business of any large mercantile or manufacturing company, whose capital, experience, and facilities may enable it to have a widely extended patronage, but such characteristics do not make the business one which is affected with a public interest. State v. Associated Press, 159 Mo. 410, 60 S. W. 91, 51 L. R. A. 151, 81 Am. St. Rep. 368.

If the state may fix the amount of compensation for which an insurer may lawfully contract for furnishing such insurance, the state may dictate the price for which all other commodities shall be sold, including the price which may be paid for labor. This cannot be done. The Fourteenth Amendment to the Constitution protects the right of those engaged in purely private business to fix the price at which they will sell their services or commodities. * * *

P.UTIL.

The act of the Nebraska Legislature of 1909 falls within the principle announced in these cases, and, as it does not seem that the portions of the act are separable, the whole act must be declared void, and its enforcement will be enjoined.

GERMAN ALLIANCE INS. CO. v. LEWIS.

(Supreme Court of the United States, 1914. 233 U. S. 389, 34 S. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189.)

Bill in equity to restrain the enforcement of the provisions of an act of the state of Kansas entitled "An act relating to fire insurance, and to provide for the regulation and control of rates of premium thereon, and to prevent discriminations therein." Chapter 152 of the Session Laws of 1909.

The grounds of the bill are that the act offends the Constitution of the state and of the United States.[52]

After stating the case, Mr. Justice McKENNA delivered the opinion of the court.[53]

The specific error complained of is the refusal of the District Court to hold that the act of the state of Kansas is unconstitutional and void as offending the due process clause of the Fourteenth Amendment of the Constitution of the United States. To support this charge of error, complainant asserts that the business of fire insurance is a private business and, therefore, there is no constitutional power in a state to fix the rates and charges for services rendered by it. An exercise of such right, it is contended, is a taking of private property for a public use. The contention is made in various ways and, excluding possible countervailing contentions, it is urged that the act under review cannot be justified as an exercise of the police power or of the power of the state to admit foreign corporations within its borders upon such terms as it may prescribe, or of any other power possessed by the state; that no state has the power to impose unconstitutional burdens either upon private citizens or private corporations engaged in a private business. * * *

We may put aside, therefore, all merely adventitious considerations and come to the bare and essential one, whether a contract of fire insurance is private and as such has constitutional immunity from regulation. Or, to state it differently and to express an antithetical proposition, is the business of insurance so far affected with a public interest as to justify legislative regulation of its rates? And we mean a broad and definite public interest. In some degree the public interest is concerned in every transaction between men, the sum of the transactions constituting the activities of life. But there is something more

52 The statement of facts is abbreviated.

53 Parts of the opinion are omitted.

special than this, something of more definite consequence, which makes the public interest that justifies regulatory legislation. We can best explain by examples, The transportation of property—business of common carriers—is obviously of public concern and its regulation is an accepted governmental power. The transmission of intelligence is of cognate character. There are other utilities which are denominated public, such as the furnishing of water and light, including in the latter gas and electricity. We do not hesitate at their regulation nor at the fixing of the prices which may be charged for their service. The basis of the ready concession of the power of regulation is the public interest. This is not denied, but its application to insurance is so far denied as not to extend to the fixing of rates. It is said, the state has no power to fix the rates charged to the public by either corporations or individuals engaged in a private business, and the "test of whether the use is public or not is whether a public trust is imposed upon the property and whether the public has a legal right to the use which cannot be denied;" or, as we have said, quoting counsel, "Where the right to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist." Cases are cited which, it must be admitted, support the contention. The distinction is artificial. It is, indeed, but the assertion that the cited examples embrace all cases of public interest. The complainant explicitly so contends, urging that the test it applies excludes the idea that there can be a public interest which gives the power of regulation as distinct from a public use which, necessarily, it is contended, can only apply to property, not to personal contracts. The distinction, we think, has no basis in principle (Noble State Bank v. Haskell, 219 U. S. 104, 31 S. Ct. 186, 55 L. Ed. 112, 32 L. R. A. [N. S.] 1062, Ann. Cas. 1912A, 487), nor has the other contention that the service which cannot be demanded cannot be regulated.

Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, is an instructive example of legislative power exerted in the public interest. The Constitution of Illinois declared all elevators or storehouses, where grain or other property was stored for a compensation, to be public warehouses, and a law was subsequently enacted fixing rates of storage. In other words, that which had been private property had from its uses become, it was declared, of public concern and the compensation to be charged for its use prescribed. The law was sustained against the contention that it deprived the owners of the warehouses of their property without due process of law. We can only cite the case and state its principle, not review it at any length. The principle was expressed to be, quoting Lord Chief Justice Hale, "that when private property is 'affected with a public interest it ceases to be juris privati' only" and it becomes "clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large"; and, so using it, the owner "grants to the public an interest in that use, and must sub-

mit to be controlled by the public for the common good." And it was said that the application of the principle could not be denied because no precedent could be found for a statute precisely like the one reviewed. It presented a case, the court further said, "for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress." The principle was expressed as to property, and the instance of its application was to property, but it is manifestly broader than that instance. It is the business that is the fundamental thing; property is but its instrument, the means of rendering the service which has become of public interest.

That the case had broader application than the use of property is manifest from the grounds expressed in the dissenting opinion. The basis of the opinion was that the business regulated was private and had "no special privilege connected with it, nor did the law ever extend to it any greater protection than it extended to all other private business." The argument encountered opposing examples, among others, the regulation of the rate of interest on money. The regulation was accounted for on the ground that the act of Parliament permitting the charging of some interest was a relaxation of a prohibition of the common law against charging any interest, but this explanation overlooked the fact that both the common law and the act of Parliament were exercises of government regulation of a strictly private business in the interest of public policy, a policy which still endures and still dictates regulating laws. Against that conservatism of the mind, which puts to question every new act of regulating legislation and regards the legislation invalid or dangerous until it has become familiar, government—state and national—has pressed on in the general welfare; and our reports are full of cases where in instance after instance the exercise of regulation was resisted and yet sustained against attacks asserted to be justified by the Constitution of the United States. The dread of the moment having passed, no one is now heard to say that rights were restrained or their constitutional guaranties impaired.

Munn v. Illinois was approved in many state decisions, but it was brought to the review of this court in Budd v. New York, 143 U. S. 517, 12 S. Ct. 468, 36 L. Ed. 247, and its doctrine, after elaborate consideration, reaffirmed, and against the same arguments which are now urged against the Kansas statute. Nowhere have these arguments been, or could be, advanced with greater strength and felicity of expression than in the dissenting opinion of Mr. Justice Brewer. Every consideration was adduced, based on the private character of the business regulated and, for that reason, its constitutional immunity from regulation, with all the power of argument and illustration of which that great judge was a master. The considerations urged did not prevail. Against them the court opposed the ever-existing police power in government and its necessary exercise for the public good and declared its entire accom-

modation to the limitations of the Constitution. The court was not deterred by the charge (repeated in the case at bar) that its decision had the sweeping and dangerous comprehension of subjecting to legislative regulation all of the businesses and affairs of life and the prices of all commodities. Whether we may apprehend such result by extending the principle of the cases to fire insurance we shall presently consider.

In Brass v. Stoeser, 153 U. S. 391, 14 S. Ct. 857, 38 L. Ed. 757, Munn v. Illinois and Budd v. New York were affirmed. A law of the state of North Dakota was sustained which made all buildings, elevators and warehouses used for the handling of grain for a profit public warehouses, and fixed a storage rate. The case is important. It extended the principle of the other two cases and denuded it of the limiting element which was supposed to beset it—that to justify regulation of a business the business must have a monopolistic character. That distinction was pressed and answered. It was argued, the court said (p. 402 [14 S. Ct. 861]), "that the statutes of Illinois and New York [passed on in the Munn and Budd Cases] are intended to operate in great trade centers, where, on account of the business being localized in the hands of a few persons in close proximity to each other, great opportunities for combinations to raise and control elevating and storage charges are afforded, while the wide extent of the state of North Dakota and the small population of its country towns and villages are said to present no such opportunities." And it was also urged that the method of carrying on business in North Dakota and the Eastern cities was different, that the elevators in the latter were essentially means of transporting grain from the lakes to the railroads and those who owned them could, if uncontrolled by law, extort such charges as they pleased, and stress was laid upon the expression in the other cases which represented the business as a practical monopoly. A contrast was made between those conditions and those which existed in an agricultural state where land was cheap and limitless in quantity. It was replied that this difference in conditions was "for those who make, not for those who interpret, the laws." And considering the expressions in the other cases which, it was said, went rather to the expediency of the laws, than to their validity, yet, it was further said, the expressions had their value because the "obvious aim of the reasoning that prevailed was to show that the subject-matter of these enactments fell within the legitimate sphere of legislative power, and that, so far as the laws and Constitution of the United States were concerned, the legislation in question deprived no person of his property without due process of law" (page 404 [14 S. Ct. 862]).

The cases need no explanatory or fortifying comment. They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regulation. And they demonstrate, to apply the language of Judge Andrews in People v. Budd, 117 N. Y. 1, 27, 22 N. E. 670, 679

(5 L. R. A. 559, 15 Am. St. Rep. 460), that the attempts made to place the right of public regulation in the cases in which it has been exerted, and of which we have given examples, upon the ground of special privilege conferred by the public on those affected cannot be supported. "The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation." Is the business of insurance within the principle? It would be a bold thing to say that the principle is fixed, inelastic, in the precedents of the past and cannot be applied though modern economic conditions may make necessary or beneficial its application. In other words, to say that government possessed at one time a greater power to recognize the public interest in a business and its regulation to promote the general welfare than government possesses today. We proceed then to consider whether the business of insurance is within the principle.

A contract for fire insurance is one for indemnity against loss and is personal. The admission, however, does not take us far in the solution of the question presented. Its personal character certainly does not of itself preclude regulation, for there are many examples of governmental regulation of personal contracts, and in the statutes of every state in the Union superintendence and control over the business of insurance are exercised, varying in details and extent. We need not particularize in detail. We need only say that there was quite early (in Massachusetts 1837, New York 1853) state provision for what is known as the unearned premium fund or reserve; then came the limitation of dividends, the publishing of accounts, valued policies, standards of policies, prescribing investment, requiring deposits in money or bonds, confining the business to corporations, preventing discrimination in rates, limitation of risks and other regulations equally restrictive. In other words, the state has stepped in and imposed conditions upon the companies, restraining the absolute liberty which businesses strictly private are permitted to exercise.

Those regulations exhibit it to be the conception of the law-making bodies of the country without exception that the business of insurance so far affects the public welfare as to invoke and require governmental regulation. A conception so general cannot be without cause. The universal sense of a people cannot be accidental; its persistence saves it from the charge of unconsidered impulse, and its estimate of insurance certainly has substantial basis. Accidental fires are inevitable and the extent of loss very great. The effect of insurance—indeed, it has been said to be its fundamental object—is to distribute the loss over as wide an area as possible. In other words, the loss is spread over the country, the disaster to an individual is shared by many, the disaster to a community shared by other communities; great catastrophes are thereby lessened, and, it may be, repaired. In assimilation of insurance to a tax, the companies have been said to be

the mere machinery by which the inevitable losses by fire are distributed so as to fall as lightly as possible on the public at large, the body of the insured, not the companies, paying the tax. Their efficiency, therefore, and solvency are of great concern. The other objects, direct and indirect, of insurance we need not mention. Indeed, it may be enough to say, without stating other effects of insurance, that a large part of the country's wealth, subject to uncertainty of loss through fire, is protected by insurance. This demonstrates the interest of the public in it and we need not dispute with the economists that this is the result of the "substitution of certain for uncertain loss" or the diffusion of positive loss over a large group of persons, as we have already said to be certainly one of its effects. We can see, therefore, how it has come to be considered a matter of public concern to regulate it, and, governmental insurance has its advocates and even examples. Contracts of insurance, therefore, have greater public consequence than contracts between individuals to do or not to do a particular thing whose effect stops with the individuals. We may say in passing that when the effect goes beyond that, there are many examples of regulation. Holden v. Hardy, 169 U. S. 366, 18 S. Ct. 383, 42 L. Ed. 780; Griffith v. Connecticut, 218 U. S. 563, 31 S. Ct. 132, 54 L. Ed. 1151; Muller v. Oregon, 208 U. S. 412, 28 S. Ct. 324, 52 L. Ed. 551, 13 Ann. Cas. 957; Mutual Loan Co. v. Martell, 222 U. S. 225, 32 S. Ct. 74, 56 L. Ed. 175, Ann. Cas. 1913B, 529; Schmidinger v. Chicago, 226 U. S. 578, 33 S. Ct. 182, 57 L. Ed. 364, Ann. Cas. 1914B, 284; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 31 S. Ct. 259, 55 L. Ed. 328; Noble State Bank v. Haskell, 219 U. S. 104, 31 S. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487.

Complainant feels the necessity of accounting for the regulatory state legislation and refers it to the exertion of the police power, but, while expressing the power in the broad language of the cases, seeks to restrict its application. Counsel states that this power may be exerted to "pass laws whose purpose is the health, safety, morals and the general welfare of the people." The admission is very comprehensive. What makes for the general welfare is necessarily in the first instance a matter of legislative judgment and a judicial review of such judgment is limited. "The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance." Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 569, 31 S. Ct. 259, 263 (55 L. Ed. 328).

The restrictions upon the legislative power which complainant urges

we have discussed, or rather the considerations which take, it is contended, the business of insurance outside of the sphere of the power. To the contention that the business is private we have opposed the conception of the public interest. We have shown that the business of insurance has very definite characteristics, with a reach of influence and consequence beyond and different from that of the ordinary businesses of the commercial world, to pursue which a greater liberty may be asserted. The transactions of the latter are independent and individual, terminating in their effect with the instances. The contracts of insurance may be said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositories of the money of the insured, possessing great power thereby and charged with great responsibility. How necessary their solvency is, is manifest. On the other hand to the insured, insurance is an asset, a basis of credit. It is practically a necessity to business activity and enterprise. It is, therefore, essentially different from ordinary commercial transactions, and, as we have seen, according to the sense of the world from the earliest times—certainly the sense of the modern world—is of the greatest public concern. It is, therefore, within the principle we have announced.

But it is said that the reasoning of the opinion has the broad reach of subjecting to regulation every act of human endeavor and the price of every article of human use. We might, without much concern, leave our discussion to take care of itself against such misunderstanding or deductions. The principle we apply is definite and old and has, as we have pointed out, illustrating examples. And both by the expression of the principle and the citation of the examples we have tried to confine our decision to the regulation of the business of insurance, it having become "clothed with a public interest," and therefore subject "to be controlled by the public for the common good."

If there may be controversy as to the business having such character, there can be no controversy as to what follows from such character if it be established. It is idle, therefore, to debate whether the liberty of contract guaranteed by the Constitution of the United States is more intimately involved in price regulation than in the other forms of regulation as to the validity of which there is no dispute. The order of their enactment certainly cannot be considered an element in their legality. It would be very rudimentary to say that measures of government are determined by circumstances, by the presence or imminence of conditions, and of the legislative judgment of the means or the policy of removing or preventing them. The power to regulate interstate commerce existed for a century before the Interstate Commerce Act was passed, and the Commission constituted by it was not given authority to fix rates until some years afterwards. Of the agencies which those measures were enacted to regulate at the time of the

creation of the power, there was no prophecy or conception. Nor was regulation immediate upon their existence. It was exerted only when the size, number and influence of those agencies had so increased and developed as to seem to make it imperative. Other illustrations readily occur which repel the intimation that the inactivity of a power, however prolonged, militates against its legality when it is exercised. United States v. Delaware & Hudson Co., 213 U. S. 366, 29 S. Ct. 527, 53 L. Ed. 836. It is oftener the existence of necessity rather than the prescience of it which dictates legislation. And so with the regulations of the business of insurance. They have proceeded step by step, differing in different jurisdictions. If we are brought to a comparison of them in relation to the power of government, how can it be said that fixing the price of insurance is beyond that power and the other instances of regulation are not? How can it be said that the right to engage in the business is a natural one when it can be denied to individuals and permitted to corporations? How can it be said to have the privilege of a private business when its dividends are restricted, its investments controlled, the form and extent of its contracts prescribed, discriminations in its rates denied and a limitation on its risks imposed? Are not such regulations restraints upon the exercise of the personal right —asserted to be fundamental—of dealing with property freely or engaging in what contracts one may choose and with whom and upon what terms one may choose?

We may venture to observe that the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose and which, therefore, has led to the assertion that the business of insurance is of monopolistic character and that "it is illusory to speak of a liberty of contract." It is in the alternative presented of accepting the rates of the companies or refraining from insurance, business necessity impelling if not compelling it, that we may discover the inducement of the Kansas statute, and the problem presented is whether the legislature could regard it of as much moment to the public that they who seek insurance should no more be constrained by arbitrary terms than they who seek transportation by railroads, steam or street, or by coaches whose itinerary may be only a few city blocks, or who seek the use of grain elevators, or be secured in a night's accommodation at a wayside inn, or in the weight of a five-cent loaf of bread. We do not say this to belittle such rights or to exaggerate the effect of insurance, but to exhibit the principle which exists in all and brings all under the same governmental power.

We have summarized the provisions of the Kansas statute, and it will be observed from them that they attempt to systematize the control of insurance. The statute seeks to secure rates which shall be

reasonable both to the insurer and the insured, and as a means to this end it prescribes equality of charges, forbids initial discrimination or subsequently by the refund of a portion of the rates, or the extension to the insured of any privilege; to this end it requires publicity in the basic schedules and of all of the conditions which affect the rates or the value of the insurance to the insured, and also adherence to the rates as published. Whether the requirements are necessary to the purpose, or—to confine ourselves to that which is under review—whether rate regulation is necessary to the purpose, is a matter for legislative judgment, not judicial. Our function is only to determine the existence of power. * * *

Decree affirmed.

Mr. Justice LURTON was not present when this case was argued, and took no part in its decision.

Mr. Justice LAMAR, dissenting.[54]

I dissent from the decision and the reasoning upon which it is based. The case does not deal with a statute affecting the safety or morals of the public. It presents no question of monopoly in a prime necessity of life, but relates solely to the power of the state to fix the price of a strictly personal contract. The court holds that fire insurance though personal is affected with a public interest and therefore, that the business may not only be regulated but that the premium or price to be paid to the insurer for entering into that personal contract can be fixed by law.

The fixing of the price for the use of private property is as much a taking as though the fee itself had been condemned for a lump sum—that taking, whether by fixing rates for the use or by paying a lump sum for the fee, has always heretofore been thought to be permissible only when it was for a public use. But the court in this case holds that there is no distinction between the power to take for public use and the power to regulate the exercise of private rights for the public good. That is the fundamental proposition on which the case must stand, and the decision must therefore be considered in the light of that ruling and of the results which must necessarily flow from the future application of that principle. For if the power to regulate, in the interest of the public, comprehends what is intended in the power to take property for public use it must inevitably follow that the price to be paid for any service or the use of any property can be regulated by the General Assembly. This is so because the power of regulation is all-pervading, as witness the statute of frauds, the recording acts, weight and measure laws, pure food laws, hours of service laws, and innumerable other enactments of that class. And if this power be as extensive as is now, for the first time, decided, then the citizen holds his property and his individual right of contract and of labor under

[54] Part of the opinion is omitted.

legislative favor rather than under constitutional guaranty. The principle is applied here to the case of insurance; but the nature of that business and the intangible character of its contracts are such as to indicate the far-reaching effect of the principle announced, and warrants a statement of some of the grounds of dissent.

Insurance is not production; nor manufacture; nor transportation; nor merchandise. And this court in N. Y. Life Co. v. Deer Lodge Co., 231 U. S. 495, 34 S. Ct. 167, 58 L. Ed. 332, at the present term, reaffirmed its previous rulings that "insurance is not commerce," "not an instrumentality of commerce," "not a transaction of commerce," "but simply contracts of indemnity against loss by fire." Such a contract is personal and in the state whose statute is under consideration, insurance companies are classed among those "strictly private." Leavenworth County v. Miller, 7 Kan. 479, 520, 12 Am. Rep. 425. The fact, that insurance is a strictly private and a personal contract of indemnity puts it on the extreme outside limit and removes it as far as any business can be from those that are in their nature public. So that if the price of a private and personal contract of indemnity can be regulated,—if the price of a chose in action can be fixed,—then the price of everything within the circle of business transactions can be regulated. Considering, therefore, the nature of the subject treated and the reasoning on which the court's opinion is based, it is evident that the decision is not a mere entering wedge, but reaches the end from the beginning and announces a principle which points inevitably to the conclusion that the price of every article sold and the price of every service offered can be regulated by statute.

And such laws are not without English precedent. For while no statute ever before attempted to fix the price of a contract of indemnity,[55] yet under a Parliament that sat as a perpetual constitutional convention, with power to pass bills of attainder, to take property for private purposes and to take it without due process of law, many statutes approaching that now under review were adopted and enforced. Acts were passed by Parliament fixing the price of many commodities that were convenient or useful. These laws did not stop at fixing the price of property, but, like the present act they fixed the price of private contracts, and, by statute prescribed the rate of wages, and made it unlawful for the employé to receive or for the employer to give more than the wage fixed by law. It is needless to say that these laws were felt to be an infringement upon the rights of men; that they were bitterly resisted by buyer and seller, by employer and employé, and were a source of perpetual irritation often leading to violence. But the fact that the English Parliament had the arbitrary power to pass such statutes made them valid in law, though they were in violation of the in-

[55] The statute fixing the premium rates on surety bonds was held to be void in American Surety Co. v. Shallenberger (C. C.) 183 F. 636.

herent rights of individual. In time, the great injustice in this, was so far recognized that these laws, fixing the price of strictly private contracts, seem to have been repealed, and Lord Ellenborough, while enforcing, as proper, a rate for public wharfs, was able to say, in Allnutt v. Inglis, 12 East, 527, 538, "that the general principle is favored both in law and justice, that every man may fix what price he pleases for his own property or the use of it." But what was a favor in England, that might at any time be withdrawn, was in this country made a constitutional right that could not be withdrawn. For although the practice of fixing prices may have prevailed in some of the Colonies "up to the time of independence," yet, as Judge Cooley says, since independence "it has been commonly supposed that a general power in the state to regulate prices was inconsistent with constitutional liberty." Cooley's Const. Law (7th Ed.) 807; Stickney's State Control of Trade, p. 3, and the abstract of English price-fixing statutes, p. 9 et seq. That common supposition is rightly founded on the fact that the Constitution recognizes the liberty to contract and right of private property. They include not only the right to make contracts with which to acquire property, but the right to fix the price of its use while it is held, and the further right to fix the price if it is to be sold. To deprive any person of either is to take property, since there can be no liberty of contract and true private ownership if the price of its use or its sale is fixed by law. That right is an attribute of ownership. State Tax Case, 15 Wall. 232, 278, 21 L. Ed. 146, top. * * *

The CHIEF JUSTICE and Mr. Justice VAN DEVANTER concur in this dissent.[56]

[56] See comment on this case in 28 Harv. Law Rev. 84. For a collection of cases see note L. R. A. 1915C, 1189. In McCarter v. Fireman's Ins. Co., 74 N. J. Eq. 372, 73 A. 80, 414, 29 L. R. A. (N. S.) 1194, 135 Am. St. Rep. 708, 18 Ann. Cas. 1048 (1909), a court of equity, without the aid of statute, enjoined fire insurance companies from entering into contracts fixing unreasonable fire insurance rates. See comment in 9 Col. Law Rev. 639, and 23 Harv. Law Rev. 69. Contra: Queen Ins. Co. v. Texas, 86 Tex. 250, 24 S. W 397, 22 L. R. A. 483 (1893). The New Jersey decision was cited with approval in Blanchard v. Prudential Ins. Co. of America, 78 N. J. Eq. 471, 477, 79 A. 533 (1911); Citizens' Ins. Co. v. Clay (D. C.) 197 F. 435 (1912). See note in 29 L. R. A. (N. S.) 1194. On the regulation of insurance business generally, see Bell v. Louisville Board of Fire Underwriters, 146 Ky. 841, 143 S. W. 388 (1912); North American Ins. Co. v. Yates, 214 Ill. 272, 73 N. E. 423 (1905); Commonwealth v. Vrooman, 164 Pa. 306, 30 A. 217, 25 L. R. A. 250, 44 Am. St. Rep. 603 (1894).

JONES et al. v. CITY OF PORTLAND.

(Supreme Court of the United States, 1917. 245 U. S. 217, 38 S. Ct. 112, 62 L. Ed. 252, L. R. A. 1918C, 765, Ann. Cas. 1918E, 660.)

Mr. Justice DAY delivered the opinion of the Court.

By an Act of the Legislature of the State of Maine approved March 19, 1903 (P. L. 1903, c. 122; section 87, chapter 4, Revised Statutes of Maine, 1903), it was provided:

"Any city or town may establish and maintain, within its limits, a permanent wood, coal, and fuel yard, for the purpose of selling, at cost, wood, coal and fuel to its inhabitants. The term 'at cost' as used herein shall be construed as meaning without financial profit."

The City of Portland, Maine, voted to establish and maintain within its limits a permanent coal and fuel yard for the purposes of selling at cost wood, coal and fuel to its inhabitants and that the money necessary for such purposes be raised by taxation, and that the term "at cost" as used in said vote should be construed as meaning without financial profit. On February 3, 1913, the common council of the city at a legal meeting passed the vote, and on the same date it was passed by the board of aldermen of the city, and on February 4, 1913, the mayor of the city approved it, whereupon it became the vote of the city of Portland. The city voted to appropriate the sum of one thousand dollars to be devoted to carrying out the purposes of the vote, and the appropriation was passed by the common council, the board of aldermen, and approved by the mayor of the city.

This suit was brought by citizens and taxpayers of Portland in the Supreme Judicial Court of Maine in equity to enjoin the establishment of the yard. The Supreme Judicial Court sustained a demurrer to the bill, and dismissed it. 113 Me. 123, 93 A. 41. A writ of error brings the case here because of alleged violation of rights secured to the plaintiffs in error by the Fourteenth Amendment. The contention is that the establishment of the municipal wood yard is not a public purpose, that taxation to accomplish that end amounts to the taking of the property of the plaintiffs in error without due process of law.

The decision of the case turns upon the answer to the question whether the taxation is for a public purpose. It is well settled that moneys for other than public purposes cannot be raised by taxation, and that exertion of the taxing power for merely private purposes is beyond the authority of the State. Citizens' Saving & Loan Ass'n v. Topeka, 20 Wall. 655, 22 L. Ed. 455.

The act in question has the sanction of the legislative branch of the state government, the body primarily invested with authority to determine what laws are required in the public interest. That the purpose is a public one has been determined upon full consideration by the Supreme Judicial Court of the state upon the authority of a pre-

vious decision of that court. Laughlin v. City of Portland, 111 Me. 486, 90 A. 318, 51 L. R. A. (N. S.) 1143, Ann. Cas. 1916C, 734.

The attitude of this court towards state legislation purporting to be passed in the public interest, and so declared to be by the decision of the court of last resort of the state passing the act, has often been declared. While the ultimate authority to determine the validity of legislation under the Fourteenth Amendment is rested in this court, local conditions are of such varying character that what is or is not a public use in a particular state is manifestly a matter respecting which local authority, legislative and judicial, has peculiar facilities for securing accurate information. In that view the judgment of the highest court of the state upon what should be deemed a public use in a particular state is entitled to the highest respect. Hairston v. Danville & Western Ry. Co., 208 U. S. 598, 607, 28 S. Ct. 331, 52 L. Ed. 637, 13 Ann. Cas. 1008. In Union Lime Co. v. Chicago & N. W. Ry. Co., 233 U. S. 211, 34 S. Ct. 522, 58 L. Ed. 924, this court declared that a decision of the highest court of the state declaring a use to be public in its nature would be accepted unless clearly not well founded, citing Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 160, 17 S. Ct. 56, 41 L. Ed. 369; Clark v. Nash, 198 U. S. 361, 369, 25 S. Ct. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171; Strickley v. Highland Boy Mining Co., 200 U. S. 527, 531, 26 S. Ct. 301, 50 L. Ed. 581, 4 Ann. Cas. 1174; Offield v. N. Y., N. H. & H. R. R. Co., 203 U. S. 372, 377, 27 S. Ct. 72, 51 L. Ed. 231; Hairston v. Danville & Western Ry. Co., 208 U. S. 598, 607, 28 S. Ct. 331, 52 L. Ed. 637, 13 Ann. Cas. 1008. This doctrine was reiterated in O'Neil v. Leamer, 239 U. S. 244, 253, 36 S. Ct. 54, 60 L. Ed. 249.

In the case of Laughlin v. City of Portland, 111 Me. supra, the matter was fully considered by the Supreme Judicial Court of that state. After reviewing the cases which establish the general authority of municipalities in the interest of the public health, convenience, and welfare to make provisions for supplying the inhabitants of such communities with water, light and heat by means adequate for that purpose, the court came to consider the distinction sought to be made between the cases which sustain the authority of the state to authorize municipal action for the purposes stated, and the one under consideration, because of the fact that in the instances in which municipal authority had been sustained the use of the public streets and highways for mains, poles and wires in the distribution of water, light and heat had been required under public authority, whereas in supplying fuel to consumers, under the terms of the law in question, no such permission was essential, the court said (111 Me. 486, 496 [90 A. 322]):

"Let us look at the question from a practical and concrete standpoint. Can it make any real and vital difference and convert a public into a private use that instead of burning the fuel at the power station to produce the electricity, or at the central heating plant to produce

the heat and then conducting it in the one case by wires and in the other by pipes to the user's home, the coal itself is carried over the same highway to the same point of distribution? We fail to see it. It is only a different and simpler mode of distribution and, if the Legislature has the power to authorize municipalities to furnish heat to its inhabitants 'it can do this by any appropriate means which it may think expedient.' The vital and essential element is the character of the service rendered and not the means by which it is rendered. It seems illogical to hold that a municipality may relieve its citizens from the rigor of cold if it can reach them by pipes or wires placed under or above highways but not if it can reach them by teams traveling along the identical highway. It will be something of a task to convince the ordinarily intelligent citizen that an act of the Legislature authorizing the former is constitutional but one authorizing the latter is unconstitutional beyond all rational doubt. For we must remember that we are considering the existence of the power in the Legislature which is the only question before the court and not the wisdom of its exercise which is for the Legislature alone."

Answering the objection that sustaining the act in question opens the door to the exercise of municipal authority to conduct other lines of business and commercial activity to the destruction of private business, the court said (111 Me. 500 [90 A. 324]):

"But it is urged, why, if a city can establish a municipal fuel yard, can it not enter upon any kind of commercial business, and carry on a grocery store, or a meat market or a bakery. The answer has already been indicated. Such kinds of business do not measure up to either of the accepted tests. When we speak of fuel, we are dealing not with ordinary articles of merchandise for which there may be many substitutes, but with an indispensable necessity of life, and more than this, the commodities mentioned are admittedly under present economic conditions regulated by competition in the ordinary channels of private business enterprise. The principle that municipalities can neither invade private liberty nor encroach upon the field of private enterprise should be strictly maintained as it is one of the main foundations of our prosperity and success. If the case at bar clearly violated that principle it would be our duty to pronounce the act unconstitutional, but in our opinion it does not. The element of commercial enterprise is entirely lacking. The purpose of the act is neither to embark in business for the sake of direct profits (the act provides that fuel shall be furnished at cost) nor for the sake of the indirect gains that may result to purchasers through reduction in price by government competition. It is simply to enable the citizens to be supplied with something which is a necessity in its absolute sense to the enjoyment of life and health, which could otherwise be obtained with great difficulty and at times perhaps not at all, and whose absence would endanger the community as a whole."

Bearing in mind that it is not the function of this court under the authority of the Fourteenth Amendment to supervise the legislation of the states in the exercise of the police power beyond protecting against exertions of such authority in the enactment and enforcement of laws of an arbitrary character, having no reasonable relation to the execution of lawful purposes, we are unable to say that the statute now under consideration violates rights of the taxpayer by taking his property for uses which are private.

The authority to furnish light and water by means of municipally owned plants has long been sanctioned as the accomplishment of a public purpose justifying taxation with a view to making provision for their establishment and operation. The right of a municipality to promote the health, comfort and convenience of its inhabitants by the establishment of a plant for the distribution of natural gas for heating purposes was sustained, and we think properly so, in State of Ohio v. Toledo, 48 Ohio St. 112, 26 N. E. 1061, 11 L. R. A. 729. We see no reason why the state may not, if it sees fit to do so, authorize a municipality to furnish heat by such means as are necessary and such systems as are proper for its distribution. Heat is as indispensable to the health and comfort of the people as is light or water. In any event we are not prepared to say that when a state authorizes a municipality to tax with a view to providing heat at cost to the inhabitants of the city, and that purpose is declared by the highest court of the state to be a public one, that the property of a citizen who is taxed to effect such purpose is taken in violation of rights secured by the Constitution of the United States. As this view decides the questions open to consideration, it follows that the judgment of the Supreme Court of Maine must be affirmed.

Affirmed.[57]

[57] Contra: Opinion of the Justices, 182 Mass. 605, 66 N. E. 25, 60 L. R. A. 592 (1904). As to the power of a municipality to tax its inhabitants in order to operate a municipal ice plant see Holton v. City of Camilla, 134 Ga. 560, 68 S. E. 472, and notes in 31 L. R. A. (N. S.) 116, 20 Ann. Cas. 199 (1910). See Opinion of The Justices, 211 Mass. 624, 98 N. E. 611, and note in 42 L. R. A. (N. S.) 221 (1912), dealing with the question whether the Legislature can use public money for the purpose of securing homes for wage earners by purchasing the property and renting it or selling it to them on installments. See also note in 51 L. R. A. (N. S.) 1143, and an interesting discussion of the general problem of municipal taxation for public purposes, 15 Col. Law Rev. 179, 18 Columbia Law Rev. 489, 27 Yale Law Jour. 824 In Green v. Frazier, 253 U. S. 233, 40 S. Ct. 499, 64 L. Ed. 878 (1920), the Supreme Court upheld legislation of North Dakota providing for state taxation to enable the state to carry out such enterprises as a state bank, a state warehouse, elevator, flour-mill system, and a state home-building project. See note in 34 Harv. Law Rev. 207.

PEOPLE ex rel. DURHAM REALTY CORPORATION v. LA FETRA.

(Court of Appeals of New York, 1921. 230 N. Y. 429, 130 N. E. 601, 16 A. L. R. 152.)

Two mandamus proceedings by the People, on the relation of the Durham Realty Corporation and on the relation of the Brixton Operating Corporation, against Edward B. La Fetra, justice of the city court of the city of New York. From an order of the Appellate Division, First Department (194 App. Div. 523, 186 N. Y. S. 58; 186 N. Y. S. 63), in each case, affirming, as a matter of law, an order of the Special Term which denied a motion for a peremptory writ requiring defendant to issue a precept for the eviction of a hold-over tenant from relator's premises, each relator appeals.

POUND, J.[58] The relator in each case, except for the laws enacted at the extraordinary session of the Legislature convened in September, 1920, to deal with an emergency in the housing situation in Greater New York, was, under subdivision 1 of section 2231 of the Code of Civil Procedure, entitled to institute summary proceedings for the removal of its tenant upon the expiration of his term. The leased premises were used for dwelling purposes. The tenant had, by written lease executed before the passage of the September laws, contracted to surrender the premises at the expiration of the term, and the term had expired on the 30th day of September, 1920. The defendant, when applied to by the landlord to issue a precept under section 2238 of the Code of Civil Procedure, refused to entertain the application on the ground that by the provisions of chapter 942 of the Laws of 1920 the proceeding could not be instituted before the 1st day of November, 1922.

The landlord thereupon applied for a writ of mandamus requiring the defendant to issue such precept, asserting that chapter 942 was unconstitutional as impairing the obligation of the contract of lease (Const. U. S. art. 1, § 10), depriving the landlord of its property without due process of law, denying to it the equal protection of the laws (Const. U. S. Amend. 14), and taking private property not only for private use but without compensation (Const. N. Y. art. 1, § 6); in brief, that its private property was taken and turned over to another without its consent. The courts have thus far upheld the constitutionality of the law in question on the ground that summary proceedings are a creature of the statute and may be abolished at the legislative will. But the official explanation of the law appended to and submitted with the bill states its purpose and effect to be "to do away with the anxiety of the many people in New York who have been served with notices to move on October 1st." This declared purpose draws with it the consideration of a group of statutes enacted at the same session to meet a supposed

[58] Parts of the opinion are omitted.

crisis which are closely related to each other; are a part of the same plan of remedial protection to the tenants in possession on October 1st; and can be fairly understood only when considered as parts of one comprehensive design.

These statutes, commonly and collectively known as the September housing laws, include chapters 942–953, inclusive, but chapters 943, 945, 946, 948–953, inclusive, are not directly before the court on this appeal. The reason stated for their enactment is that within New York City and contiguous counties an emergency in the housing situation had arisen as a sequence of the activities of the World War and the astonishing growth of large cities whereby at the same time building had stopped and the home-seeking population of the city had vastly increased; dispossess proceedings, more than had ever been known before, were pending to the number of upwards of 100,000; each proceeding practically involved a family averaging four or five persons; the demand for homes thus became in excess of the supply; the landlords took advantage of the situation to exact, under threats of eviction, whatever exorbitant rents the necessities of the occasion would bring forth; tenants offered themselves who would submit to such demands rather than take the chance of finding other places of abode.

The Legislature had investigated the situation through the agency of its joint committee; the Governor had called the Legislature in special session to deal with the subject, although at its regular session in April it had passed what are known as the April housing laws, dealing with the same subject, which had failed substantially to relieve the existing conditions. While the inadequacy of housing facilities in cities had become a matter of world-wide concern, in the closely settled metropolis it was a problem of the utmost gravity, calamitous in its possibilities. The Legislature, unequal to the task of caring for all, decided to make the tenants in possession a preferred class by staying until November 1, 1922, all proceedings to dispossess them, except for reasons hereinafter stated, so long as they paid a "reasonable rent," which is the term used for a statutory charge for use and occupation, to be ascertained judicially through a method provided by the statutes.

The owners of dwellings, including apartment and tenement houses (but excepting buildings under construction in September last, lodging houses for transients, and the larger hotels), were therefore wholly deprived until November 1, 1922, of all possessory remedies for the purpose of removing from their premises the tenants or occupants in possession when the laws took effect, except where the person holding over is shown to be objectionable, or the landlord seeks to occupy the premises as a dwelling for himself and family, or intends to demolish the building and construct a new building, or has sold to a co-operative ownership plan corporation, providing such tenants or occupants are ready, able, and willing to pay a reasonable rent or price for their use and occupation. The presumption is created that any demand for rent greater than that in any year prior to such demand is unreasonable

and oppressive. The landlord may not evict the statutory tenants, although they remain as free to depart as they were prior to the enactment of the housing laws.

To accomplish this purpose the Legislature first enacted chapter 942, to amend the Code of Civil Procedure in relation to summary proceedings, which recited that, a public emergency existing, no summary proceedings should be maintained until the 1st day of November, 1922, to recover possession of real property, except for one of the four reasons indicated above. It also provided that in pending hold-over proceedings, where no warrant had been issued, the warrant should not be issued unless the proceeding came under one of the exceptions above quoted. This chapter is supplemented by chapter 947, which amends the Code of Civil Procedure in relation to actions to recover possession of real property, and prohibits the landlord for the same period from maintaining an action to recover possession of real property, with the same exceptions previously indicated, and by chapter 944, which recites that unjust, unreasonable, and oppressive agreements for the payment of rent have been made and exacted from tenants under stress of prevailing conditions whereby the freedom of contract has been impaired, and congested housing conditions resulting therefrom have seriously affected and endangered the public welfare, health, and morals in certain cities of the state, preserves the action for rent, provides that the plaintiff may recover a fair and reasonable rent for the premises, and further provides that on default of payment of the fair rental value the landlord may obtain possession of his premises by a dispossess warrant. The provision in chapter 944 above quoted was first incorporated in chapter 136, Laws of 1920, and applies at least to leases made after April 1, 1920. Its retroactive effect is not at present before the court for consideration. Chapters 942 and 947 apply only to "cities of a population of one million or more and in cities in a county adjoining such a city." Chapter 944 applies to cities of the first class and cities in a county adjoining such city.

Whether or not a public emergency existed was a question of fact, debated and debatable, which addressed itself primarily to the Legislature. That it existed, promised not to be presently self-curative, and called for action, appeared from public documents and from common knowledge and observation. If the lawmaking power on such evidence has determined the existence of the emergency and has, in the main, dealt with it in a manner permitted by the constitutional limitations upon legislative power, so far as the same affect the class of landlords now challenging the statutes, the legislation should be upheld. * * *

The proposition is fundamental that private business may not be regulated, and may not be converted into public business by legislative fiat. Producers' Transp. Co. v. R. R. Com., 251 U. S. 228, 40 S. Ct. 131, 64 L. Ed. 239. By the application of this principle the act of Congress known as the Ball Rent Law, for the relief of tenants in the District of Columbia, applicable to all rental property, was said to be

unconstitutional by the Court of Appeals of the District. Hirsh v. Block, 267 F. 614.* The proposition is equally fundamental that the state may establish regulations reasonably necessary to secure the general welfare of the community by the exercise of its police power, although the rights of private property are thereby curtailed and freedom of contract is abridged. Chicago, B. & Q. Ry. Co. v. Drainage Com'rs, 200 U. S. 561, 26 S. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175; Rast v. Van Deman, 240 U. S. 342, 36 S. Ct. 370, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455; American Coal Min. Co. v. Special Coal & Food Com. (D. C.) 268 F. 563. The legislative or police power is a dynamic agency, vague and undefined in its scope, which takes private property or limits its use when great public needs require, uncontrolled by the constitutional requirement of due process. Either the rights of property and contract must when necessary yield to the public convenience, advantage, and welfare, or it must be found that the state has surrendered one of the attributes of sovereignty for which governments are founded, and made itself powerless to secure to its citizens the blessings of freedom and to promote the general welfare.

The first question to be considered arises under chapter 944, which provides that it shall be a defense to an action for rent accruing under an agreement therefor that such rent is unjust and unreasonable and the agreement to pay is oppressive. May the legislative power, in a season of exigency, consistently with the due process clauses of the state and federal Constitutions designed to protect property rights, so invade the domain of private contract as to interfere with and regulate the right of a landlord to exact what he will for his own in the way of rent for private property?

The landlord is a purveyor of a commodity; the vendor of space in which to shelter one's self and family. He has heretofore been permitted to make his own terms with his tenants, but that consideration is not conclusive. Unquestionably some taking of private property for the benefit of a class of individuals is the result of the housing laws. The free choice of tenants; the unlimited right to bargain—these are property rights which may not be affected unless a public advantage over and beyond such rights justifies legislative interference, but "an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use." Noble State Bank v. Haskell, 219 U. S. 104, 110, 580, 31 S. Ct. 186, 187, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487. While in theory it may be said that the building of houses is not a monopolistic privilege; that houses are not public utilities like railroads and that if the landlord turns one off another may take him in; that rents are fixed by economic rules and the market value is the reasonable value; that people often move from one city

* Reversed by United States Supreme Court, Block v. Hirsh, 256 U. S. 135, 41 S. Ct. 458, 65 L. Ed. 865, 16 A. L. R. 165 (1921).

to another to secure better advantages; that no one is compelled to have a home in New York; that no crisis exists; that to call the legislation an exercise of the police power, when it is plainly a taking of private property for private use and without compensation, is a mere transfer of labels, which does not affect the nature of the legislation—yet the Legislature has found that in practice the state of demand and supply is at present abnormal; that no one builds because it is unprofitable to build; that those who own seek the uttermost farthing from those who choose to live in New York and pay for the privilege rather than go elsewhere; and that profiteering and oppression have become general.

It is with this condition, and not with economic theory, that the state has to deal in the existing emergency. The distinction between the power of eminent domain and the police power is often fine. In the main it depends on whether the thing is destroyed or is taken over for the public use. If property rights are here invaded, in a degree, compensation therefor has been provided, and possession is to be regained when such compensation remains unpaid. What is taken is the right to use one's property oppressively, and it is the destruction of that right that is contemplated, and not the transfer thereof to the public use. The taking is therefore analogous to the abatement of a nuisance or to the establishment of building restrictions, and it is within the police power.

Emergency laws in time of peace are uncommon, but not unknown. Wholesale disaster, financial panic, the aftermath of war (Hamilton v. Kentucky Distilleries & W. Co., 251 U. S. 146, 161, 40 S. Ct. 106, 64 L. Ed. 194), earthquake, pestilence, famine, and fire, a combination of men or the force of circumstances may, as the alternative of confusion or chaos, demand the enactment of laws that would be thought arbitrary under normal conditions (Bowditch v. Boston, 101 U. S. 16, 18, 19, 25 L. Ed. 980; American Land Co. v. Zeiss, 219 U. S. 47, 31 S. Ct. 200, 55 L. Ed. 82). Although emergency cannot become the source of power, and although the Constitution cannot be suspended in any complication of peace or war (Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281), an emergency may afford a reason for putting forth a latent governmental power already enjoyed but not previously exercised. Thus it has been held that, although the relation between employer and employee is essentially private so far as the right to fix a standard of wages by agreement is concerned, Congress may establish a standard of wages for railroad employees to be in force for a reasonable time in an emergency to avert the calamity of a nation-wide strike. Wilson v. New, 243 U. S. 332, 348, 37 S. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024; Ft. Smith & W. R. Co. v. Mills, 253 U. S. 206, 40 S. Ct. 526, 64 L. Ed. 862.

Even in the absence of an emergency, the state may pass wholesome and proper laws to regulate the use of private property. Lincoln Trust Co. v. Williams Bldg. Corp., 229 N. Y. 313, 128 N. E. 209; St. Louis

Poster Advertising Co. v. City of St. Louis, 249 U. S. 269, 39 S. Ct. 274, 63 L. Ed. 599. Laws restricting the uses of property do not deal directly with the question whether a private business may be limited in its return to a reasonable rate fixed by a force external to the law of supply and demand. Aside from the war power, the regulation of prices, except for public utilities, is unusual, although usury statutes which forbid the taking of exorbitant interest on the loan of money are common. The power of regulation exists, however, and is not limited to public uses or to property where the right to demand and receive service exists or to monopolies or to emergencies. It may embrace all cases of public interest, and the question is whether the subject has become important enough for the public to justify public action. Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; Budd v. New York, 143 U. S. 517, 12 S. Ct. 468, 36 L. Ed. 247; Brass v. Stoeser, 153 U. S. 391, 14 S. Ct. 857, 38 L. Ed. 757; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 34 S. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189; Oklahoma Operating Co. v. Love, 252 U. S. 331, 40 S. Ct. 338, 64 L. Ed. 596; Holter Hardware Co. v. Boyle (D. C.) 263 F. 134; American Coal Min Co. v. Special C. & F. Com., supra.

The field of regulation constantly widens into new regions. The question in a broad and definite sense is one of degree. * * *

Novelty is no argument against constitutionality. Changing economic conditions, temporary or permanent, may make necessary or beneficial the right of public regulation. German Alliance Ins. Co. v. Kansas, supra. Housing in normal times may be and often is a competitive business; landlords may, in the lean years and in periods of oversupply, be unable to secure a fair return on their investments. Competition will then regulate rents more effectively than legislation can. An historical justification of liberty of contract between landlord and tenant is not a demonstration that the system must survive every exigency. When it temporarily ceases to be adapted to the demands of the present it may be modified, if the best interests of society are thereby served. "An earnest conflict of serious opinion" may arise as to whether such interests have been wisely served, or whether the legislation is anything more than another example of misdirected zeal in dealing with a crisis. But that argument does not address itself to the court. "The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy." Chicago, B. & Q. R. R. Co. v. McGuire, 219 U. S. 549, 569, 31 S. Ct. 259, 263 (55 L. Ed. 328); German Alliance Ins. Co. v. Kansas, supra. The objection to chapter 944 that when it temporarily fixes reasonableness as the standard of rent in order to prevent oppression it deprives the landlords of property without due process of law seems untenable, when tested by the principles above stated.

The next question is whether the landlords who rent dwellings are denied the equal protection of the law. Legitimate governmental au-

thority ought to be able to protect unobjectionable tenants, ready and willing to pay reasonable rents, from wholesale evictions for the further enrichment of profiteers who have brought themselves to the notice of the Legislature by their greed and extortion, without subjecting landlords who have not offended and tenants who have no substantial grievance to a restraint that a class has invited by its conduct. One class of landlords is selected for regulation because one class conspicuously offends; one class of tenants has protection because all who seek homes cannot be provided with places to sleep and eat. Those who are out of possession, willing to pay exorbitant rentals, or unable to pay any rentals whatever, have been left to shift for themselves. But such classifications deny to no one the equal protection of the laws. The distinction between the groups is real and rests on a substantial basis. People v. Beakes Dairy Co., 222 N. Y. 416, 119 N. E. 115, 3 A. L. R. 1260.

The next question is whether such laws impair the obligation of contracts, as applied to existing leases and tenancies which contain an express or implied obligation to surrender possession at the expiration of the term, or as applied to a case where it is claimed that the parties had contracted or stipulated between themselves in dispossess proceedings that the warrant should be issued on October 1st. The provision of the federal Constitution that no state shall pass any law impairing the obligation of contracts puts no limit on any lawful exercise of legitimate governmental power. Legal Tender Cases, 12 Wall. 457, 551, 20 L. Ed. 287. The rule alike for state and nation is that private contract rights must yield to the public welfare, when the latter is appropriately declared and defined and the two conflict. Manigault v. Springs, 199 U. S. 473, 480, 26 S. Ct. 127, 50 L. Ed. 274; Louisville & Nashville R. R. Co. v. Mottley, 219 U. S. 467, 486, 31 S. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; Producers' Transportation Com. v. R. R. Co., supra; Atlantic Coast Line R. R. Co. v. City of Goldsboro, 232 U. S. 548, 558, 34 S. Ct. 364, 58 L. Ed. 721; Union Dry Goods Co. v. Georgia P. S. Corp., 248 U. S. 372, 375, 39 S. Ct. 117, 63 L. Ed. 309, 9 A. L. R. 1420. But if the law is "arbitrary, unreasonable, and not designed to accomplish a legitimate public purpose" (Mutual Loan Co. v. Martell, 222 U. S. 225, 234, 32 S. Ct. 74 [56 L. Ed. 175, Ann. Cas. 1913B, 529]), the courts will declare it invalid.

It is contended, however, that the only laws which may be said to impair the obligation of contracts which have been upheld are those in which the United States, which is not included within the constitutional prohibition, has acted (Sinking Fund Cases, 99 U. S. 700, 718, 25 L. Ed. 496) to assert its limited but unquestioned sovereignty; as in the Legal Tender Cases to regulate the currency, and in the Mottley Case (supra) to make illegal all discriminatory rates of interstate carriers; or where the state has acted to regulate public utilities as in the

Producers' Case (supra) to subject contracts for future transportation by common carriers to regulation; or in cases where the effect of laws prohibiting the sale of liquor or narcotics or the conducting of lotteries and the like, for the public good, was indirectly to affect the contract (Beer Co. v. Mass., 97 U. S. 25, 32, 24 L. Ed. 989); or in which the state had exercised the power of eminent domain to extinguish a contract right; that the obligation of no ordinary private contract could, without violence to the plain words of the Constitution, be impaired by the exercise of the police power. As the purpose of these laws is temporarily to deprive landlords of all power to enforce covenants to quit in leases, although made prior to the enactment of the laws, it is urged that if such legislation is upheld the contract clause of the Constitution gives little protection to private contractual rights.

Laws directly nullifying some essential part of private contracts are rare, and are not lightly to be upheld by hasty and sweeping generalizations on the common good (Barnitz v. Beverly, supra; Bradley v. Lightcap, 195 U. S. 1, 24 S. Ct. 748, 49 L. Ed. 65); but no decision upholds the extreme view that the obligation of private contracts may never be directly impaired in the exercise of the legislative power. No vital distinction may be drawn between the exercise in times of emergency of the police power upon the property right and upon the contract obligations for the promotion of the public weal. The state in an emergency caused by flood or fire, when multitudes are homeless, might concededly compel owners of houses to take in undesired occupants in order to shelter them from exposure to storm and cold. Why, then, would the state have no power reasonably to regulate for a time the terms upon which a landlord under such conditions might put his tenants out when they promptly pay a reasonable compensation for the use of the property? The distinction thus proposed becomes illusive when practically applied.

No constitutional difficulty presents itself in the way of enforcing the laws on the ground of uncertainty as to what constitutes a reasonable rent or an oppressive agreement. Courts and juries are in civil cases constantly dealing with questions of proper care, just compensation, reasonable conduct, fair market value, and the like. It is quite a different thing to say that Congress may not punish the act of making "any unjust or unreasonable rate or charge" in dealing with necessaries because the language is too indefinite and uncertain upon which to fasten criminal liability. U. S. v. Cohen Grocery, 255 U. S. 81, 41 S. Ct. 298, 65 L. Ed. 516, 14 A. L. R. 1045. The test is not what the jury may say, but what the jury may reasonably infer from the evidence. Nash v. U. S., 229 U. S. 373, 33 S. Ct. 780, 57 L. Ed. 1232. The exaction of an unjust and unreasonable rent makes oppressive the agreement under which the same is sought to be recovered. * * *

The question comes back to what the state may do for the benefit of the community at large. Here the legislation rests on a secure

foundation. Chicago & Alton R. R. Co. v. Tranbarger, 238 U. S. 67, 76, 77, 35 S. Ct. 678, 59 L. Ed. 1204. The struggle to meet changing conditions through new legislation constantly goes on. The fundamental question is whether society is prepared for the change. The law of each age is ultimately what that age thinks should be the law. Decisions of the courts in conflict with legislative policy, when such decisions have been thought to be unwisely hard and stiff, have been met by constitutional amendments, as in the case of the decision of the Supreme Court of the United States in the Income Tax Cases (Pollock v. Farmers', etc., Co., 158 U. S. 601, 15 S. Ct. 912, 39 L. Ed. 1108), which led to the adoption of the Sixteenth Amendment; and of this court on the statute which fixed an eight-hour day and the prevailing rate of wages for employees of municipal contractors, and on the Workmen's Compensation Law (People ex rel. Rodgers v. Coler, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. Rep. 605; N. Y. Const. art. 12, § 1; Ives v. South Buffalo Ry. Co., 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. [N. S.] 162, Ann. Cas. 1912B, 156; N. Y. Const. art. 1, § 19). Each of the latter laws was also approved by the Supreme Court of the United States. Atkin v. Kansas, 191 U. S. 207, 24 S. Ct. 124, 48 L. Ed. 148; N. Y. Central R. R. Co. v. White, 243 U. S. 188, 37 S. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629.

The reaction on the courts is that the existence of a strong opinion in any real or fancied public need has been suggested as the sufficient test. Noble State Bank v. Haskell, supra. But constitutional limitations on the power of government are self-imposed restrictions upon the will of the people and qualify the despotism of the majority. Such limitations do not yield to strong opinions merely. They are incorporated in the fundamental law to restrict arbitrary legislative power. They forbid government to take from the owner without compensation whatever private right to control the use of his property the many may earnestly desire to deprive him of. Isolated expressions of the courts may suggest that whatever the Legislature enacts on grounds of public policy should be sustained, but the courts may not uphold the exercise of arbitrary power. What is arbitrary and what is beneficent must be decided by common sense applied to a concrete set of facts. To uphold private contracts and to enforce their obligations is a matter of high public consequence, but the Legislature has a wide latitude in doing what seems in accordance with sound judgment and reasonableness in order to bring about a great good to a large class of citizens, even at some sacrifice of private rights.

Curative action is needed. While some may question whether it may be said without exaggeration that these enactments promote the public health or morals or safety, they do in a measurable degree promote the convenience of many, which is the public convenience, and the public welfare and advantage, in the face of the extraordinary

and unforeseen public exigency, which the Legislature has, on sufficient evidence, found to exist.

The conclusion is, in the light of present theories of the police power, that the state may regulate a business, however honest in itself, if it is or may become an instrument of widespread oppression (People v. Beakes Dairy Co., supra, and cases cited; Payne v. Kansas, 248 U. S. 112, 39 S. Ct. 32, 63 L. Ed. 153); that the business of renting homes in the city of New York is now such an instrument and has therefore become subject to control by the public for the common good; that the regulation of rents and the suspension of possessory remedies so far tend to accomplish the purpose as to supervene the constitutional inhibitions relied upon to defeat the laws before us (Marcus Brown Holding Co. v. Feldman [D. C.] 269 Fed. 306).

The order appealed from should be affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, and ANDREWS, JJ., concur.

CRANE, J., concurs in result on opinion in Guttag v. Shatzkin, 130 N. E. 929, decided herewith.

MCLAUGHLIN, J., dissents on dissenting opinion in Levy Leasing Co. v. Siegel, 130 N. E. 923, decided herewith.

Order affirmed.[59]

[59] A writ of error to the Supreme Court of the United States was dismissed. People of State of New York ex rel. Brixton Operating Corporation v. La Fetra, 257 U. S. 665, 42 S. Ct. 47, 66 L. Ed. 424 (1921). See in accord, Marcus Brown Holding Co. v. Feldman (D. C.) 269 F. 306 (1920) affirmed 256 U. S. 170, 41 S. Ct. 465, 65 L. Ed. 877 (1921); Block v. Hirsh, 256 U. S. 135, 41 S. Ct. 458, 65 L. Ed. 865, 16 A. L. R. 165 (1921). For a résumé of statutes dealing with the housing shortage, see 23 Col. Law Rev. 583. In Block v. Hirsh, supra, the Supreme Court upheld a similar statute regulating rents in the District of Columbia; the Chief Justice and Justices McKenna, Van Devanter, and McReynolds dissenting. In delivering the opinion of the majority of the court, Mr. Justice Holmes declared: "The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law. Plainly circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern. * * * Assuming that the end in view otherwise justified the means adopted by Congress, we have no concern of course with the question whether those means were the wisest, whether they may not cost more than they come to, or will effect the result desired. It is enough that we are not warranted in saying that legislation that has been resorted to for the same purpose all over the world, is futile or has no reasonable relation to the relief sought. Chicago, Burlington & Quincy R. R. Co. v. McGuire, 219 U. S. 549, 569, 31 S. Ct. 259, 55 L. Ed. 328 [1911]." The rent law of the District of Columbia was again before the Supreme Court in Chastleton Corporation v. Sinclair, 264 U. S. 543, 44 S. Ct. 405, 68 L. Ed. 841 (1924) and, while the order of the rent commission was upheld, the court said: "We repeat what was stated in Block v. Hirsh, 256 U. S. 135, 154, 41 S. Ct. 458, 65 L. Ed. 865, 870, 16 A. L. R. 165 (1921), as to the respect due to a declaration of this kind by the Legislature so far as it relates to present facts. But, even as to them, a court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. Chas. Wolff Packing Co. v. Court of Industrial Relations of State of Kansas, 262 U. S. 522, 536, 43 S. Ct. 630, 67 L. Ed. 1103, 1108, 27 A. L. R. 1280 [1923]. And still more obviously, so far as this declaration looks to

AMERICAN COAL MINING CO. v. SPECIAL COAL & FOOD COMMISSION OF INDIANA et al.

(District Court of the United States, District of Indiana, 1920. 268 F. 563.)

In Equity. Suit by the American Coal Mining Company against the Special Coal and Food Commission of Indiana and others. Application for temporary injunction denied, and bill dismissed without prejudice.

BAKER, Circuit Judge.[60] * * * There is involved, however, in this application for a preliminary injunction, the one foundational question of the right of the state to touch, at all, the coal-mining business.

If no such right exists in the state, then the temporary injunction should be issued at once; and because there would be no questions of fact to controvert, a final decree in favor of the plaintiff should at once be entered, if there is a total lack of power in the state to create this commission, through which to undertake the control of coal mining. * * *

The Legislature of the state is the agent of the people of the state in exercising the people's powers as an absolute sovereignty. The Legislature is an absolutely free agent in exercising state powers, except in so far as its principals, the people, have expressed a limitation in the state Constitution. For the purpose of this federal inquiry it may be taken that the state Legislature had the full power of the people of the state of Indiana, and that the people of Indiana stood as absolute sovereigns over the persons and properties within the limits of the state, except in so far as those powers of sovereignty had been surrendered to the federal government. Among the powers surrendered, of course, was the power over interstate and foreign commerce, treaty making, the war power, and others. But there remained to the people of Indiana, as absolute sovereigns, the whole of the police power over matters within the state. That means the power of the people to determine upon measures for the public welfare, which may be expressed by the Legislature with-

the future, it can be no more than prophecy, and is liable to be controlled by events. A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change, even though valid when passed. Perrin v. United States, 232 U. S. 478, 486, 487, 34 S. Ct. 387, 58 L. Ed. 691, 695, 696 (1914); Missouri v. Chicago, B. & Q. R. Co., 241 U. S. 533, 539, 540, 36 S. Ct. 715, 60 L. Ed. 1148, 1154, 1155 (1916). * * * Obviously, the facts should be accurately ascertained and carefully weighed, and this can be done more conveniently in the Supreme Court of the District than here." A few days after this decision, an order of the rent commission was set aside on the ground that the statute was no longer constitutional, because the emergency declared had ceased to exist. Peck v. Fink (App. D. C.) 2 F. (2d) 912 (1924). Apparently the Supreme Court approved of the decision because a writ of certiorari in the Peck Case was denied. 266 U. S. 631, 45 S. Ct. 197, 69 L. Ed. 478 (1925). 20 Ill. Law Rev. 96. See interesting article by Bikle, Questions of Fact Affecting Constitutionality, 38 Harv. Law Rev. 6.

[60] Parts of the opinion are omitted.

out any limitation that is not imposed upon the state by the federal Constitution.

In this present inquiry concerning the right of the plaintiff to a preliminary injunction, the only federal question presented is that which arises under the Fourteenth Amendment. The Fourteenth Amendment was adopted, according to my present memory, in 1868. In 1868 there was a certain circle within which a person had his life, his right to his physical being. Within that circle he had free movement, and it was not until he came to cross its periphery that he collided either with his fellowmen or with the government as a social organism. And similarly in 1868 there existed circles which circumscribed a person's business and property rights.

Now, did the adoption of the Fourteenth Amendment mean that civilization was arrested at that date? Did it mean that the historian of the year 3000 would look back to the year 1868 as the time of the formation of a crystallized stratum of civilization in which, as in the geological stratum, he might find the footprints of the megatherium and the fossils of the dinosaurus? If that is true, then every attempt since 1868 to narrow the circle within which one was entitled to life has been in violation of the federal Constitution. If that is so, then every statute which created and defined a new crime and provided a punishment for it was unconstitutional. If that is so, then every time a new condition was imposed by which liberty of contract was restricted, and this circle was diminished in its area, the statute creating the condition was unconstitutional. Property is coupled with life and liberty. It is thereby entitled to equal consideration, but certainly to no greater. And therefore a state Legislature was just as free to limit the circle in which property rights stood as it was to diminish the circles in which life and liberty, freedom of contract, freedom of action, were circumscribed.

Of course, all the cases that have upheld any sort of state legislation since 1868, that has in fact diminished one's condition with his fellows and with the state, have necessarily meant that this Fourteenth Amendment did not fix a date line at which civilization should be considered as stratified and embodied in a dead layer.

To my mind there are two classes of cases that illustrate the right of the state to exercise its police power. Over on the one side fall all of the cases in which there is a public franchise, or a public service, or a public utility. Over on that side belong, also, innkeepers along with the carriers, and to that class was added, in Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, the warehouse, which had been a private warehouse. In such cases the right to exercise the police power is based upon the fact that they either had a public charter, exercising a public power, like that of eminent domain, or they were performing a public service.

But there are other cases in which none of these elements of a charter, or the power of eminent domain, or a public service, or a devotion of property to public use, appears.

How about the law in Indiana, back in 1881, that forbade a lightning

rod expert to sell 40 rods to a farmer, and put them up on his barn, and go in and get the farmer to persuade or coerce his wife into signing as surety? In that case there was no charter, no franchise, no eminent domain, no public service, involved. It was purely an interference with the right of private contract, without the slightest excuse of the kind found over on the other side of the line. And what was the basis of it? The basis was the finding by the Legislature that wrongs and oppressions were being inflicted upon the married women of this state through the persuasion or duress of husbands or sons, and that the condition was of such consequence to the state, as an organized society, that a stop should be put to it; and so the Legislature passed the law (Rev. St. Ind. 1881, § 5119) that any contract of suretyship of a married woman should be void. That act was passed since 1868. If the adoption of the Fourteenth Amendment created a crystallized stratum, so that never thereafter could the right of contract be impaired, then that law was unconstitutional.

How about the laws, in this coal-mining industry, relating to the furnishing of timbers and props, and cages, and ventilation, and the general taking away of the freedom of contract between the mine operators and the miners with respect to the conditions under which they shall work? Under those laws it was no longer permissible for them to barter about what should be done with respect to the conditions in the mines. There was an absolute standard fixed, and the mine operator was absolutely prohibited from doing certain things. Why that law? Because of the dominance of the operator it was found by the Legislature that the men needed protection. The same thing is the basis of all our inspection laws. All of these things that are controlled in that way may be inspected, and the cost of the inspection charged against that particular industry, just as the examination of banks is charged against the banking business.

Those are all familiar restrictions. Thousands of them could be cited, but they are all over on the other side, and there is a clear line dividing them from the cases that are based upon franchises and the exercise of eminent domain, the employment of streets for water and lighting and transportation purposes. These have no basis at all, except upon the power of the people to restrict the theretofore existing circle in which a person had his life, and the one within which he had his liberty, and the one within which he had his property, to bring these down narrower on account of conditions that were found to be oppressive to the people.

Over on this side, where the source of the power is the existence of a franchise, when the evil has been found to be that of exacting more than was fair to exact of the people, there has never been any doubt that the proper remedy was to say that "all you shall obtain shall be a fair return."

Now, what basis is there for any distinction in remedies? There is no distinction as to the source of power of regulation. It all comes

from the police power. Dividing that into the two subject-matters upon which the police power operates—the one based upon the public franchise or the like, and the other upon abuses of the theretofore existing right of private contract or private property—when in the one case you find that the evil to be cured is extortion and the remedy is price regulation, then in the other case, when extortion is also found to be the evil, you should apply the known remedy for extortion. The power is one; the evil is the same evil; and the remedy is drawn from the same reservoir, though from different faucets. There is no infringement of the right of a man to hold property, if, under the power of eminent domain, it is taken from him for a public use and the fair value of it is paid him. That is a constitutional thing, and there is no objection to it. So, when it comes to regulating the returns that he shall receive from his property, that is not taking his property; it is simply a control of his property as an instrument in his hand, with which the Legislature has found that he has been bludgeoning the people.

I remember very well reading ancient statutes about cutting off the ears of the wage-earner and putting him in a pillory, if he went from one parish to another without written consent, and about fixing the wages of the laborer, and fixing prices, back in the times of Queen Elizabeth. Those statutes, though long ago repealed, demonstrate that in Anglo-Saxon institutions there was no lack of power to restrict the freedom of contract and to apply to the evil of extortion the remedy of price fixing. But there has been one statute that from the earliest times has stood over on this side of the line purely as an interference with the right of contract, and regulating the price. Take the case of the lender making a loan to a man at usurious interest. Now, what is a loan? A loan is really a sale. Title passes at once. Money is a commodity. Bankers buy and sell money. Now, here is one line of business that never has depended, as a basis for control, upon the power of eminent domain, or a public service. It is a private business. Nothing could be more private than the pawnbroker's business, and yet, from time immemorial, it has been unquestioned that the power existed to regulate that business by fixing the prices for money. I am unable to distinguish the underlying principle in that case from this, or from the statutes regulating rentals. I know, from common knowledge, that the state of New York has had under consideration such a statute, and Wisconsin has passed a law regulating rentals under certain conditions and during certain times; that is, there was a finding by the people of Wisconsin, who were the absolute sovereigns in all respects over every person and every piece of property in that state—except to the extent that sovereignty had been surrendered to the federal government—through their agent, the Legislature, that extortion was being practiced by landlords. The Legislature was the unrestricted agent of the people; it had the full power of the people, just as much so as if the people got together in a new constitutional convention and found exactly the same quality of oppression that was exercised by the man who took advan-

tage of the necessity of some one to get some currency for himself. Are the sovereign people helpless in such a situation? They certainly are, if the Fourteenth Amendment stopped the narrowing of these various circles within which persons theretofore might move freely with respect to life, liberty, and property. But, otherwise, not. The police power is continuous. It has always existed, and necessarily must always exist. And it is as wide as any conceivable sovereignty can be. It is absolutely as wide—laying aside for the moment the part of the absolute sovereignty that has been made over to the federal government—as that of the Arab shiek, sitting out in front of his tent, controlling the actions of his tribal members. * * *

Now, is there any rule for determining when the federal courts shall interfere, under the Fourteenth Amendment, with a state statute enacted under the police power? Yes. The best analogy, to my mind, is the basis on which an appellate court interferes with the verdict of a jury. If there is no basis on which a reasonable man could arrive at the result, it is set aside. Otherwise, it is not, even though the court, sitting as a jury, might have found the facts the other way.

It is only when either no basis of fact exists on which to lay the Legislature's finding, or when the remedy prescribed by the Legislature has no possible relevant bearing or connection with the evil to be cured, that the statute is set aside.

As an illustration of that last feature, let us assume that the city of Indianapolis has passed an ordinance regulating the sale of fruit by retailers, which provides that the fruit shall be protected from flies and dirt by keeping proper netting over it, even prescribing the size of the openings in the netting. I assume that nobody would dispute that that was a reasonable exercise of the police power, to protect the health of the people. But suppose the council, finding the same evil existing among these vendors, not very cleanly, and not acquainted with the germ theories regarding the spread of diseases through the excretions of insects, should prescribe as a remedy that these fruit vendors should wear red plug hats? Of course, that ordinance would fall as an unreasonable, arbitrary, whimsical exercise of the police power, because, so far as we are now informed, there is no reasonable connection between the evil to be cured and the way in which the city council said it should be cured. But, as we have heretofore indicated, control of prices is known of old as a remedy for extortion.

This leads to the conclusion that all aspects of this bill are premature, except this one on the general power of the state. We are satisfied that the general power of the state to touch, in some way, upon the coal-mining industry, exists. If by actual orders, the state of Indiana, through its coal commission, should make a requirement upon some particular coal operator, that, instead of being favorable to his interests, as the supposititious order that I stated a while ago, was deemed by him to be detrimental to his interests—detrimental by reason of a conflict between the order and the rights guaranteed to him by the federal Con-

stitution—then he would have a right to complain. That would be the time to determine whether the particular order did, in fact, infringe some right of the plaintiff—not theoretically, but in a way to inflict a trespass, an actual impending trespass, upon his property rights. The question about contracts, about violations and impairments of existing contract rights, could be raised at such a time. That is all purely speculative and conjectural now. And it is also purely speculative and hypothetical, even now, to inquire whether the plaintiff in such a case would have a sufficient legal remedy in the circuit court of Marion county, or whether he would be entitled to the prompt intervention of the federal court.

This discussion of the one underlying principle involved in the hearing of this motion for the preliminary injunction also goes to the heart of the motion to dismiss. That is, there is in this bill—speaking now for myself, on the motion to dismiss, which is before the District Court—there is no basis in fact for injunctive relief, except this one of want of power. The power existing, that ground disappears from the bill, and the other grounds present theories of what might happen and not allegations of fact respecting an existing situation—except as to those items of the $25 and the license tax of 1 cent a ton.

The order will be that the application for a temporary injunction is denied, and on the motion to dismiss the order will be that the bill is dismissed without prejudice. That means that there is absolutely nothing in the bill, now, in our judgment, that warrants either a temporary injunction or a final injunction. You cannot make any proof as to a hypothetical condition in the future.

The bill will be dismissed without prejudice, and the record may show affirmatively that there is absolutely nothing decided, except the one question, that the state, under its police power, can lay its hand upon the coal-mining industry. There may be, to-day, wholly private businesses that we would have no hesitancy, to-day, in saying were beyond the reach of the Legislature—saying so, just as we would say in case of a verdict of a jury, because there is no basis of fact upon which to predicate such a finding; but our sons, or our grandsons, may find a very urgent necessity for including that class of business, or enterprises, within the regulation of the state, under its police power.

My brethren graciously state that they concur in the views that I have endeavored to express for all of us.[61]

[61] Appeal dismissed, American Coal Mining Co. v. Special Coal & Food Commission of Indiana, 258 U. S. 632, 42 S. Ct. 273, 66 L. Ed. 801 (1922). See, in accord with the views expressed in the principal case, State v. Barrett, 172 Ind. 169, 87 N. E. 7 (1909); People v. United Mine Workers of America, 70 Colo. 269, 201 P. 54 (1921); State v. Howat, 109 Kan. 376, 198 P 686, 25 A. L. R. 1210 (1921). But see opinion of the Supreme Court in Dorchy v. Kansas, 264 U. S. 286, 44 S. Ct. 323, 68 L. Ed. 686 (1924), with reference to the provisions of the Kansas Court of Industrial Relations Act, providing for compulsory arbitration in disputes between coal miners and operators. In

CHAS. WOLFF PACKING CO. v. COURT OF INDUSTRIAL RELATIONS OF STATE OF KANSAS.

(Supreme Court of the United States, 1923. 262 U. S. 522, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A. L. R. 1280.)

Mandamus proceeding, instituted in the Supreme Court of Kansas by the Court of Industrial Relations of the State of Kansas against the Charles Wolff Packing Company. Judgment granting a writ of mandamus was rendered by the Supreme Court (207 P. 806), and defendant brings error.

This case involves the validity of the Court of Industrial Relations Act of Kansas. Chapter 29, Special Session, Laws of 1920. The act declares the following to be affected with a public interest: First, manufacture and preparation of food for human consumption; second, manufacture of clothing for human wear; third, production of any substance in common use for fuel; fourth, transportation of the foregoing; fifth, public utilities and common carriers. The act vests an industrial court of three judges with power upon its own initiative or on complaint to summon the parties and hear any dispute over wages or other terms of employment in any such industry, and if it shall find the peace and health of the public imperiled by such controversy, it is required to make findings and fix the wages and other terms for the future conduct of the industry. After 60 days, either party may ask for a readjustment, and then the order is to continue in effect for such reasonable time as the court shall fix, or until changed by agreement of the parties. The Supreme Court of the state may review such orders, and in case of disobedience to an order that court may be appealed to for enforcement.

The Charles Wolff Packing Company, the plaintiff in error, is a corporation of Kansas engaged in slaughtering hogs and cattle and preparing the meat for sale and shipment. It has $600,000 capital stock and total annual sales of $7,000,000. More than half its products are sold beyond the state. It has 300 employees. There are many other packing houses in Kansas, of greater capacity. This is considered a small one.

In January, 1921, the president and secretary of the Meat Cutters' Union filed a complaint with the industrial court against the Packing Company respecting the wages its employees were receiving. The company appeared and answered and a hearing was had. The court made findings, including one of an emergency, and an order as to wages, increasing them over the figures to which the company had recently re-

connection with the Kansas act, see, also, Wolff Packing Co. v. Court of Industrial Relations of State of Kansas, 262 U. S. 522, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A. L. R. 1280 (1923), and Wolff Packing Co. v. Court of Industrial Relations of Kansas, 267 U. S. 552, 45 S. Ct. 441, 69 L. Ed. 785 (1925).

P.UTIL.

duced them. The company refused to comply with the order and the industrial court then instituted mandamus proceedings in the Supreme Court to compel compliance. That court appointed a commissioner to consider the record, to take additional evidence, and report his conclusions. He found that the company had lost $100,000 the previous year, and that there was no sufficient evidence of an emergency or danger to the public from the controversy to justify action by the industrial court. The Supreme Court overruled his report and held that the evidence showed a sufficient emergency.

The prescribed schedule of wages and the limitation of hours and the rate of pay required for overtime resulted in an increase in wages of more than $400 a week.

It appeared from the evidence that the company and plant were under the control of, and in business association with, what were called "The Allied Packers" who have plants in various cities and compete with the so-called Big Five Packers, the largest in the country; that the products of the Wolff Packing Company are sold in active competition with such products made by other concerns throughout the United States. It appeared, further, that about the time of this controversy a strike was threatened in the packing houses of the Big Five, which the President of the United States used his good offices to settle. The chief executive of the Wolff Company testified that there had been no difficulty in securing all the labor it desired at the reduced rates offered. The industrial court conceded that the Wolff Company could not operate on the schedule fixed without a loss, but relied on the statement by its president that he hoped for more prosperous times.

The packing company brings this case here on the ground that the validity of the Industrial Court Act was upheld although challenged as in conflict with the provision of the Fourteenth Amendment that no state shall deprive any person of liberty or property without due process of law.

Mr. Chief Justice TAFT, after stating the case as above, delivered the opinion of the Court.

The necessary postulate of the Industrial Court Act is that the state, representing the people, is so much interested in their peace, health, and comfort that it may compel those engaged in the manufacture of food and clothing, and the production of fuel, whether owners or workers, to continue in their business and employment on terms fixed by an agency of the state, if they cannot agree. Under the construction adopted by the state Supreme Court the act gives the industrial court authority to permit the owner or employer to go out of the business, if he shows that he can only continue on the terms fixed at such heavy loss that collapse will follow; but this privilege under the circumstances is generally illusory. Block v. Hirsh, 256 U. S. 135, 157, 41 S. Ct. 458, 65 L. Ed. 865, 16 A. L. R. 165. A laborer dissatisfied with his wages is permitted to quit, but he may not agree with his fellows to quit or combine with others to induce them to quit.

These qualifications do not change the essence of the act. It curtails the right of the employer on the one hand, and of the employee on the other, to contract about his affairs. This is part of the liberty of the individual protected by the guaranty of the due process clause of the Fourteenth Amendment. Meyer v. Nebraska, 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042, 29 A. L. R. 1446, decided June 4, 1922. While there is no such thing as absolute freedom of contract, and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances. Adkins v. Children's Hospital, 261 U. S. 525, 43 S. Ct. 394, 67 L. Ed. 785, 24 A. L. R. 1238, decided April 9, 1923.

It is argued for the state that such exceptional circumstances exist in the present case and that the act is neither arbitrary nor unreasonable. Counsel maintain:

First. The act declares that the preparation of human food is affected by a public interest and the power of the Legislature so to declare and then to regulate the business is established in Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, Budd v. New York, 143 U. S. 517, 12 S. Ct. 468, 36 L. Ed. 247, Brass v. Stoeser, 153 U. S. 391, 14 S. Ct. 857, 38 L. Ed. 757, Noble State Bank v. Haskell, 219 U. S. 104, 31 S. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487, German Alliance Insurance Co. v. Lewis, 233 U. S. 389, 34 S. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189, and Block v. Hirsh, 256 U. S. 135, 41 S. Ct. 458, 65 L. Ed. 865, 16 A. L. R. 165.

Second. The power to regulate a business affected with a public interest extends to fixing wages and terms of employment to secure continuity of operation. Wilson v. New, 243 U. S. 332, 352, 353, 37 S. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024.

Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes:

(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or colonial Legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs, and gristmills. State v. Edwards, 86 Me. 102, 29 A. 947, 25 L. R. A. 504, 41 Am. St. Rep. 528; Terminal Taxicab Co. v. District of Columbia, 241 U. S. 252, 254, 36 S. Ct. 583, 60 L. Ed. 984, Ann. Cas. 1916D, 765.

(3) Businesses which, though not public at their inception, may be fairly said to have risen to be such and have become subject in conse-

quence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly. Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; Spring Valley Water Works v. Schottler, 110 U. S. 347, 4 S. Ct. 48, 28 L. Ed. 173; Budd v. New York, 117 N. Y. 1, 27, 22 N. E. 670, 682, 5 L. R. A. 559, 15 Am. St. Rep. 460; Id., 143 U. S. 517, 12 S. Ct. 468, 36 L. Ed. 247; Brass v. Stoeser, 153 U. S. 391, 14 S. Ct. 857, 38 L. Ed. 757; Noble State Bank v. Haskell, 219 U. S. 104, 31 S. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487; German Alliance Insurance Co. v. Lewis, 233 U. S. 389, 34 S. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189; Van Dyke v. Geary, 244 U. S. 39, 47, 37 S. Ct. 483, 61 L. Ed. 973; Block v. Hirsh, 256 U. S. 135, 41 S. Ct. 458, 65 L. Ed. 865, 16 A. L. R. 165.

It is manifest from an examination of the cases cited under the third head that the mere declaration by a Legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest are always a subject of judicial inquiry.

In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well being of the people. The public may suffer from high prices or strikes in many trades, but the expression "clothed with a public interest," as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered. The circumstances which clothe a particular kind of business with a public interest, in the sense of Munn v. Illinois and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public.

It is urged upon us that the declaration of the Legislature that the business of food preparation is affected with a public interest and devoted to a public use should be most persuasive with the court, and that nothing but the clearest reason to the contrary will prevail with the court to hold otherwise. To this point, counsel for the state cite Clark v. Nash, 198 U. S. 361, 25 S. Ct. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171; Strickley v. Highland Boy Mining Co., 200 U. S. 527, 26 S. Ct. 301, 50 L. Ed. 581, 4 Ann. Cas. 1174; Hairston v. Danville & Western Ry. Co., 208 U. S. 598, 600, 28 S. Ct. 331, 52 L. Ed. 637, 13 Ann. Cas. 1008; Union Lime Co. v. Chicago & North Western Ry. Co., 233 U. S. 211, 34 S. Ct. 522, 58 L. Ed. 924; Jones v. Portland,

245 U. S. 217, 38 S. Ct. 112, 62 L. Ed. 252, L. R. A. 1918C, 765, Ann. Cas. 1918E, 660; and Green v. Frazier, 253 U. S. 233, 40 S. Ct. 499, 64 L. Ed. 878. These cases are not especially helpful in determining how a business must be devoted to a public use to clothe it with a public interest so as to permit regulation of rates or prices. They were of two classes—one where condemnation proceedings were opposed on the ground that private property could only be taken for a public use and the use contemplated by the Legislature was not a public one. The other was of tax suits in which the validity of the tax was denied because the use for which the tax was levied was not a public one. "Public use" in such cases would seem to be a term of wider scope than where it is used to describe that which clothes property or business "with a public interest." In the former, the private owner is fully compensated for his property. In the latter, the use for which the tax is laid may be any purpose in which the state may engage and this covers almost any private business if the Legislature thinks the state's engagement in it will help the general public and is willing to pay the cost of the plant and incur the expense of operation.

It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. It is true that in the days of the early common law an omnipotent parliament did regulate prices and wages as it chose, and occasionally a colonial legislature sought to exercise the same power; but nowadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances.

An ordinary producer, manufacturer, or shopkeeper may sell or not sell as he likes, United States v. Freight Association, 166 U. S. 290, 320, 17 S. Ct. 540, 41 L. Ed. 1007; Terminal Cab Co. v. Kutz, 241 U. S. 252, 256, 36 S. Ct. 583, 60 L. Ed. 984, Ann. Cas. 1916D, 765, and while this feature does not necessarily exclude businesses from the class clothed with a public interest, German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 34 S. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189, it usually distinguishes private from quasi public occupations.

In nearly all the businesses included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation.

In the preparation of food, the changed conditions have greatly increased the capacity for treating the raw product and transferred the work from the shop with few employees to the great plant with many. Such regulation of it as there has been, has been directed toward the health of the workers in congested masses, or has consisted of inspec-

tion and supervision with a view to the health of the public. But never has regulation of food preparation been extended to fixing wages or the prices to the public, as in the cases cited above where fear of monopoly prompted, and was held to justify regulation of rates. There is no monopoly in the preparation of foods. The prices charged by plaintiff in error are, it is conceded, fixed by competition throughout the country at large. Food is now produced in greater volume and variety than ever before. Given uninterrupted interstate commerce, the sources of the food supply in Kansas are country-wide, a short supply is not likely, and the danger from local monopolistic control less than ever.

It is very difficult under the cases to lay down a working rule by which readily to determine when a business has become "clothed with a public interest." All business is subject to some kinds of public regulation, but when the public becomes so peculiarly dependent upon a particular business that one engaging therein subjects himself to a more intimate public regulation is only to be determined by the process of exclusion and inclusion and to gradual establishment of a line of distinction. We are relieved from considering and deciding definitely whether preparation of food should be put in the third class of quasi public businesses, noted above, because, even so, the valid regulation to which it might be subjected as such, could not include what this act attempts.

To say that a business is clothed with a public interest is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation.

If, as, in effect, contended by counsel for the state, the common callings are clothed with a public interest by a mere legislative declaration, which necessarily authorizes full and comprehensive regulation within legislative discretion, there must be a revolution in the relation of government to general business. This will be running the public interest argument into the ground, to use a phrase of Mr. Justice Bradley when characterizing a similarly extreme contention. Civil Rights Cases, 109

U. S. 3, 24, 3 S. Ct. 18, 27 L. Ed. 835. It will be impossible to reconcile such result with the freedom of contract and of labor secured by the Fourteenth Amendment.

This brings us to the nature and purpose of the regulation under the Industrial Court Act. The avowed object is continuity of food, clothing and fuel supply. By section 6 reasonable continuity and efficiency of the industries specified are declared to be necessary for the public peace, health and general welfare, and all are forbidden to hinder, limit or suspend them. Section 7 gives the industrial court power in case of controversy between employers and workers which may endanger the continuity or efficiency of service, to bring the employer and employees before it and after hearing and investigation to fix the terms and conditions between them. The employer is bound by this act to pay the wages fixed and while the worker is not required to work, at the wages fixed, he is forbidden, on penalty of fine or imprisonment, to strike against them and thus is compelled to give up that means of putting himself on an equality with his employer which action in concert with his fellows gives him.

There is no authority of this court to sustain such exercise of power in respect to those kinds of business affected with a public interest by a change in pais, first fully recognized by this court in Munn v. Illinois, supra, where it said (94 U. S. 126, 24 L. Ed. 77):

"Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. *He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.*"

These words refute the view that public regulation in such cases can secure continuity of a business against the owner. The theory is that of revocable grant only. Weems Steamboat Co. v. People's Co., 214 U. S. 345, 29 S. Ct. 661, 53 L. Ed. 1024, 16 Ann. Cas. 1222. If that be so with the owner and employer, a fortiori must it be so with the employee. It involves a more drastic exercise of control to impose limitations of continuity growing out of the public character of the business upon the employee than upon the employer; and without saying that such limitations upon both may not be sometimes justified, it must be where the obligation to the public of continuous service is direct, clear, and mandatory, and arises as a contractual condition express or implied of entering the business either as owner or worker. It can only arise when investment by the owner and entering the employment by the worker create a conventional relation to the public somewhat equivalent to the appointment of officers and the enlistment of soldiers and sailors in military service.

We are considering the validity of the act as compelling the employer to pay the adjudged wages, and as forbidding the employees to combine against working and receiving them. The penalties of the act are directed against effort of either side to interfere with the settlement by arbitration. Without this joint compulsion, the whole theory and purpose of the act would fail. The state cannot be heard to say, therefore, that upon complaint of the employer the effect upon the employee should not be a factor in our judgment.

Justification for such regulation is said to be found in Wilson v. New, 243 U. S. 332, 37 S. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024. It was there held that in a nation-wide dispute over wages between railroad companies and their train operatives, with a general strike, commercial paralysis, and grave loss and suffering overhanging the country, Congress had power to prescribe wages not confiscatory, but obligatory on both for a reasonable time to enable them to agree. The court said that the business of common carriers by rail was in one aspect a public business because of the interest of society in its continued operation and rightful conduct and that this gave rise to a public right of regulation to the full extent necessary to secure and protect it; that viewed as an act fixing wages it was an essential regulation for protection of public right; that it did not invade the private right of the carriers because their property and business were subject to the power of government to insure fit relief by appropriate means and it did not invade private rights of employees since their right to demand wages and to leave the employment individually or in concert was subject to limitation by Congress because in a public business which Congress might regulate under the commerce power.

It is urged that under this act the exercise of the power of compulsory arbitration rests upon the existence of a temporary emergency as in Wilson v. New. If that is a real factor here, as in Wilson v. New, and in Block v. Hirsh, 256 U. S. 135, 157, 41 S. Ct. 458, 65 L. Ed. 865, 16 A. L. R. 165 (see Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 43 S. Ct. 158, 67 L. Ed. 322, 28 A. L. R. 1321, decided December 11, 1922) it is enough to say that the great temporary public exigencies, recognized by all and declared by Congress, were very different from that upon which the control under this act is asserted. Here it is said to be the danger that a strike in one establishment may spread to all the other similar establishments of the state and country, and thence to all the national sources of food supply so as to produce a shortage. Whether such danger exists has not been determined by the Legislature, but is determined under the law by a subordinate agency, and on its findings and prophecy owners and employers are to be deprived of freedom of contract and workers of a most important element of their freedom of labor. The small extent of the injury to the food supply of Kansas to be inflicted by a strike and suspension of this packing company's plant is shown in the language of the Kansas Supreme Court in this case

(Court of Industrial Relations v. Packing Co., 111 Kan. 501, 207 P. 806):

"The defendant's plant is a small one, and it may be admitted that, if it should cease to operate, the effect on the supply of meat and food in this state would not greatly inconvenience the people of Kansas; yet, the plant manufactures food products and supplies meat to a part of the people of this state, and, if it should cease to operate, that source of supply would be cut off."

The Supreme Court's construction of the operation and effect of the act is controlling. The language quoted shows how drastic and all-inclusive it is.

But the chief and conclusive distinction between Wilson v. New and the case before us is that already referred to. The power of a Legislature to compel continuity in a business can only arise where the obligation of continued service by the owner and its employees is direct and is assumed when the business is entered upon. A common carrier, which accepts a railroad franchise, is not free to withdraw the use of that which it has granted to the public. It is true that if operation is impossible without continuous loss (Brooks-Scanlon Co. v. R. R. Commission, 251 U. S. 396, 40 S. Ct. 183, 64 L. Ed. 323; Bullock v. R. R. Commission, 254 U. S. 513, 41 S. Ct. 193, 65 L. Ed. 380), it may give up its franchise and enterprise, but, short of this, it must continue. Not so the owner, when by mere changed conditions his business becomes clothed with a public interest. He may stop at will, whether the business be losing or profitable.

The minutely detailed government supervision, including that of their relations to their employees, to which the railroads of the country have been gradually subjected by Congress through its power over interstate commerce, furnishes no precedent for regulation of the business of the plaintiff in error, whose classification as public is at the best doubtful. It is not too much to say that the ruling in Wilson v. New went to the border line, although it concerned an interstate common carrier in the presence of a nation-wide emergency and the possibility of great disaster. Certainly there is nothing to justify extending the drastic regulation sustained in that exceptional case to the one before us.

We think the Industrial Court Act, in so far as it permits the fixing of wages in plaintiff in error's packing house, is in conflict with the Fourteenth Amendment, and deprives it of its property and liberty of contract without due process of law.

The judgment of the court below must be reversed.[62]

[62] In the subsequent case of Wolf Packing Co. v. Court of Industrial Relations of Kansas, 45 S. Ct. 441, 69 L. Ed. 785 (1925), the Supreme Court held that the Kansas Court of Industrial Relations Act, declaring the business of manufacturing and preparing food for human consumption to be affected with a public interest, and establishing a system of compulsory arbitration which, if enforced, would compel the owner and his employees to continue the business on terms not of their making, is violative of the due process clause of the

In re OPINION OF THE JUSTICES.

(Supreme Judicial Court of Massachusetts, 1924. 247 Mass. 589, 143 N. E. 808.)

In the matter of answers to questions propounded by the Senate, as follows:

"Whereas, there is pending in the Senate a bill entitled 'An act to regulate the sale and resale of tickets to theaters and other places of public amusement or entertainment,' printed as House No. 1038, a copy of which is herewith submitted; and

"Whereas, doubt exists as to the constitutionality of said bill, if enacted into law: Accordingly be it

"Ordered, that the Senate require the opinions of the honorable the Justices of the Supreme Judicial Court on the following important questions of law:

"(1) May the General Court, if it finds that prices and other conditions attending the sale of tickets of admission to theaters or other public places of amusement, requiring a license under section 181 of chapter 140 of the General Laws, are matters affected with a public interest, and that legislation is necessary for the purpose of safeguarding the public against fraud, extortion, exorbitant rates, and like abuses in relation thereto, constitutionally enact legislation:

"(A) Requiring that the price at which such tickets may be sold shall be printed on the face thereof?

"(B) Requiring that no ticket shall be sold or resold at a price in excess of that printed on the face thereof?

"(C) Requiring that the business of reselling such tickets, commonly known as 'ticket scalping,' may be subjected to reasonable regulation under the police power?

"(D) Requiring that such business shall be licensed?

"(E) Requiring that the price at which tickets are resold by persons engaging in such business shall be stamped upon the ticket?

"(F) Imposing a limit, reasonably calculated to prevent extortion, but affording a reasonable profit, on the resale price of such tickets by persons engaging in such business?

"(2) Would said bill, if enacted, be constitutional?"

To the Honorable the Senate of the Commonwealth of Massachusetts:

The Justices of the Supreme Judicial Court respectfully submit these answers to the questions in the order of March 28, 1924, copy whereof is hereto annexed.

The questions are considered on the footing that the General Court as set forth in the order will find or has already found that the subject with which the statute deals is affected with a public interest and

Fourteenth Amendment and therefore invalid. See article by Simpson, Constitutional Limitations on Compulsory Industrial Arbitration, 38 Harv. Law Rev. 753.

that the proposed statute is necessary for the protection of the public against fraud, extortion and similar abuses in the sale of tickets of admission to theaters and other places of public amusement. Such determination is not conclusive that the proposed regulation is justified. The nature and extent of the public interest and of the exertion of the police power touching it are always a subject for judicial inquiry. Opinion of the Justices, 207 Mass. 601, 604, 94 N. E. 558, 34 L. R. A. (N. S.) 604; Chas. Wolff Packing Co. v. Industrial Court, 262 U. S. 522, 536, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A. L. R. 1280.

Broadly stated, the questions relate to regulation of the sale of tickets to theaters and other places of public amusement. Some aspects of the proposed statute deal with the fixing of the price with reference to original cost to be charged for the resale by brokers of tickets of admission to such resorts. We accept as the controlling principle a recent pronouncement by the Supreme Court of the United States:

"There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances." Adkins v. Children's Hospital, 261 U. S. 525, 546, 43 S. Ct. 394, 67 L. Ed. 785, 24 A. L. R. 1238.

The right to set up and maintain theaters and other places of public amusement is not natural and inherent. Working by an artisan at his trade, carrying on an ordinary business, or engaging in a common occupation or calling cannot be subjected to a license fee or excise. These plainly are not affected with a public interest. Gleason v. McKay, 134 Mass. 419, 425. O'Keeffe v. Somerville, 190 Mass. 110, 112, 113, 76 N. E. 457, 5 Ann. Cas. 654, 112 Am. St. Rep. 316. Chas. Wolff Packing Co. v. Industrial Court, 262 U. S. 522, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A. L. R. 1280. Theaters and places of public amusement as to maintenance and operation are different in nature. Without undertaking to trace the history of the stage in this commonwealth, it may be regarded as common knowledge that it was not favored by the temper of the times in colonial and early provincial Massachusetts. Probably as soon as there appeared a disposition to set up and patronize playhouses, they were strictly forbidden. By Prov. Laws 1749–50, c. 24, stage plays and other theatrical entertainments were forbidden. That act by its terms was to continue in force for five years. It was extended by Prov. Laws 1769–70, c. 12; 1770–71, c. 5; 1775–76, c. 14; 1779–80, c. 18, at least until November 1, 1785.

Reports of discussions of that period show that the inhibitory act was thought to have continued in force until 1797 and that prosecutions occurred after 1790. In any event, it was operative for a considerable time after the adoption of the Constitution. Apparently, after the expiration of the last prohibitory statute, there was no further legislation until St. 1805, c. 98. All theatrical entertainments without a license by public authorities were prohibited by that statute.

The subject has since been continuously regulated. It has been the practice of this commonwealth for more than a century to treat the maintenance of such places as a special and peculiar business upon which an excise, as distinguished from a general tax, might rightly be levied. It was held in 1830 that the constitutionality of such a statute was not open to doubt. Boston v. Schaffer, 9 Pick. 415. To the same effect are recent decisions. Commonwealth v. McGann, 213 Mass. 213, 100 N. E. 355; Mutual Film Corp. v. Ohio Industrial Commission, 236 U. S. 230, 35 S. Ct. 387, 59 L. Ed. 552, Ann. Cas. 1916C, 296.

Numerous reasons lead to the conclusion that the maintenance of theaters and other places of amusement is for the use of the public and affected with a public interest. The character of the performances presented has an intimate connection with the preservation and promotion of public morality. Some theatrical presentations are injurious and some are beneficial to public morals. Although their entertaining and recreative features are commonly more emphasized than any other, they also have or are susceptible of distinctly educative functions. Some are highly instructive and enlightening. Some inspire emotions of patriotism, philanthropy and good will. They have a tendency to gather at one time large numbers of people under a single roof and under comparatively crowded conditions. These factors have intimate relation to the health, safety and good order of the community. In these particulars such places require constant supervision and inspection in the interests of the public at large in order to prevent disaster by fire and accident, spread of disease and general and individual disorder and crime. The construction and maintenance of buildings devoted to such uses demand approval and oversight by public officers acting for the general welfare. There can be no doubt as to the validity of a statute denouncing under penalty discrimination on account of race or color in admission to theaters and other places of amusement. G. L. c. 272, § 98. Bryant v. Rich's Grill, 216 Mass. 344, 103 N. E. 925, Ann. Cas. 1915B, 869. Other regulations as to the admission of persons to places of amusement have been upheld. Western Turf Association v. Greenberg, 204 U. S. 359, 27 S. Ct. 384, 51 L. Ed. 520.

In the light of their history in this commonwealth, but without resting wholly upon that ground, we are of opinion that theaters and other places of public amusement are affected with a public interest and devoted to a public use. There are decisions in other jurisdictions to this effect. People v. King, 110 N. Y. 418, 428, 18 N. E. 245, 1 L. R. A. 293, 6 Am. St. Rep. 389; Donnell v. State, 48 Miss. 661, 680, 681, 12 Am. St. Rep. 375; Aaron v. Ward, 203 N. Y. 351, 356, 96 N. E. 736, 38 L. R. A. (N. S.) 204. See Civil Rights Cases, 109 U. S. 3, 41, 42, 3 S. Ct. 18, 27 L. Ed. 835.

Such kinds of business fall either in the class which can be carried on only by authority of a public grant with the correlative duty of

rendering public service, or in that exceptional class recognized for historical reasons as impressed with a public interest, like money lenders, "keepers of inns, cabs and grist mills." Chas. Wolff Packing Co. v. Industrial Court, 262 U. S. 522, 535, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A. L. R. 128; Commissioner of Banks v. Prudential Trust Co., 242 Mass. 78, 88, 136 N. E. 410. See German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 425, 426, 34 S. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189.

The circumstance that a business is affected with a public interest does not make legally possible every legislative regulation. All such regulations must be reasonable in their nature, directed to the prevention of real evils and adapted to the accomplishment of their avowed purpose. Under the guise of protecting the general welfare there cannot be arbitrary interference with business or irrational or unnecessary restriction. When it becomes established that a business is subject to legislative regulation because affected with a public interest and devoted to a public use, incidental and accessory features reasonable in scope and fair in aim fall under the same rule. State v. Corbett, 57 Minn. 345, 349, 59 N. W. 317, 24 L. R. A. 498.

A statute requiring the one issuing a ticket of admission to a theater or other place of public amusement to print the price on its face violates no constitutional right. People v. Thompson, 283 Ill. 87, 119 N. E. 41, L. R. A. 1918D, 382.

One professed purpose of the proposed statute in the light of the facts assumed in the order is the suppression of "fraud, extortion, exorbitant rates and like abuses." It may be presumed that facts found in actual trials in courts in other states are found to exist in kind in this commonwealth. See for example, People v. Weller, 237 N. Y. 316, 326–329, 143 N. E. 205. An attempt to safeguard the public against fraud and extortion in connection with sales of tickets to theaters and places of amusement cannot be pronounced vain. Strangers or sojourners may be thought peculiarly liable to abusive practices in this particular. Moreover, it may be that there has been found to be collusion between the management and those engaged in resale.

A ticket of admission to a place of amusement is a revocable license. Burton v. Scherpf, 1 Allen, 133, 59 Am. Dec. 717. Commonly a license is a personal privilege and not transferable. Burgess v. Mayor & Alderman of Brockton, 235 Mass. 95, 100, 126 N. E. 456; De Haro v. United States, 5 Wall. 599, 627, 18 L. Ed. 681. While it may be assumed that the resale of a theater ticket transfers all the right of the original purchaser, the transaction relates to property of such tenuous nature as to render it peculiarly liable to abuses. Business of that kind rightly may be required to be licensed. See La Tourette v. McMaster, 248 U. S. 465, 39 S. Ct. 160, 63 L. Ed. 362.

The fair import of the order is that the business of reselling such tickets has assumed proportions which have become in the opinion of the General Court a menace to the public welfare.

Manifestly no statute by attempting to outlaw a natural right can deprive one of the opportunity to earn his livelihood. The rights to labor and to do ordinary business are natural, essential and inalienable, partaking of the nature both of personal liberty and of private property. Bogni v. Perotti, 224 Mass. 152, 155, 112 N. E. 853, L. R. A. 1916F, 831; Adams v. Tanner, 244 U. S. 590, 37 S. Ct. 662, 61 L. Ed. 1336, L. R. A. 1917F, 1163, Ann. Cas. 1917D, 973. It was held in People v. Steele, 231 Ill. 340, 83 N. E. 236, 14 L. R. A. (N. S.) 361, 121 Am. St. Rep. 321, and Ex parte Quarg, 149 Cal. 79, 84 P. 766, 5 L. R. A. (N. S.) 183, 117 Am. St. Rep. 115, 9 Ann. Cas. 747; that a prohibition of the resale of such tickets at an advance over the price printed on the face of the tickets was unconstitutional because it made criminal the doing of a reasonable kind of business.

Instances of the establishment of prices by public authority in connection with any business except that of common carriers and those requiring use of the public ways, although affected with a public interest, are not common. Usury laws which fix the price for the use of money have been upheld when directly assailed. Griffith v. Connecticut, 218 U. S. 563, 31 S. Ct. 134, 54 L. Ed. 1155; Missouri, Kansas & Texas Trust Co. v. Krumseig, 172 U. S. 351, 19 S. Ct. 179, 43 L. Ed. 474; Holcombe v. Creamer, 231 Mass. 99, 105, 120 N. E. 354. If these laws are to be upheld only in the light of the common law history of interest for the use of money, Munn v. Illinois, 94 U. S. 113, 153, 154, 24 L. Ed. 77, German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 432, 433, 34 S. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189, we are of opinion that in view of the history of the theater in this commonwealth it stands on the same footing.

There are examples of more or less definite fixing of prices in connection with licensing to be found in our statutes. For example, return under certain conditions of a percentage of the fee collected by managers of intelligence offices, G. L. c. 140, §§ 43, 44; interest to be charged by pawnbrokers, G. L. c. 140, § 72; interest to be charged on loans of less than $1,000, G. L. c. 140, § 90; interest to be charged on loans of $300 or less, G. L. c. 140, §§ 96 and 100. The constitutionality of such statutes, when attacked, has been sustained. It was held in Dewey v. Richardson, 206 Mass. 430, 92 N. E. 708, that St. 1908, c. 605, § 1, limiting the rate of interest legally to be charged on unsecured loans for less than $200 was constitutional. Similar laws as to pawnbrokers have been upheld. Commonwealth v. Danziger, 176 Mass. 290, 57 N. E. 461.

Regulation of rates for hackney carriages are permissible. Commonwealth v. Page, 155 Mass. 227, 29 N. E. 512, Terminal Taxicab Co. v. District of Columbia, 241 U. S. 252, 36 S. Ct. 583, 60 L. Ed. 984, Ann. Cas. 1916D, 765. Rates of common carriers and other so-called public service corporations are subject to public regulations. Donham v. Public Service Commission, 232 Mass. 309, 122 N. E. 397. Under the Workmen's Compensation Act fees of attorneys are regu-

lated, Gritta's Case, 241 Mass. 525, 135 N. E. 114; and also of physicians, Panasuk's Case, 217 Mass. 589, 105 N. E. 368; Huxen's Case, 226 Mass. 292, 115 N. E. 426.

In view of the prices commonly charged for tickets of admission to theaters and places of amusement, we are of opinion that a limitation of additional price on resale to a sum not exceeding 50 cents on each ticket cannot be pronounced unreasonable.

A statute similar in its substantial features to the one here proposed has recently been held to be constitutional in People v. Weller, 237 N. Y. 316, 143 N. E. 205.

In advising as to the constitutionality of the proposed statute we do not rely in this connection upon cases like Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, and German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 34 S. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189, which rest upon more extreme ground, and we confine ourselves strictly to the questions here propounded.

In the light of the principles which we have stated, we answer as to question (1): Yes to its subdivisions (A), (C), (D), (E), (F), and No to its subdivision (B).

Although we do not observe any unconstitutional provision in the proposed bill, we respectfully ask to be excused from answering question (2) touching its constitutionality in all its provisions. The reasons for this are stated in Opinion of the Justices, 239 Mass. 606, 612, 133 N. E. 453.[63]

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[63] A similar statute, passed by the New York Legislature in 1922, required theater brokers to be licensed, and also fixed the resale price of tickets at 50 cents in advance of the box office price printed on the ticket. The licensing section of the statute was held constitutional by the state courts in People v. Weller, 207 App. Div. 337, 202 N. Y. S. 149 (1923), and 237 N. Y. 316, 143 N. E. 205 (1924), and by the Supreme Court of the United States in Weller v. People, 45 S. Ct. 556, 69 L. Ed. 978 (1925). The validity of section 172 of the New York Statute (Consol. Laws, c. 20, as added by Laws 1922, c. 590) was not raised or decided, but the Supreme Court said: "If section 172, which restricts resale prices, were eliminated, a workable plan would still remain. See Dorchy v. Kansas, 264 U. S. 286, 44 S. Ct. 323, 68 L. Ed. 686 (1924)." State statutes prohibiting the resale of theater tickets at a price in excess of the box office price were held unconstitutional in People v. Steele, 231 Ill. 340, 83 N. E. 236, 14 L. R. A. (N. S.) 361, 121 Am. St. Rep. 321 (1907), and Ex parte Quard, 149 Cal. 79, 84 P. 766, 5 L. R. A. (N. S.) 183, 117 Am. St. Rep. 115, 9 Ann. Cas. 747 (1906). Since section 172 of the New York statute merely regulates the profits of theater brokers, and does not seek to prohibit the business, it was suggested in 24 Col. Law Rev. 203, that this section of the statute is constitutional. See, also, 37 Harv. Law Rev. 1125. However, a state statute prescribing the maximum commission which an employment agency may charge

II. Scope of Regulatory Statutes

PEOPLE ex rel. KELLY v. PUBLIC SERVICE COMMISSION, SECOND DIST.

(Supreme Court of New York, Appellate Division, 1916. 171 App. Div. 810, 157 N. Y. S. 703.)

Howard, J. The American Real Estate Company owns, or did at one time own, most of the land on top of what is known as Park Hill in the city of Yonkers. The New York Central Railroad runs along at the foot of this hill, and Undercliff street runs parallel with the railroad. On top of the hill is Alta avenue, running also substantially parallel to the railroad. From Alta avenue, on top of the hill, to Undercliff street, at the bottom of the hill, the slope is very steep, and in order to furnish easy communication between the settlement on top of the hill and the railroad and community at the foot of the hill the American Real Estate Company built and now operates an elevator between the two thoroughfares. This was built primarily for the accommodation of the persons who live on the land purchased from the Real Estate Company; but the company also receives and carries, on this elevator, any person who wishes to ride and who pays his fare. The elevator is built entirely on the land of the American Real Estate Company. Those who live in the houses built on the land of the company are styled by the company "residents," and all other persons are styled "nonresidents." The price of passage to "residents" is one cent, and the price of passage to "nonresidents" is five cents. John Kelly, who resides on top of the hill, but not on lands purchased from the Real Estate Company, attempted to purchase a ticket for one cent, but the company refused to sell him a ticket for that sum, and compelled him to pay five cents. He claims that this is a discrimination, in violation of sections 31 and 32 of the Public Service Commissions Law. Kelly made complaint to the Public Service Commission of the Second District, setting forth these facts, and asking the commission to put a stop to this discrimination. The commission has declined to interfere, holding that it has no jurisdiction over the subject-matter. Kelly brings the matter here by a writ of certiorari to review this determination of the Public Service Commission.

was declared unconstitutional in Ex parte Dickey, 144 Cal. 234, 77 P. 924, 66 L. R. A. 928, 103 Am. St. Rep. 82, 1 Ann. Cas. 428 (1904). In Adams v. Tanner, 244 U. S. 590, 37 S. Ct. 662, 61 L. Ed. 1336, L. R. A. 1917F, 1163, Ann. Cas. 1917D, 973 (1917), a state statute seeking to prohibit employment agencies was declared unconstitutional, four justices dissenting. But in Brazee v. Michigan, 241 U. S. 340, 36 S. Ct. 561, 60 L. Ed. 1034, Ann. Cas. 1917C, 522 (1916), a state statute requiring employment agencies to be licensed was held constitutional. This statute also fixed the commission which an employment agency might charge. However, the validity of this provision of the statute was not raised, and the Supreme Court did not pass upon it.

The Public Service Commission only has such jurisdiction as is given to it by statute. It cannot assume jurisdiction over common carriers and other enterprises and appliances simply because they are quasi public services. This elevator, or inclined railroad, however it may be styled, is private property devoted somewhat to a public use. But this is not enough to give the Public Service Commission jurisdiction, for many public services are concededly not within the jurisdiction of the commission. Section 5 of the Public Service Commissions Law enumerates the public services over which the commission has jurisdiction. Railroads and common carriers are included in this section, and the appellant contends first that this elevator is a railroad. It seems entirely clear to us that the Legislature did not have in mind any such apparatus as this, when the word "railroad" was used in section 5 of the Public Service Commissions Law. In subdivision 6 of section 2 the term "railroad" is defined as follows:

"The term 'railroad,' when used in this act, includes every railroad, other than a street railroad, by whatsoever power operated for public use in the conveyance of persons or property for compensation, with all bridges, ferries, tunnels, switches, spurs, tracks, stations and terminal facilities of every kind used, operated, controlled or owned by or in connection with any such railroad."

But this definition is incomplete, forcing us to fall back upon the ordinary definition of the word. Webster's definition meets the common conception. It is as follows:

"*Railroad.* A permanent road or way having a line or lines of rails fixed to ties or sleepers and laid to gauge, usually on a leveled or graded, ballasted road or roadbed, providing a track for freight cars, passenger cars or coaches, and other rolling stock designed to be drawn by locomotives or sometimes propelled by self-contained motors; hence, such a road or line together with all the lands, buildings, rolling stocks, franchises, and other assets pertaining thereto and constituting a single property."

While the foregoing definition does not cover every conceivable style of railroad, it seems quite plain that this mechanism in question is in no sense a railroad. The appliance is not at all definitely described in the record, but the appellant himself in his complaint to the commission speaks of it always as an "elevator," and this is manifestly the correct name for this apparatus, built exclusively for lifting and lowering persons.

But, even if it be an elevator, the appellant still contends that it is a common carrier at common law, and that the Public Service Commission has jurisdiction over it. We cannot concur in this view. Subdivision 4 of section 5 of the act gives the commission jurisdiction over "any common carrier." But "common carrier" is limited and defined in subdivision 9 of section 2 as follows:

"The term 'common carrier,' when used in this act, includes all rail-

road corporations, street railroad corporations, express companies, car companies, sleeping-car companies, freight companies, freight-line companies and all persons and associations of persons, whether incorporated or not, operating such agencies for public use in the conveyance of persons or property within this state."

In saying the term common carrier "includes" certain agencies, the Legislature must have intended to exclude all others; otherwise, the common-law definition would have been adopted, or, if the common-law definition were not quite sufficient, a list of agencies, in addition to the common-law common carriers, would have been sufficient. It must be held that the definition of "common carrier" excludes all those agencies not enumerated. The definition of "common carrier," quoted above, ends with this expression: "Operating such agencies for public use in the conveyance of persons or property within this state."

It is argued that the words "such agencies" mean similar agencies, and is therefore broad enough to include this elevator. But the words "such agencies" refer, we think, to the preceding agencies enumerated in the definition and to no other agencies. The elevator in question not being one of the public services falling within the scope of the Public Service Commissions Law, it follows that sections 31 and 32 of the act have not been violated, and that the Public Service Commission has no authority to regulate the rates of fare charged by the American Real Estate Company, and has no jurisdiction over the elevator, or the American Real Estate Company. The writ should be dismissed, and the order affirmed.[64]

Writ dismissed, and order affirmed with $10 costs and disbursements. All concur.

TERMINAL TAXICAB CO. v. PUBLIC UTILITIES COMMISSION OF DISTRICT OF COLUMBIA.

(Supreme Court of the United States, 1916. 241 U. S. 252, 36 S. Ct. 583, 60 L. Ed. 984, Ann. Cas. 1916D, 765.)

The facts, which involve the construction and application of the provisions of the Act of March 4, 1913, creating the Public Utilities Commission of the District of Columbia, are stated in the opinion.[65]

Mr. Justice HOLMES delivered the opinion of the court.[66]

This is a suit to restrain the Public Utilities Commission of the District of Columbia from exercising jurisdiction over the plaintiff. The Commission was created and its powers established by a section (section

[64] In Joest v. Clarendon & Rosedale Packet Co., 122 Ark. 353, 183 S. W. 759 (1916), it was held that one operating an incline for hire for the purpose of transferring goods from ships to railroad cars is, under common-law principles, a common carrier.

[65] Statement by the authors.

[66] Part of the opinion is omitted.

8) of an appropriation act, divided into numbered paragraphs. Act of March 4, 1913, c. 150, § 8, 37 Stat. 938, 974. By paragraph 2 of the section "every public utility is hereby required to obey the lawful orders of the Commission," and by paragraph 1 public utility embraces every common carrier, which phrase in turn is declared to include "express companies and every corporation * * * controlling or managing any agency or agencies for public use for the conveyance of persons or property within the District of Columbia for hire." Steam railroads, some other companies, and the Washington Terminal Company are declared not to be within the words. The main question is whether the plaintiff is a common carrier under the definition in the act. The bill was dismissed by the Supreme Court and the decree was affirmed by the Court of Appeals. 43 App. D. C. 120.

The facts are agreed. The plaintiff is a Virginia corporation authorized by its charter, with copious verbiage, to build, buy, sell, let and operate automobiles, taxicabs, and other vehicles, and to carry passengers and goods by such vehicles; but not to exercise any of the powers of a public service corporation. It does business in the District, and the important thing is what it does, not what its charter says. The first item, amounting to about thirty-five hundredths of the whole, is done under a lease for years from the Washington Terminal Company, the owner of the Union Railroad Station in Washington, which we have mentioned as excluded from the definition of common carriers. By this lease the plaintiff has the exclusive right to solicit livery and taxicab business from all persons passing to or from trains in the Union Station, and agrees in its turn to provide a service sufficient in the judgment of the Terminal Company to accommodate persons using the station, and is to pay over a certain percentage of the gross receipts. It may be assumed that a person taking a taxicab at the station would control the whole vehicle both as to contents, direction, and time of use, although not, so far as indicated, in such a sense as to make the driver of the machine his servant, according to familiar distinctions. The last facts however appear to be immaterial and in no degree to cast doubt upon the plaintiff's taxicabs when employed as above stated being a public utility by ancient usage and understanding, Munn v. Illinois, 94 U. S. 113, 125, 24 L. Ed. 77, as well as common carriers by the manifest meaning of the act. The plaintiff is "an agency for public use for the conveyance of persons," etc.; and none the less that it only conveys one group of customers in one vehicle. The exception of the Terminal Company from the definition of common carriers does not matter. The plaintiff is not its servant and does not do business in its name or on its behalf. It simply hires special privileges and a part of the station for business of its own.

The next item of the plaintiff's business, constituting about a quarter, is under contracts with hotels by which it agrees to furnish enough taxicabs and automobiles within certain hours reasonably to meet the needs of the hotel, receiving the exclusive right to solicit in and about

the hotel, but limiting its service to guests of the hotel. We do not perceive that this limitation removes the public character of the service, or takes it out of the definition in the act. No carrier serves all the public. His customers are limited by place, requirements, ability to pay and other facts. But the public generally is free to go to hotels if it can afford to, as it is free to travel by rail, and through the hotel door to call on the plaintiff for a taxicab. We should hesitate to believe that either its contract or its public duty allowed it arbitrarily to refuse to carry a guest upon demand. We certainly may assume that in its own interest it does not attempt to do so. The service affects so considerable a fraction of the public that it is public in the same sense in which any other may be called so. German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 34 S. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189. The public does not mean everybody all the time. See Peck v. Tribune Co., 214 U. S. 185, 190, 29 S. Ct. 554, 53 L. Ed. 960, 16 Ann. Cas. 1075.

The rest of the plaintiff's business, amounting to four-tenths, consists mainly in furnishing automobiles from its central garage on orders, generally by telephone. It asserts the right to refuse the service and no doubt would do so if the pay was uncertain, but it advertises extensively and, we must assume, generally accepts any seemingly solvent customer. Still, the bargains are individual, and however much they may tend towards uniformity in price probably have not quite the mechanical fixity of charges that attends the use of taxicabs from the Station and hotels. There is no contract with a third person to serve the public generally. The question whether as to this part of its business it is an agency for public use within the meaning of the statute is more difficult. Whether it is or not, the jurisdiction of the Commission is established by what we have said, and it would not be necessary to decide the question if the bill, in addition to an injunction against taking jurisdiction, did not pray that Order No. 44 of the Commission be declared void. That order, after declaring that the plaintiff was engaged in the business of a common carrier within the meaning of the act and so was within the jurisdiction of the Commission, required the plaintiff to furnish the information called for in a circular letter of April 12, 1913. What this information was does not appear with technical precision, but we assume that it was in substance similar to a later requirement of a schedule showing all rates and charges in force for any service performed by the plaintiff within the District or any service in connection therewith. If we are right this demand was too broad unless the business from the garage also was within the act. There is no such connection between the charges for this last and the others as there was between the facts required and the business controlled in Int. Comm. Comm. v. Goodrich Transit Co., 224 U. S. 194, 211, 32 S. Ct. 436, 56 L. Ed. 729. Although I have not been able to free my mind from doubt the court is of opinion that this part of the business is not to be regarded as a public utility. It is true that all business, and for the matter of that, every life in all its details, has a public aspect, some

bearing upon the welfare of the community in which it is passed. But however it may have been in earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. It is assumed that an ordinary shop keeper may refuse his wares arbitrarily to a customer whom he dislikes, and although that consideration is not conclusive, German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 407, 34 S. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189, it is assumed that such a calling is not public as the word is used. In the absence of clear language to the contrary it would be assumed that an ordinary livery stable stood on the same footing as a common shop, and there seems to be no difference between the plaintiff's service from its garage and that of a livery stable. It follows that the plaintiff is not bound to give information as to its garage rates. * * *

The decree, so far as it asserts the jurisdiction of the Commission, is affirmed, but it must be modified so as to restrain an inquiry into the rates charged by the plaintiff at its garage, or the exercise of jurisdiction over the same.[67]

Decree modified as above set forth.

HISSEM v. GURAN et al.

(Supreme Court of Ohio, 1925. 146 N. E. 808.)

MARSHALL, C. J. This cause involves the interpretation of the Freeman-Collister Motor Transportation Act, but is not a review of any order of the Public Utilities Commission. The cause originated in the court of common pleas of Summit county, Ohio, at the suit of Hissem, operating a motor transportation company under a certificate of public convenience issued by the Public Utilities Commission, granting him the exclusive right to conduct and operate his business as a motor transportation company over a regular route between fixed termini in Summit county, Ohio, seeking to enjoin Guran and Myers from operating a motor truck over the same route, without first obtaining a certificate of authority from the Public Utilities Commission.

[67] Many statutes defining the jurisdiction of Public Utilities Commissions, are so worded as to include taxicabs, jitneys, and bus lines, as well as other common carriers. For a collection of cases, see notes in 1 A. L. R. 1455, 9 A. L. R. 1011, 18 A. L. R. 1316, 1321. But it has been held that a "sight-seeing automobile" is not a "bus line," a "stage route," or a "motor vehicle line or route," within the meaning of the New York Public Service Law. P. U. R. 1919F, 63. In City of Chicago v. Mayer, 290 Ill. 142, 124 N. E. 842 (1919), it was held that an auto express line, although a common carrier at common law was not a "common carrier" within the meaning of that term as used in the public utilities statute (Hurd's Ill. Rev. St. 1917, p. 2284). But in State Public Utilities Commission v. Bartonville Bus Line, 290 Ill. 574, 125 N. E. 373 (1919), it was held that a motor bus line is a "public utility" within the meaning of that term as used in the public utilities statute.

The record discloses that Hissem was engaged in hauling milk to the city of Akron, for certain producers, and that Guran and Myers were also engaged in hauling milk from certain other producers located in the same community to the same market in the city of Akron. The trucks of both parties cover practically the same route; each rendering the same service, though for different employers. Guran and Myers were operating under a contract of employment with a branch of the Summit County Milk Producers Association, whereby they were employed for hire to collect and transport milk and cream of the members of the said association, and no one else, to the White Rock Dairy Company of Akron, and no other person, upon a regular schedule of prices, depending upon the distance and the character of the highways covered. The Summit County Milk Producers Association, the employer of Guran and Myers, is a co-operative marketing association organized in accordance with Ohio laws (109 O. L. 50). Guran and Myers do not serve the public generally, or any person or firm other than members of the association, in accordance with the contract. They do not hold themselves ready to carry for all persons, indifferently, who may choose to employ them, neither have they ever accepted any public franchise or called the police powers of the state to their aid.

Upon these facts the Court of Common Pleas refused to enjoin, and upon error being prosecuted to the Court of Appeals that court affirmed the judgment. Upon error prosecuted to this court we are asked to construe and apply the provisions of the Freeman-Collister Act (110 Ohio Laws, 211–223).

Section 614—2, General Code (110 O. L. 212) provides:

"Any person or persons, firm or firms, copartnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated: * * * When engaged in the business of carrying and transporting persons or property or both, in motor propelled vehicles of any kind whatsoever, for hire, over any public street, road or highway in this state except as hereinafter provided in section 614—84, is a motor transportation company and as such is declared to be a common carrier."

Section 614—84, subd. (c), defines a motor transportation company:

"The term 'motor transportation company,' when used in this chapter, means every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any motor propelled vehicle not usually operated on or over rails, used in the business of transportation of persons or property or both, as a common carrier for compensation, over any public highway in this state."

The term, "motor transportation company," is first used in section 614—2, and if we insert the definition of the term and write it into that section in the place of the term itself it will be found that the Gen-

eral Assembly has attempted by legislative fiat to constitute the person or company who may do the things therein referred to a common carrier. In this controversy this court is required to determine the limitations upon the power and authority of the General Assembly to declare certain persons and firms to be common carriers, when the business conducted by them is such as not to bring them within the common-law definition of common carriers. By section 614—2 it is declared that any transportation for hire of persons or property in motor-propelled vehicles over the streets and highways of the state constitutes the operators of the vehicles common carriers. If common carriers, they are of course subject to regulation both as to the rates to be charged and the service to be rendered. They are subject also to taxes and charges, and involved in expenses which do not have to be met by persons and firms not subject to public regulation. If they are common carriers their vehicles and other property are devoted to public use, and they cannot complain of public regulation, with the taxes, charges, expenses, and other inconveniences incident thereto. If their business has not in fact been dedicated to public use and service, any regulation would amount to a taking of private property for public use, and therefore be beyond the power of the state, unless just compensation were first paid in money.

As to what constitutes a common carrier, there can be no real controversy. It has been determined by numerous decisions of this court and the United States Supreme Court, and, for that matter, by the courts in practically every state in the Union. Samms v. Stewart & McKibben, 20 Ohio, 70, 55 Am. Dec. 445; United States Express Co. v. Backman, 28 Ohio St. 144; Ohio Mining Co. v. Public Utilities Commission, 106 Ohio St. 138, 140 N. E. 143; Korner v. Cosgrove, 108 Ohio St. 484, 141 N. E. 267, 31 A. L. R. 1193; Southern Ohio Power Co. v. Public Utilities Commission, 110 Ohio St. 246, 143 N. E. 700.

The declarations of the foregoing cases are in perfect harmony with all other decisions throughout the states of the Union, and of the United States Supreme Court, in declaring that to constitute a common carrier there must be a dedication of property to public use of such character that the product and service are available to the public generally and indiscriminately, and that the carrier must hold himself ready to serve the public indifferently to the limit of his capacity. The authorities are equally uniform in holding that, if a carrier is employed by one or a definite number of persons by a special contract, or for a special undertaking, he is only a private carrier.

In the instant case it is true that Guran and Myers are performing services for other persons, for which they are receiving a compensation, and it is also true that they are using the improved highways of the state in and about the performance of that service. Neither of these features is conclusive of the question. The entire service ren-

dered by them is pursuant to a private contract, in which no one else is interested, and no benefit or disadvantage accrues to any other person by reason of the rendition of that service, except that Hissem might possibly enjoy a larger patronage if the injunction against Guran and Myers should become effective. It does not conclusively follow that this would happen, because each of the producers might transport his own individual product of the market in his own vehicle. The use of the highways by Guran and Myers is not conclusive of the question, because it cannot be said that traversing the highways by a single truck, serving a large number of patrons, is more destructive to the highways than the transportation of the same product to the same market by the use of a large number of vehicles of individual owners. There does not therefore, upon principle, appear to be any sound basis for the exercise of public regulation of motor vehicles not dedicated to public use.

This question is not a new one, but, on the contrary has been met by many courts. The Supreme Court of California, in Allen v. Railroad Comm., 179 Cal. 68, 175 P. 466, 8 A. L. R. 249, in a very clear opinion, denies the right of the Legislature to constitute a private carrier a public and common carrier by legislative fiat, as being in contravention of section 10, art. 1, and of the Fourteenth Amendment, of the federal Constitution. Aside from the logic of the opinion in that case, it becomes a very cogent authority by reason of an application having been made to the Supreme Court of the United States for a writ of certiorari, which writ was denied. Railroad Comm. v. Allen, 249 U. S. 601, 39 S. Ct. 259, 63 L. Ed. 797. Since the denial of the writ in that case, the Supreme Court of the United States has squarely met this question, and has decided against the authority of a state Legislature to convert a private carrier into a public utility by mere legislative fiat. Producers' Transportation Co. v. Railroad Comm. of California, 251 U. S. 228, 230, 231, 40 S. Ct. 131, 64 L. Ed. 239; Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 536, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A. L. R. 1280; Michigan Public Utilities Comm. v. Duke, 45 S. Ct. 191, 69 L. Ed. ——, not yet [officially] reported, decided by the Supreme Court of the United States January 12, 1925. The Michigan statute construed in that case is quite similar to section 614—2, General Code, and its pertinent provisions are as follows:

"Any and all persons * * * engaged * * * in the transportation of persons or property for hire by motor vehicle, upon or over the public highways of this state * * * shall be common carriers, and, so far as applicable, all laws of this state now in force or hereafter enacted, regulating * * * transportation * * * by other common carriers, including regulation of rates, shall apply with equal force and effect to such common carriers * * * by motor vehicles. * * *" Pub. Acts 1923 (Mich.) No. 209, § 3.

The business of Duke, which the Commission sought to regulate in that case, was that of hauling motor trucks and trailers over the public highways of Michigan from Detroit to Toledo. He had no other business, and did not hold himself out as a carrier for the public. He had three contracts with three manufacturers of automobile bodies in Detroit to transport their product to an automobile manufacturer in Toledo. It was held by the Supreme Court of the United States that the provisions of the act above quoted could not be enforced against him. Duke was further declared to be a private carrier, having no power of eminent domain, exercising no franchise under the state, and possessing no greater right to use the highways than any other member of the public.

For the foregoing reasons, and upon the foregoing authorities, any interpretation of section 614—2 which would give state agencies any authority to regulate motor-propelled vehicles employed only in private service would constitute a violation of section 10, art. 1, and of the Fourteenth Amendment, of the federal Constitution.

Section 614—2, being a part of a general scheme of legislation to regulate motor-vehicle transportation, and essential to the other provisions of the Freeman-Collister Act, this controversy can be disposed of by an interpretation of that section whereby it will be made to apply only to motor-vehicle transportation which comes within the purview of the common-law definition of common carriers.

This case cannot be disposed of without some reference to the following provisions of section 614—88, General Code:

"Except as provided in section 614—84, no corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, shall operate any automobile, jitney, bus, truck, stage, auto stage, or rent for hire car, for the transportation of persons or property or both, for compensation, over any public street, road or highway in this state between fixed termini or over a regular or irregular route, over which any motor transportation company is operating under a certificate of convenience and necessity issued by the commission as provided in this act, until such corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, shall have secured a certificate of public convenience and necessity or permission from the commission to so operate, and then only in strict accordance with such rules as the commission may prescribe for such operation."

That section performs a very useful function, and is quite necessary to be employed in giving complete protection to motor transportation companies which have been furnished certificates of convenience and necessity against the aggressions of other motor transportation companies which are in fact common carriers, and that section should be employed by the courts in a proper case. The courts may not, however, employ the provisions of that section as an instrument of oppres-

sion against a private carrier, even though the business operated by the private carrier might prove to be ruinous to a public carrier operating over the same routes and between the same termini, even though he has made full compliance with all the requirements of the act, and even though he may have been subject to all of the charges, taxes, and expenses incident to regulation at the hands of the Public Utilities Commission. The judgment of the Court of Appeals and of the common pleas will therefore be affirmed.

Judgment affirmed.[68]

JONES, MATTHIAS, DAY, ALLEN, KINKADE, and ROBINSON, JJ., concur.

VAN DYKE et al. v. GEARY et al.

(Supreme Court of the United States, 1917. 244 U. S. 39, 37 S. Ct. 483, 61 L. Ed. 973.)

Mr. Justice BRANDEIS delivered the opinion of the court.[69]

In 1909 Ida A. Van Dyke and her husband organized a corporation under the name of the Miami Townsite Company to acquire a tract in Gila county, Arizona, and establish a town thereon. A large part of Miami is now located on that land. In order to supply residents and others thereon with water for domestic, commercial and fire purposes, the Van Dykes introduced a water system which developed rapidly. In October, 1913, the Arizona Corporation Commission, a public service commission with the usual powers of regulation, instituted before itself a proceeding to have the rates charged by the water system declared excessive, and to have reasonable rates established. The Van Dykes, who were duly served, filed a "plea in bar"; alleged that the plant was the individual property of Ida A. Van Dyke; that the business was operated by her with her husband as manager, and not by a corporation; and denied not only the validity of the order but also the jurisdiction of the commission over them. The objection to the jurisdiction was overruled; and the commission proceeded to a hearing on the merits, at which the Van

[68] A statute regulating common carriage by trucks, but exempting trucks carrying farm implements and products, was held unduly discriminatory and unconstitutional in Franchise Motor Freight Ass'n v. Seavey (Cal. Sup.) 235 P. 1000 (1925). Where a statute required a permit to operate a motor vehicle, for hire, over fixed routes and between fixed termini, it was held not applicable to one operating a taxicab business. People v. Carr et al. (Mich.) 203 N. W. 948 (1925). But where a statute required persons operating taxicabs to obtain a certificate of convenience, one operating a taxicab business without such certificate may be enjoined, Princeton Power Co. v. Calloway (W. Va.) 128 S. E. 89 (1925), or stopped by order of the Commission, Austin Bros. Transfer Co. v. Bloom, 316 Ill. 435, 147 N. E. 387 (1925). A certificate of convenience to operate a motor-bus line was held to be non-transferrable in Westhoven v. Public Utilities Commission (Ohio) 147 N. E. 759 (1925). For a résumé of recent legislation dealing with motor bus lines, see 24 Col. Law Rev. 528.

[69] Parts of the opinion are omitted.

Dykes offered no evidence. On May 1, 1914, after an elaborate report, an order was entered greatly reducing the water rates. The Van Dykes promptly filed a motion for a rehearing, which was denied. Thereupon they applied to the commission to stay the operation of the order pending proceedings for review in the state court. This application also was denied. Then they filed, in the District Court of the United States for the District of Arizona, this suit against the members of the commission, the Attorney General of the state and the county attorney to enjoin the enforcement of the order and the prosecution for penalties for failure to observe the same; and to have the order itself cancelled.

Both plaintiffs and defendants are citizens and residents of Arizona. Jurisdiction of the federal court was invoked solely on the ground that the order of the commission, if enforced, would deprive plaintiffs of their property in violation of the Fourteenth Amendment; and that the penalties prescribed by the Arizona statute for failure to obey the order are so severe as to prevent resort to the remedies therein provided for testing in the state courts the validity of the orders. An interlocutory injunction was applied for; and the case was heard before three judges under section 266 of the Judicial Code. The jurisdiction of the court was sustained under the rule declared in Ex parte Young, 209 U. S. 123, 28 S. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; but the court refused relief against the order reducing water rates. * * * From an order entered in accordance with this opinion the Van Dykes appealed; and this court has jurisdiction to review the whole case. Louisville & Nashville R. R. Co. v. Garrett, 231 U. S. 298, 34 S. Ct. 48, 58 L. Ed. 229. The errors alleged are, in substance, as follows: * * * Second, that a water system established for the purpose of furnishing water only to purchasers of lots from the Miami Townsite Company was treated as a public water system.[70] * * *

2. Whether the Van Dyke water system is a private business.

The Van Dyke system appears to be the only water supply of the inhabitants of the original town of Miami (not including the "additions"). The number of water takers is not shown. But it appears that the large consumers who used meters numbered, at the time of the commission's investigation, 675, yielding a revenue of $11,378.10; and that the number of small takers must have been much larger,

[70] The Arizona statute conferred jurisdiction upon the Corporation Commission to regulate rates of public service corporations. A public service corporation was defined as follows: "Sec. 2. All corporations other than municipal engaged in carrying persons or property for hire; or in furnishing gas, oil, or electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing for profit, hot or cold air or steam for heating or cooling purposes; or in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers shall be deemed public service corporations." Const. Ariz. art. 15, § 2.

since the revenue derived from the flat rates was $14,517.35. "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large." Munn v. Illinois, 94 U. S. 113, 126, 24 L. Ed. 77. The property here in question was devoted by its owners to supplying a large community with a prime necessity of life. That Mrs. Van Dyke pumps the water on her own land, stores it in tanks on her own land and thence conducts it through pipes all upon her own land (the strips reserved in the streets for conduits being owned by her), and delivers it to purchasers at the boundary line between her and their properties; and that lot purchasers bought with the understanding that they might purchase water from Mrs. Van Dyke's water system at rates fixed by her—are all facts of no significance; for the character and extent of the use make it public; and since the service is a public one the rates are subject to regulation.

Counsel contend that the use is not public, because water is furnished only to particular individuals in fulfillment of private contracts made with the purchasers of townsite lots. But there is nothing in the record to indicate that such is the fact. Purchasers seem to have bought merely with the oral understanding that water could be secured from the Van Dyke system. Affidavits filed by appellants state expressly that their water system is operated "for the purpose of supplying the residents and inhabitants of said Miami townsite with water, and not for the purpose of supplying persons outside of said townsite, or the public generally with water." The offer thus is to supply all the "inhabitants" within the given area; and that of course includes subvendees, tenants and others with whom the Van Dykes had no contract relations. The fact that the service is limited to a part of the town of Miami does not prevent the water system from being a public utility. See Del Mar Water, etc., Co. v. Eshelman, 167 Cal. 666, 681–683, 140 P. 591, 948. * * *

The decree of the District Court is affirmed.

Mr. Justice McREYNOLDS dissents.

WINGROVE et al. v. PUBLIC SERVICE COMMISSION et al.

(Supreme Court of Appeals of West Virginia, 1914. 74 W. Va. 190, 81 S. E. 734, L. R. A. 1918A, 210.)

POFFENBARGER, J.[71] A physician, a barber, and the postmaster of the incorporated town of Scarbro in Fayette county complain here by petition of the refusal of the public service commission to order the White Oak Fuel Company, a corporation, on their complaint, to furnish them electricity for lighting purposes upon the usual and customary terms upon which it supplies such commodity to other persons

[71] Part of the opinion is omitted.

similarly situated. Deeming the company in question not to be a public service corporation, the public service commission refused the relief asked, and dismissed the complaint.

The company's charter authorizes it to mine, produce, and sell coal and do such other things as are necessary and incidental to that business. It confers no right to generate or deal in electricity otherwise than as such business may be incidental to or involved in the mining, producing, and selling of coal. In connection with its four or five shafts or plants, it maintains a large power plant for the generation of electricity for use in the operation of its motors and other machinery in its mines, and for lighting its offices and stores and 200 or 300 tenement houses on its premises, occupied by its employés.

About six or eight years ago, after the mines had been opened, and before the town of Scarbro was incorporated, the company, at the request of a few citizens doing business in the immediate vicinity of its stores and offices, furnished them electric light for their business rooms, and has since continued to do so. Since that time the number so supplied has increased so that now occupants of 18 or 20 houses, not tenants of the company, are supplied, and some 200 or 250 lights are carried for them. In fact, all who have applied for lights, except the complainants, have been permitted to connect their dwellings, stores, and places of business with the company's transmission wires and receive light therefrom. For these lights a uniform flat rate of 50 cents per month for each light is charged, while the tenants are required to pay 40 cents per month. From this source the company has an income of at least $500 or $600 per month, but only about one-fourth of it comes from strangers. Its employés wire the buildings and install lights upon request, and it keeps for sale all necessary light fixtures.

It has no franchise from the town nor any express permit to occupy the streets with its poles and wires, and does not furnish light to it in its corporate capacity. Whether there has ever been a formal dedication or acceptance of any streets is not clearly shown, but one or two public roads run through the village and the poles and transmission wires run along one or both of them, but, it is claimed, on the company's property.

That the electrical power plant is operated primarily as a part of the mining enterprise, and was not installed as a public service agency, is clear and indisputable. Its chief function is to supply power for running the motors, pumps, fans, and other mining machinery, and light to the stores and offices maintained as part of the enterprise. Upon the facts and circumstances disclosed, it could, no doubt, be safely said the company would never have installed its plant for lighting service only, and would not now operate it for that purpose alone. Nevertheless its rendition of public service, incidental and for accommodation rather than profit though it may be, is equally obvious. If for accommodation, it is not gratuitous. Compensation is charged and paid, a considerable income derived, and the business is conducted

in much the same manner as if the plant were maintained and run primarily for public service. Citizens not in any way connected with the company apply to it for the service; the wiring of their buildings and fixtures and all these demands have been complied with except in three instances.

Dr. Wingrove, Doliff, the barber, and Kessler, the postmaster, who are the complainants, all have their places of business in the same block. Until January 17, 1914, Wingrove and Kessler had lights, but Doliff did not. Prior to that time, he had applied for them, but his request was not complied with. Without authority so to do, he connected his wires through those in Wingrove's office, and the company cut off the entire block, but later restored its service to some of the buildings. These are the only known instances of refusal to furnish any person light, and, as to them, the company relies, for justification, on the misconduct of Wingrove and Doliff. There is no denial of the ability of the company to furnish these parties light. It stands upon a claim of right to withhold its service from any person, on the ground that it is not engaged in the public service, and its charter does not authorize it to do public service business.

The lighting portion of this company's business falls within the letter of the statute conferring jurisdiction and power upon the public service commission. Its jurisdiction includes "gas companies, electric lighting companies and municipalities furnishing gas or electricity for lighting, heating or power purposes." Chapter 150, Code of 1913, § 3 (sec. 638). In the same section public service corporations are defined, for the purposes of the act, in the following terms: "'The words 'public service corporation' used in this act shall include all persons, association of persons, firms, corporations, municipalities and agencies engaged or employed in any business herein enumerated, or in any other public service business whether above enumerated or not, whether incorporated or not." This being true, no ground is perceived upon which it can be said to have been impliedly excepted from such jurisdiction. The service is voluntary, but such is the character of all other public service. No exception can stand on that ground. The company does other business, and its public service is incidental, auxiliary, secondary, or appendant. So is the lighting business of many others. For instance, a municipal corporation is created primarily for governmental purposes, but elects to furnish citizens water, electricity, and gas, not a strictly governmental function at all, and purely voluntary. So a private water and light company may deal in coal and ice, and the coal and ice business may predominate in volume; still the company would undoubtedly be engaged in the service of the general public.

Its lack of the power of eminent domain is a mere inconclusive circumstance. Many persons and firms engaged in the public service do not have it. If concerns engaged exclusively in water, light, and gas service did not possess it, they would clearly be public service con-

cerns nevertheless. Many common carriers are without power to exercise this high right. Acceptance of practically all applications for service, made by citizens of the town, is a sufficient election to engage in the business and manifestation thereof, without advertisement of the fact or solicitation of customers. Acquisition and retention of its patronage by the company constitute an occupation of a certain field in the public service, into which no other concern or person can safely enter. While it has not formally or in terms kept any one else out, others may be barred out, by such occupancy. Nor can it be material that the company reserves the right to discontinue the service at any time, or has guarded against obligation on its part to continue it indefinitely or at all. It is now devoting its property in part to a public function, and, in so doing, has subjected it to governmental regulation and control for the time being. "When private property is devoted to public use, it is subject to public regulation." Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; Gas Co. v. Lowe and Butler, 52 W. Va. 662, 671, 44 S. E. 410. Its lack of charter authorization or contemplation cannot be set up as a defense. It cannot plead its want of power while persisting in the alleged ultra vires act. It does not seem to be relied upon, however, otherwise than as a circumstance tending to prove nonparticipation in public service. * * *

Under these principles and conclusions, the order of the public service commission complained of will be suspended, and a peremptory writ of mandamus awarded, commanding the White Oak Fuel Company forthwith to connect its lighting service wires with the wires in the houses of the petitioners Wingrove and Doliff, in the proceedings mentioned, on their compliance with the conditions prescribed for other patrons similarly situated, and furnish them and each of them electricity from its electrical plant upon the terms and conditions prescribed for other persons similarly situated. Since this proceeding was instituted, the service to Kessler has been restored, and the controversy with him thus ended.[72]

[72] Accord: Chambers v. Spruce Lighting Co., 81 W. Va. 714, 95 S. E. 192 (1918). Where the term "public utility" was defined to embrace "any person," etc., "that may own, operate, manage, or control any plant or equipment, or any part of a plant or equipment, within the state, for the conveyance of telephone messages or for the production, transmission, delivery, or furnishing of heat, light, water or power either directly or indirectly, to or for the public," it was held that the owner of a building who, in addition to supplying heat to his tenants also supplied heat to several neighbors, was not supplying heat "to or for the public," and therefore was not operating a public utility within the meaning of the statute. Cawker v. Meyer, 147 Wis. 320, 133 N. W. 157, 37 L. R. A. (N. S.) 510 (1911).

STATE ex rel. M. O. DANCIGER & CO. v. PUBLIC SERVICE COMMISSION OF MISSOURI et al.

(Supreme Court of Missouri, 1918. 275 Mo. 483, 205 S. W. 36, 18 A. L. R. 754.)

* * * This case is one of three of similar character and bottomed upon identically similar facts. The relief severally sought was an order upon M. O. Danciger (trading as M. O. Danciger & Co.) to compel him to restore electric service to the complainants, which service, it was alleged, had been by said Danciger cut off without any legal excuse therefor. The complaints filed before the Commission by the three several complainants were similar in all substantial respects, and wholly similar, except that the complaint filed in the instant case averred as a motive for the cutting off of the service that discontinuance was due to ill feeling engendered by the attitude of complainant in a local option election.

It was shown by the testimony adduced upon the hearing before the Commission that the Royal Brewing Company, situate at Weston, Mo., is a corporation, the stock of which is largely, if not wholly, owned by respondent M. O. Danciger and his brothers. The Royal Brewing Company is engaged in the brewing of beer and in the manufacture of so-called soft drinks. The town of Weston contained, according to the last census, a population of 1,019 persons, though the evidence adduced tends to show roughly that it now contains about 1,500 population. Some six years before the hearing the Royal Brewing Company (hereinafter called for brevity the "Company") installed in its brewing plant the necessary machinery for producing electric light solely for its own use in lighting its property. During the last three or four years preceding the hearing before the Commission the Company has also been using the electric current so generated for the purpose of operating by electricity a large part of the machinery used in its brewing business. Shortly after the Company put in its private electric plant, it discovered that it was able to produce more electricity than was necessary for its own use in lighting and running its plant. It thereupon began to make special private contracts to furnish, under the conditions and circumstances below named, electricity for lighting and power purposes to certain private citizens of the town of Weston, located within a radius of three blocks of the Company's plant. Subsequently it began furnishing to the town of Weston lights for some of the streets and alleys thereof. At the time of the filing of this complaint between 20 and 30 of the business houses and some 10 residences, within the area mentioned, were being lighted or partially lighted by electricity from the Company's plant.

At this time the city was being furnished 30 or 32 lights, for which it paid for only 5 or 6 of these the sum of $19.50 per month. The re-

mainder of the lights were furnished gratuitously. All of the electrical energy sold is delivered to consumers at the Company's plant, for says one of the complainants, "we were told if we would run the line we could have the service." The Company has no distribution system for supplying any of these private persons, nor is it incorporated for this purpose, nor is this purpose mentioned among the things which as a corporation it may do, nor has it a franchise from the town of Weston as an electric lighting company, or any other permission to enter or cross the streets and alleys thereof. It does not itself place or construct any poles or wires upon the streets, alleys or public places of the city, nor does it own any poles or wires. The consumer desiring the surplus light or power furnishes his wire and poles, and bears all cost of constructing the line for transmitting the electric current from the Company's plant to the place of consumption, or he "taps in" on some other private owner's wire. The actual work of construction and installation is usually done, if not always, by employés of the Company, in which case the Company is reimbursed by the private consumer. In some instances the contracts for this installation were made directly with the employés themselves, and the work was done after working hours. In some cases the amount of current consumed is measured by a meter, which meter belongs to the consumer; and in others—the greater number of cases—the amount paid is governed by a flat rate. * * *

The complainant Roach is the owner of a weekly newspaper published in Weston, called the Weston Herald. About a year or a year and a half before the matters here in controversy arose, complainant bought this paper and printing plant from one Taylor. Power and lights were then being furnished by the Company, through respondent, upon the arrangement above set out to Taylor, and after complainant's purchase of the newspaper the service was continued until June 7, 1916, when the wires were suddenly cut by Danciger, without prior notice, and the service discontinued. Upon demand made for reinstatement of the service, and upon a refusal thereof, this proceeding was brought. * * *

The Commission, after taking voluminous testimony in the case, made a report in which it held that respondent was conducting a public utility, that he owed the duty of serving complainant, and that the discontinuance of the service was without reasonable excuse, and thereupon entered an order that the service be restored. From this order respondent herein took the case by the statutory writ of review or certiorari to the circuit court of Jackson county, wherein, upon a hearing de novo, the order of the Commission was annulled. Thereupon the Commission and the complainant, Roach, appealed.[73]

FARIS, J. (after stating the facts as above). * * * There is but one question in the case. That is a question of law, and is, to wit: Is M. O. Danciger, trading as M. O. Danciger & Co., engaged in doing

[73] The statement of facts is abbreviated and parts of the opinion are omitted. P.UTIL.

such business as by law permits the regulation thereof by the Public Service Commission Act? * * *

It is contended by appellants that the whole question is settled by subdivisions 12 and 13 of section 2 of the Public Service Commission Act, which define an "electric plant" and an "electric corporation," over which plants and aggregations, as defined, other appropriate provisions of this act (subdivision 25, § 2, p. 560, Laws 1913), confer plenary powers of regulation. The above clauses read thus:

"The term 'electric plant,' when used in this act, includes all real estate, fixtures and personal property operated, controlled, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power; and any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power."

"The term 'electrical corporation,' when used in this act, includes every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees, or receivers appointed by any court whatsoever (other than a railroad or street railroad corporation generating electricity solely for railroad or street railroad purposes or for the use of its tenants and not for sale to others) owning, operating, controlling or managing any electric plant except where electricity is generated or distributed by the producer solely on or through private property for railroad purposes or for its own use or the use of its tenants and not for sale to others."

While the definitions quoted supra express therein no word of public use, or necessity that the sale of the electricity be to the public, it is apparent that the words "for public use" are to be understood and to be read therein. State ex rel. v. Spokane, etc., Co., 89 Wash. 599, 154 P. 1110. For the operation of the electric plant must of necessity be for a public use, and therefore be coupled with a public interest; otherwise the Commission can have no authority whatever over it. The electric plant must, in short, be devoted to a public use before it is subject to public regulation. Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77. Since the sole right of regulation depends upon the public interest, the subdivisions quoted above, and which define an electric plant and an electric corporation, mean the same, whether the idea of a public use is expressly written therein or not; it is, nevertheless, of necessity connoted and to be understood therein. We are not to be understood as saying that an electric plant constructed solely for private use could not, by professing public service, become by such profession, and by the furnishing of general public service, a public utility.

There is in this case no explicit professing of public service, or undertaking to furnish lights or power to the whole public, or even to all persons in that restricted portion thereof who reside within three blocks of the Company's plant; for there is in the case neither existence nor assertion of the right of eminent domain. Nor does there exist any

franchise or license, nor has there been obtained from the town of Weston any right or privilege to cross the streets, alleys, or other public places therein nor are there any charter powers authorizing the Company, or the respondent, to engage in the public service. The fact of professing public service—that is, of holding himself or the Company out as ready and willing to serve the public—must therefore, in order to hold respondent, be deduced implicitly, if it is to be found in this record at all.

It is certainly fundamental that the business done by respondent either constitutes him a "public utility," or it does not. If he is a public utility, he is such within the whole purview, and for all inquisitorial and regulatory purposes of the Public Service Commission Act. If, therefore, what respondent did constitutes him a public utility, other apposite sections of the law confer upon the Commission the power of compelling him to furnish and provide such instrumentalities and facilities as shall be safe and adequate to furnish service. Section 68, p. 602, Laws 1913. Still other provisions would seem to confer upon the Commission the power to compel service as to all residences, businesses, and purposes within a radius of three blocks from the Company's plant. Certainly so much could be compelled by orders of the Commission. Absent the matter of franchise, it is possible, we suggest arguendo, that plenary authority exists, if respondent be a public utility, to compel the furnishing of the service to the entire town of Weston. The plant is now running at its full capacity, and if any considerable extension of the service thereof were ordered, extensive and expensive additions of machinery to the plant must likewise be ordered. In order to afford such service to the whole town, or even to all persons within the three blocks area, the respondent would be compelled to obtain from the town of Weston a franchise permitting him to erect poles and wires along and across the public streets and alleys thereof. In an analogous case we have said that the Commission cannot compel a public utility to do a thing wherein the obtaining of a franchise is a condition precedent. State ex rel. v. Public Service Com., 270 Mo. loc. cit. 442, 192 S. W. 958, 198 S. W. 872.

In the light of these considerations, does the business of respondent constitute him a public utility, within the meaning of the Public Service Commission Act? We are of opinion that it does not; for, as forecast above, state regulation of private property can be had only pursuant to the police power, which power is bottomed on and wholly dependent upon the devotion of private property to a public use. If the requirement that the private property shall be devoted to a public use, before it can be regulated, and before inquisitorial authority be exercised over it, is not to be read into the applicatory law, then that law is obviously unconstitutional, because it takes private property for public use without compensation.

The precise question before us is one of first impression in this jurisdiction. It has been up before the courts but few times in any jurisdic-

tion. It has been up recently before the Public Service Commissions of the several states a number of times. The holding of the courts thereon, while not absolutely unanimous, has been usually against the contentions of the appellants here (Cawker v. Meyer, 147 Wis. 320, 133 N. W. 157, 37 L. R. A. [N. S.] 510; Del Mar Light & Power Co. v. Eshleman, 167 Cal. 666, 140 P. 591, 948; State ex rel. v. Spokane, etc., Railroad Co., 89 Wash. 599, 154 P. 1110; Brown v. Gerald, 100 Me. 351, 61 A. 785, 70 L. R. A. 472, 109 Am. St. Rep. 526; Minnesota Canal & Power Co. v. Koochiching Co., 97 Minn. 429, 107 N. W. 405, 5 L. R. A. [N. S.] 638, 7 Ann. Cas. 1182; Avery v. Vermont Electric Co., 75 Vt. 235, 54 A. 179, 59 L. R. A. 817, 98 Am. St. Rep. 818; Fallsburg Co. v. Alexander, 101 Va. 98, 43 S. E. 194, 61 L. R. A. 129, 99 Am. St. Rep. 855; 1 Wyman on Public Service Corps. 243), while a very few of the courts, and the Public Service Commissions rather unanimously, have held to the contrary (Wingrove v. Public Service Commission, 74 W. Va. 190, 81 S. E. 734, and cases cited in L. R. A. 1918A, 210). * * *

The case of Van Dyke v. Geary, 244 U. S. 39, 48, 37 S. Ct. 483, 486 (61 L. Ed. 973), is strongly relied on by appellants as upholding their contentions. We do not regard it as doing so, and we have no quarrel with the law announced, upon the facts existing in that case. The facts, which in our view differentiate that case from this one are thus stated by the court in the opinion: "Counsel contend that the use is not public, because water is furnished only to particular individuals in fulfillment of private contracts made with the purchasers of town-site lots. *But there is nothing in the record to indicate that such is the fact.*" (Italics ours.)

The rule by which profession of public employment is to be tested, where, as here, such profession arises if at all implicitly, is thus laid down by Mr. Wyman: "The fundamental characteristic of a public calling is indiscriminate dealing with the general public. As Baron Alderson said in the leading case: 'Everybody who undertakes to carry for any one who asks him is a common carrier. The criterion is whether he carries for particular persons only, or whether he carries for every one. If a man holds himself out to do it for every one who asks him, he is a common carrier; but if he does not do it for every one, but carries for you and me only, that is a matter of special contract.' This regular course of public service without respect of persons makes out a plain case of public profession by reason of the inevitable inference which the general public will put upon it. 'One transporting goods from place to place for hire, for such as see fit to employ him, whether usually or occasionally, whether as a principal or an incidental occupation, is a common carrier.'" 1 Wyman on Pub. Service Corps. 227.

Testing the facts of the instant case by this rule, and by the rule announced by the majority of the courts, as well as by the reason of the thing, and the far-reaching results of any other view, rather than by the view taken by a majority of the Public Service Commissions of the several states, we are constrained to hold that as to complainant, the

respondent owed him no continuing public duty of service, and that the view taken nisi is correct.

It follows that the case ought to be affirmed. Let this be done. All concur.[74]

SOUTHERN OKLAHOMA POWER CO. v. CORPORATION COMMISSION et al.

(Supreme Court of Oklahoma, 1923. 96 Okl. 53, 220 P. 370.)

COCHRAN, J. This is an appeal from an order of the corporation commission entered on the 21st day of December, 1922, adjudging that the Southern Oklahoma Power Company was a public utility under chapter 93, Session Laws 1913, and ordering such corporation to file with the corporation commission all reports required of public utilities by law or by orders 201 and 774 of the corporation commission. The Southern Oklahoma Power Company is a corporation organized and existing under the laws of the state of Oklahoma with its principal place of business at Ada, Okl. It owns and operates an electrical plant located at Byng, Okl., and is engaged in generating electric current, the entire output of the plant being sold at the switchboard of the Southern Oklahoma Power Company to the Oklahoma Light & Power Company, under the terms of a 20-year contract. The Oklahoma Light & Power Company is an Oklahoma corporation engaged in the business of transmitting and distributing electric energy and current to various towns and cities served by it in the state of Oklahoma.

The question for determination is whether a plant engaged in the manufacture of electric energy which it furnishes under contract at the switchboard in its plant to a public utility which is engaged in the business of transmitting and distributing current to various cities of the state is a public utility, and, as such, subject to control by the corporation commission of this state.

Section 19, art. 9, of the Constitution of Oklahoma, provides: "The commission may be vested with such additional powers, and charged with such other duties (not inconsistent with this Constitution) as may be prescribed by law, in connection with the visitation, regulation, or control of corporations, or with the prescribing and enforcing of rates and charges to be observed in the conduct of any business where the state has the right to prescribe the rates and charges in connection therewith. * * *"

Section 3462, Comp. Stat. 1921, provides: "The term 'public utility,' as used in this act, shall be taken to mean and include every corporation,

[74] Accord: Stoehr v. Natatorium Co., 34 Idaho, 217, 200 P. 132 (1921). For a collection of cases dealing with the effect of rendering incidental service to a limited number of the public, see note 18 A. L. R. 764. See comment on principal case, 32 Harv. Law Rev. 169.

association, company, individuals, their trustees, lessees, or receivers, successors or assigns, except cities, towns, or other bodies politic, that now or hereafter may own, operate, or manage any plant or equipment, or any part thereof, directly or indirectly, for public use, or may supply any commodity to be furnished to the public. * * * (c) For the production, transmission, delivery or furnishing electric current for light, heat or power."

The plaintiff in error contends that the Southern Oklahoma Power Company does not hold itself out to the public as furnishing power or electricity; that it simply furnishes electricity to one public utility under private contract; that this is simply a case of a private corporation furnishing a public utility with a commodity which the latter in turn distributes for public use; and that the element is lacking which would determine that it is a public utility, viz. the impression of its service with a public use.

It is our opinion that the statutory definition of a public utility is sufficiently broad to include a plant operated as the plant of the plaintiff in error, where it generates electricity and furnishes same under a contract to a public utility for distribution to the public. This corporation operates a plant which furnishes and supplies a commodity (electric energy) to be furnished to the public for the production of electric current for light, heat, and power. The statute does not require that the corporation furnish the commodity to the public, but, if it furnishes a commodity for the purpose of that commodity being delivered to the public for the production of light, heat, or power, it comes within the statutory definition. It is our opinion that the statute impresses the service rendered by this corporation with a public use.

Plaintiff in error contends further that the corporation is not a public utility because it does not profess to serve the public, and because its charter provisions do not permit the exercise of the functions of a public utility. In this connection it is contended by the plaintiff in error that in Oklahoma Natural Gas Co. v. Corporation Commission, 88 Okl. 51, 211 P. 401, this court held that a corporation should not be required to render a service outside and beyond its profession of service, and under this announcement the plaintiff in error should not be held to be a public utility, because it does not profess to be such. The rule announced in the above case has no application to the case at bar, as that case applied to an order requiring the Oklahoma Natural Gas Company to give service which it had not been giving, and which it did not profess to give; whereas, in the instant case, we have an attempt to regulate a service which is already being rendered. In the instant case the corporation commission says: "The service in which you are engaged, and in which you profess to be, constitutes you a public utility, and subject to the statutory regulations as such."

No effort is made to require the corporation to do something which it has not professed; but only to regulate the corporation in connection with the service which it professes and actually renders. The plaintiff

contends that the corporation commission is attempting to extend its regulatory jurisdiction over a company which has never made any dedication of its property to a public use, or made any profession of service to the public. Such is not the case. The statute has prescribed that the very service performed by this corporation is a public service, and, when the corporation undertakes to and does perform that service which the statute has defined to be a public service, such action constitutes a dedication of property to the public use.

It is next contended that the charter of the company provides that it is incorporated for the purpose of building, owning and operating a plant in Pontotoc county to be used for the purpose of manufacturing and selling at the switchboard of the corporation at its power plant electric energy, and that it can only exercise the rights and powers conferred by its charter, and, since its charter does not authorize it to assume to serve the public generally, service to the public would be ultra vires. It is sufficient to say that the charter provision is adequate to authorize the corporation to do just what it is doing, to wit, supply and sell to the Oklahoma Light & Power Company electric energy at the switchboard of the corporation to be distributed by the Oklahoma Light & Power Company to the public, and that such acts which are authorized to be performed by it under its charter are such acts as constitute the corporation a public utility under the statute.

The various authorities cited by plaintiff in error on the question as to what constitutes profession of service sufficient to render a corporation a public utility are of no value here, as none of them construe a statutory provision similar to ours. In North Carolina Public Service Co. v. Southern Power Co., 282 F. 837, the Circuit Court of Appeals of the Fourth Circuit had under consideration a statute of North Carolina, which provided: "The corporation commission shall make reasonable and just rules and regulations—1. To prevent discrimination in the transportation of freight or passengers, or in furnishing electricity, electric light, current, power or gas"—and, in holding that this statute was sufficient to authorize the corporation commission to regulate the furnishing of current by a private corporation to independent vendors, said: "Surely the court has no power to say that the Legislature meant to provide a limitation which it refrained from expressing; namely, that furnishing current or power to independent vendors was not furnishing current or power within the unlimited terms of the statute."

And in the instant case we are of the opinion that the Legislature intended, and in plain terms provided, for the control of the corporation commission of all plants producing electricity to be furnished to the public for the production of light, heat, or power.

In State ex rel. Public Service Commission of Washington v. Spokane, 89 Wash. 599, 154 P. 1110, L. R. A. 1918C, 675, the court said: "The regulation and control of business of a private nature is sustained by reference to the police power, and even then it is sustained only when the courts have been [fully] able to say that a business is, in char-

acter and extent of operation, such that it touches the whole people and affects their general welfare. It is upon this principle that Noble State Bank v. Haskell, 219 U. S. 104, * * * and German Alliance Ins. Co. v. Kansas, 233 U. S. 389, * * * rest. Until the Legislature brings a business within the police power by clear intent courts will not do so. Courts have assumed to say whether an act of the Legislature falls within the police power, but primarily the assertion of police power is for the Legislature."

In the instant case, it is our opinion that the Legislature has asserted its police power, and the business of the plaintiff in error is clearly within the terms of the statute.

It is further contended by the plaintiff in error that the construction which we have given to section 1, c. 93, Session Laws 1913, renders the law unconstitutional, in that the order of the commission requires an extension of the business of the company beyond its profession of service, and is an attempt to convert a private corporation into a public utility, and thus deprive the plaintiff in error of its property without due process of law, in contravention of sections 7 and 24, art. 2, of the Constitution of Oklahoma, and in contravention of the Fourteenth Amendment of the Constitution of the United States. We have heretofore concluded that the order of the corporation commission did not require an extension of the business of the company beyond its profession of service, and the contention that the order of the commission has the effect of converting a private corporation into a public utility and thus depriving the corporation of its property without due process of law is not well founded, because the statute, defining a public utility and which we have held constitutes the plaintiff in error a public utility while furnishing electric energy in the manner hereinbefore described, was the law of this state before the corporation entered into its contract with the Oklahoma Light & Power Company and undertook to sell electric energy which was to be furnished to the public for the purpose of producing light, heat, and power by electricity. The company therefore entered into this contract and undertook this service with full knowledge of the existing law which rendered a corporation performing such service a public utility.

Under these circumstances the corporation will not be heard to complain that this order of the corporation commission which was plainly within the scope of the statutes in effect when the corporation entered into its contract for furnishing electric energy to the Oklahoma Light & Power Company, was a conversion of its private property to public use without due process of law, as it voluntarily undertook the performance of a service which under the existing statute rendered it a public utility. Pierce Oil Corporation v. Phœnix Refining Co., 259 U. S. 125, 42 S. Ct. 440, 66 L. Ed. 855; P. U. R. 1922E, p. 236; United States v. Ohio Oil Co., 234 U. S. 548, 34 S. Ct. 956, 58 L. Ed. 1459.

In view of our holding on the above questions, it is unnecessary to determine the questions raised in the fifth and sixth assignments of

error. It is our opinion that the order of the corporation commission should be and the same is hereby affirmed.[75]

McNEILL, V. C. J., and KENNAMER, MASON, and BRANSON, JJ., concur.

NICHOLSON, J., dissents.

[75] Accord: North Carolina Public Service Co. v. Southern Power Co. (C. C. A.) 282 F. 837, 33 A. L. R. 626 (1922); People's Natural Gas Co. v. Public Service Commission, 79 Pa. Super. Ct. 560 (1922). Similarly, in United States v. Ohio Oil Co., 234 U. S. 548, 34 S. Ct. 956, 58 L. Ed. 1459 (1914), the provision of the Interstate Commerce Act declaring all persons engaged in the transportation of oil, by pipe line, or partly by pipe line and partly by railroad or water, to be common carriers within the meaning of the act, was held to include a company which was engaged only in transporting its own oil. See comment on this case in 14 Col. Law Rev. 662, and 28 Harv. Law Rev. 84.

CHAPTER 2

SUPERVISION OF PUBLIC UTILITIES

SECTION 1.—ENTRY AND WITHDRAWAL

WEST SUBURBAN TRANSP. CO. v. CHICAGO & W. T. RY. CO.

(Supreme Court of Illinois, 1923. 309 Ill. 87, 140 N. E. 56.)

Proceeding by the West Suburban Transportation Company before the Commerce Commission for certificate of convenience and authority to operate motor vehicles over certain routes. An order granting the certificate was reversed and set aside on appeal by the Chicago & West Towns Railway Company, and applicant appeals.

FARMER, C. J.[1] The West Surburban Transportation Company applied to the Illinois Commerce Commission for a certificate of convenience and necessity and authority to operate motor vehicles for the transportation of passengers and property in towns west of Chicago, called in this record the West Towns. * * *

The Chicago & West Towns Railway Company has for several years operated a street railway system through most of the same towns for carrying passengers, and that transportation company resisted the application of the bus company for a certificate of convenience and necessity and authority to operate bus lines in the same territory. Applicant, the bus company, proposed to operate five motor vehicles on a fixed schedule at a definite rate of fare, and receive and discharge passengers at any and all points along the route. The objection of the street railway company was that the bus lines were a duplication of its transportation system, and, in part, parallel its street railways on the same streets, and would create competition between the two companies, using different means of conveyance. After a hearing the Commerce Commission on April 19, 1922, entered an order that the operation of the bus lines over the routes described was a convenience to the public and a necessary transportation facility, and the commission ordered that, upon the bus company complying with certain conditions for the protection of the public, a certificate of convenience and necessity issue. The street railway company appealed from that order to the superior court of Cook county, where after a hearing, the order and decision of the Commerce Commission were reversed and

[1] Parts of the opinion are omitted.

set aside. From the judgment of the superior court the bus company has prosecuted this appeal to this court. * * *

Appellee has for many years maintained and operated through the West Towns, west of Forty-Eighth avenue, lines of street railway for the transportation of passengers. The Western Electric plant is situated on Forty-Eighth avenue and extends south from Twenty-Second street. It employs approximately 25,000 persons. The bus lines terminate at the Western Electric plant on the east. One of appellee's railway lines runs from that plant west on Twenty-Second street to Harlan avenue, then south to Twenty-Sixth street, west and south through the north edge of Riverside and Brookfield, south through La Grange Park, and terminates at Stone Avenue station, in La Grange. The proof showed it carries on this line as many as 3,600 passengers in one day and furnishes service approximately every 20 minutes. Another of appellee's lines runs from the Western Electric plant west on Twenty-Fifth and Twenty-Sixth streets to Ridgeland avenue, in Berwyn, then south and west to the line between Berwyn and Riverside (which is Harlem avenue), then south on Harlem avenue to Ogden avenue, and southwest along Ogden avenue into Lyons, where the line terminates. The proof shows that it carries as high as 6,200 passengers a day on this line, with a schedule of a car from 5 to 15 minutes. Appellee also operates a north and south line in Cicero, extending from Twenty-Second street south to Thirty-Sixth street, which is more than a mile south of Ogden avenue, over which the bus lines operate. Appellee also operates a line north on Forty-Eighth avenue from Twenty-Fifth street. With the exception of Western Springs, Hinsdale, and Fullersburg both transportation lines operate through the same towns and are at no point more than a mile apart, but through approximately nine-tenths of the territory served by both transportation companies they are much nearer, and both lines are in the same street from Forty-Eighth avenue to Oak Park avenue, a distance of about three miles.

If the transportation facilities furnished by appellee are so inadequate as to subject the public to inconvenience, and the operation of appellant's bus lines would eliminate that inconvenience, the order of the commission was authorized. It is not the policy of the Public Utilities Act to promote competition between common carriers as a means of providing service to the public. The policy established by that act is that, through regulation of an established carrier occupying a given field and protecting it from competition it may be able to serve the public more efficiently and at a more reasonable rate than would be the case, if other competing lines were authorized to serve the public in the same territory.[2] Methods for the transportation of persons are

[2] For an excellent note dealing with "a number of innovations in legislative policy with respect to public utilities," see "Recent Statutes Relating to Carriers," 24 Col. Law Rev. 528.

Was there any limitation at common law in respect of engaging in public service? See 32 Harv. Law Rev. 716; 24 Col. Law Rev. 528.

established and operated by private capital as an investment, but as they are public utilities the state has the right to regulate them and their charges, so long as such regulation is reasonable. The policy of the Public Utilities Act is that existing utilities shall receive a fair measure of protection against ruinous competition. Rates of fare charged for service are subject to regulation by the Commerce Commission within reasonable limits, but the commission has no power to make a rule or order regulating a utility which would amount to a confiscation of its property or require operation under conditions which would not provide a reasonable return upon the investment. Where one company can serve the public conveniently and efficiently, it has been found from experience that to authorize a competing company to serve the same territory ultimately results in requiring the public to pay more for transportation, in order that both companies may receive a fair return on the money invested and the cost of operation.

The Chicago, Burlington & Quincy Railroad runs southwest from the Western Electric plant, through Cicero, Berwyn, Riverside, Brookfield, La Grange, Western Springs, and Hinsdale, and performs a large part in the transportation of the public in those towns. It has 15 stations between the Western Electric plant and Hinsdale, a distance of about 8 miles, and runs from 19 to 34 trains each way per day. This suburban service accommodates people desiring to go to points in the city of Chicago, as well as persons desiring to stop at intervening stations between the Western Electric plant and Hinsdale.[3] It does not appear that the public has ever made any complaint that the transportation service in the towns mentioned was inadequate or insufficient, and no proof was offered on the hearing to that effect except the testimony of appellant's officers, and their testimony is not impressive. Only a comparatively small portion of the population of the West Towns would be more conveniently served by the operation of the bus lines.

"For several men were jointly indicted for erecting and keeping of four several inns in Bathe; it was moved that the indictment was insufficient, because the offence of the one is not the offence of the other, like unto the case in Dyer 19, where two joyn in an action upon the case of words, 'tis not good, but they ought for to sever in their actions, because the wrong to the one, is no wrong to the other. Dodderidge Justice, One indictment may comprehend several offences, if they be particularly laid, and then it is in law several indictments: it may be intended that the inns were lawfull inns; for it is not laid to be ad nocumentum, and therefore not punishable; but if they be an annoyance and inconvenient for the inhabitants, then the same ought particularly to appear, otherwise it is a thing lawfull to erect an inn. * * * And in an action upon the case against an inn-keeper, he needeth not to shew that he hath a license to keep the inn." Extract from Anonymous, King's Bench, Godbolt, 345, 78 Reprint, 203 (1623).

The requirement of certificates of convenience and necessity has not been restricted to common carriers. In some jurisdictions it is applied to public utilities generally. See the note above cited, 24 Col. Law Rev. 528, at 531.

[3] In determining the convenience and necessity of motor vehicle transportation, should other modes of transportation be considered? In accord with principal case: McLain v. Public Utilities Commission, 110 Ohio St. 1, 143 N. E. 381 (1924). Contra: Rapid Ry. Co. v. Michigan Public Utilities Commission, 225 Mich. 425, 196 N. W. 518 (1923).

The Commerce Commission has no arbitrary powers. Its orders must be reasonable and lawful, and the question whether they are so or not is subject to review on appeal. Public Utilities Com. v. Toledo, St. Louis & Western Railroad Co., 267 Ill. 93, 107 N. E. 774; Chicago Bus Co. v. Chicago Stage Co., 287 Ill. 320, 122 N. E. 477. To authorize the Commerce Commission to grant appellant a certificate of convenience and necessity, and authority to operate its lines to serve the same public already served by an existing utility, it was required that it be shown the existing utility was not rendering adequate and convenient service, and that the operation of the bus line would eliminate such inadequacy and inconvenience. In determining that question the primary consideration is the convenience and necessity of the public. Public Utilities Com. v. Cleveland, Cincinnati, Chicago & St. Louis Railway Co., 288 Ill. 502, 123 N. E. 547. Whether the public convenience and necessity require the establishment of a new transportation facility is not determined by the number of individuals who may ask for it. The public must be concerned, as distinguished from any number of individuals. Public Utilities Com. v. Toledo, St. Louis & Western Railroad Co., 286 Ill. 582, 122 N. E. 158.

Some individuals—perhaps a considerable number—would be convenienced by the operation of the bus lines; but it is clear from the record that to the great body of the public it would be neither a convenience nor necessity. It was not within the authority of the commission to authorize the operation of the bus lines for the convenience of a small part of the public already served by other utilities at no very great inconvenience. The order appealed from stated the bus company proposes to operate its transportation facilities at a lower rate of fare than the public is now paying, and in appellant's brief it says the fare charged is 5 cents; but the order does not fix the rate of fare to be charged. Assuming appellant is limited to a 5-cent fare and appellee is charging a larger rate, that was not, of itself, sufficient to authorize the order of the commission. The commission had authority to regulate the rate charged by the appellee, and if its fares were excessive to reduce them. Fares are not the only thing to be considered in a case of this kind. The public is interested and vitally concerned in adequate transportation facilities at reasonable rates, and the state is interested in assisting to get them; but the state cannot, as we have said, require a carrier to furnish service at a rate which will not pay a fair return on the investment and cost of operation. We are not advised that any complaint had ever been made to the commission that appellee is charging excessive rates, and so far as this case is concerned we will assume it is not doing so. The effect of authorizing the operation of the bus lines at a lower fare to serve the same territory would be to decrease appellee's revenues, and, if the rate it is now charging is a reasonable one, to require it to operate at a loss or increase its rate. This would be against the public interest, because appellant's lines cannot accom-

modate more than a comparatively small portion of the public in the matter of transportation.

The superior court found and adjudged that the order of the commission was against the manifest weight of the evidence heard, that the operation of the bus lines is not a convenience to the public and a necessary transportation facility, that the present transportation facilities are not inadequate and do not subject the public to inconveniences which will be eliminated by authorizing the operation of the bus lines, and that the order and decision of the commission are unreasonable. We are of opinion the decision of the superior court was right, and its judgment is affirmed.

Judgment affirmed.[4]

PEOPLE ex rel. POTTER et al. v. BOARD OF RAILROAD COM'RS et al.

(Supreme Court of New York, Appellate Division, Third Department, 1908. 124 App. Div. 47, 108 N. Y. S. 288.)

Certiorari by the people, on the relation of Elizabeth L. Potter and others, to review proceedings by the railroad commissioners certifying as to the necessity and convenience of the Cooperstown & Northern Railway Company under Railroad Law, Laws 1890, p. 1082, c. 565, § 89, as amended by Laws 1892, p. 1395, c. 676, etc.

JOHN M. KELLOGG, J. The proposed road is to run from the village of Cooperstown to the village of Springfield Center, upon the westerly side of Otsego Lake. It is to be a standard-gauge steam railway about 12 miles in length, and is to be built as an independent road. The village of Cooperstown has about 2,500 inhabitants, the village of Springfield Center about 300 inhabitants, the town of Springfield, including Springfield Center, about 1,800 inhabitants. The principal necessity for the road is supposed to be the furnishing of railroad facilities to Springfield Center and the town of Springfield. Springfield Center is now 6 miles distant from the Delaware, Lackawanna & Western Railway station and the Oneonta & Mohawk Valley Railway at Richfield Springs, and about 7½ miles distant from the Delaware & Hudson Railroad station at Cherry Valley, and about 10 miles distant from the Delaware & Hudson station at Cooperstown. The freight rate at Cherry Valley is the Albany rate, the freight rate at Richfield Springs is the Utica rate, the freight rate at Cooperstown is the Albany rate plus the charge from Oneonta to Cooperstown, the Delaware & Hudson Company giving no through rate to Cooperstown, and the

[4] For a discussion of matters to be considered on the question of convenience and necessity, see Norfolk Sou. R. Co. v. Commonwealth (Va.) 126 S. E. 82 (1925).

present rate from Cooperstown to Oneonta for car load lots is 4 cents per 100 pounds and from 5 to 15 cents per 100 pounds for broken car lots. It now costs 50 cents per ton less to ship hay from Cherry Valley than from Cooperstown. The town of Springfield extends in an easterly and westerly direction. The easterly part of the town is nearer to Cherry Valley than to Springfield Center, and the westerly part nearer to Richfield Springs than to Springfield Center, and it is evident that, if the proposed railway is built, it will still be cheaper and nearer for the farmers in the easterly part of the town of Springfield to take their produce to Cherry Valley, and for those in the western part of the town to take theirs to Richfield Springs. Thus the principal advantage of the road will be to the village of Springfield Center and to the population of about 900 included within a radius of about two miles from that village.

Various witnesses were sworn as to the probable amount of milk, hay, and other products to be shipped from the town of Springfield, assuming that the entire products of the town will go over the proposed railroad, which we have seen is not probable. The passenger travel seems to be very light, and it is at present conducted by a stage coach running once a day from Springfield Center to Cooperstown. In the summer there is a line of boats upon Otsego Lake which accommodates in part the summer travel. The stock of the proposed road is $240,000. It is estimated that it will cost $254,000 to build the road, exclusive of equipment and the right of way. The equipment is estimated at $100,000, so that the road at the beginning, if the stock represents actual cash, will be $114,000 in debt, besides the cost of the right of way. It is evident that the road could not be bonded for that amount, unless it is fairly demonstrated that it could pay running expenses and interest on the bonds at least. From the record it is extremely probable that the road cannot pay running expenses. It therefore would apparently be a financial cripple from the start, and there is no public necessity for the construction of a road which cannot maintain itself and which must inevitably be bankrupt from the beginning. Such a road in this territory cannot be a public convenience or necessity.

It is unnecessary to go into detail as to the estimated business and the probabilities that the company may do such business, and the probable cost of operation and maintenance. The evidence as to the probable business and shipments is evidently mere guesswork and greatly exaggerated. A mere statement of the locality of the proposed road and the manner in which that locality is now served by the railroads clearly indicates that there is no necessity for this road.

The question here is not whether the railroad commission would have authority to permit a railroad to be constructed upon a right of way owned by the promoters of the road. The promoters do not own the right of way, but are seeking to take the property of the relators for their own use, which cannot be done. A public use only will authorize

the taking of the property of the relators against their will. There is in this case no public necessity which justifies or requires that the owners be deprived of their property.

The order appealed from should be annulled, with $50 costs and disbursements to be paid by the respondent railway company. All concur, except SEWELL, J., not voting.[5]

DAVIS & BANKER, Inc., v. NICKELL et al.

(Supreme Court of Washington, 1923. 126 Wash. 421, 218 P. 198.)

Action by Davis & Banker, Inc., doing business under the name and style of the Methow Valley Transportation Company, against G. E. Nickell and others, doing business under the name and style of G. E. Nickell & Sons. From an order denying an injunction and dismissing this action, plaintiff appeals.

TOLMAN, J. Appellant is operating a freight and passenger stage line on state highway No. 12, between Pateros and Winthrop, in Okanogan county, under a certificate of convenience and necessity, duly issued to it by the board of public works. It has filed and posted its schedules, and apparently complied with the law and with the regulations of the board in all respects. By its complaint in this action it charges:

"That for the purpose of injuring and damaging the plaintiff the defendants have, without any authority of law whatever, ever since the 9th day of June, 1921, been carrying passengers between said towns of Winthrop and Pateros, pretending to do so without charge or remuneration, and they have, between the 9th day of June, 1921, and the 1st day of July, 1922, injured and damaged the plaintiff by the hauling of passengers to the extent of $20 per week, aggregating the sum of $1,100, and since the 1st day of July, 1922, the defendants have injured and damaged the plaintiff by hauling passengers to the extent of $15 per day, aggregating the sum of $420. That the defendants have ever since the 9th day of June, 1921, been operating cars and vehicles on said state highway No. 12, between said terminal points of Winthrop and Pateros, for the purpose of hauling passengers, and for the express purpose of injuring and damaging the plaintiff, and unless restrained and enjoined by the order of this court they will continue to do so, to the great injury and damage of the plaintiff, and for which it has no plain, speedy, and adequate remedy at law."

All of which is denied by answer. Upon the trial below abundant testimony was introduced to the effect that the defendants, who had a certificate of convenience and necessity for transporting freight only

[5] See Wabash, C. & W. Ry. Co. v. Commerce Commission, 309 Ill. 412, 141 N. E. 212 (1923); Construction Application of Michigan N. R. R., 65 Interst. Com. Com'n R., 480 (1920).

over the same route, had, for a year prior to the taking effect of the Transportation Act of 1921 (chapter 111, Laws of 1921), and ever since, operated a truck twice a week over the entire route; that later a second truck was added, and the trips were much more frequent, and about July 1, 1922, they began to operate, in addition, a Dodge touring car for carrying the mail; and that by each and all of these conveyances they habitually carried passengers, sometimes one, and sometimes as many as four or five, and but seldom did any of their vehicles make the trip without carrying a passenger. There is also evidence that some soliciting of passengers was done by and on behalf of the defendants, and one witness testified to certain statements made by one of the defendants, which strongly indicates a settled purpose to thus injure the plaintiff's business. As against this the testimony on behalf of the defendants denied nothing of that which we have referred to, but admitted the carrying of any one who asked, denied ever having made any charge, or having received any compensation therefor, and asserted that it was their purpose at any and all times to carry any one, friend or stranger, who desired to be carried, as an accommodation only. The trial court seems to have been of the opinion that the defendants were not engaged in transporting passengers for hire, were therefore not violating the terms of the Transportation Act, and that the plaintiff was entitled to no relief. From a judgment denying injunctive relief, and dismissing the action, the plaintiff has appealed.

The purpose of the Transportation Act is to permit the establishment of regular and dependable service wherever public necessity and convenience requires. No adequate service can be given without proper equipment, and, as appears here, appellant has invested upwards of $20,000 in equipment to enable it to properly serve the public on this route. An income must be earned, which will cover operating costs and depreciation, and give some return on the investment or the service cannot be long continued. In the case of Public Utilities Commission v. Garviloch, 54 Utah, 406, 181 P. 272, the Supreme Court of Utah said:

"The granting of a certificate of convenience and necessity by the commission of Chandler, therefore, was in the nature of a limited franchise, which authorized him to operate his automobile stage line over the route designated in the certificate for the time and under the conditions therein specified. The certificate, therefore, not only confers authority to operate the stage line, but it necessarily also affords him protection against any one who unlawfully interferes with the right thereby conferred. If such is not the legal effect of the certificate, then the operation of utilities may easily become detrimental rather than beneficial to the public and thus result in a farce."

This case was referred to with approval in Seattle & Rainier Valley R. Co. v. Superior Court (Wash.) 212 P. 259.

There can be no question but that, if respondents were shown to be collecting fares from the passengers transported, their acts would

be an unlawful interference with the rights of appellant. Puget Sound Traction, Light & Power Co. v. Grassmeyer, 102 Wash. 482, 173 P. 504, L. R. A. 1918F, 469. But is not the true test, not whether the unlicensed operator is deriving a profit, but whether his acts are necessarily a direct injury to the certificate holder? We think so, and we are not without authority to sustain this view. Norris v. Farmers' & Teamsters' Co., 6 Cal. 590, 65 Am. Dec. 535; Vallejo Ferry Co. v. Solano Aquatic Club, 165 Cal. 255, 131 P. 864, Ann. Cas. 1914C, 1197. Nor is there any intimation in the Grassmeyer Case, supra, that a different rule would have been applied, if the competing service had been free of charge.

By what we have already said we do not mean in any sense to condemn and outlaw neighborly acts, even though frequently indulged in, and if it appeared that respondents did nothing more than to offer to and carry passengers overtaken on the highway, even if habitually done, we would not interfere. But, as we read the testimony here, respondents constantly picked up passengers at both termini and at way stations in such a way and under such conditions that, in the absence of further explanation, the conclusion that it was done for the purpose of injuring appellant's business seems unescapable. We conclude, therefore, that appellant was entitled to an injunction to the extent herein indicated.

Reversed and remanded for further proceedings in accordance with the views herein expressed.[6]

MAIN, C. J., and PARKER and FULLERTON, JJ., concur.

PEMBERTON, J., dissents.

BUCK v. KUYKENDALL, State Director of Public Works of Washington.

(Supreme Court of the United States, 1925. 267 U. S. 307, 45 S. Ct. 324, 69 L. Ed. 623.)

Suit by A. J. Buck against E. V. Kuykendall, Director of Public Works of the State of Washington. Motion for preliminary injunction was denied by the District Court (295 F. 197, 203), and plaintiff appeals.

Mr. Justice BRANDEIS delivered the opinion of the Court.[7]

This is an appeal, under section 238 of the Judicial Code (Comp. St. § 1215), from a final decree of the federal court for Western Wash-

[6] Injunctions were granted in United Traction Co. v. Smith, 115 Misc. Rep. 73, 187 N. Y. S. 377 (1921); Memphis Street Ry. Co. v. Rapid Transit Co., 138 Tenn. 594, 198 S. W. 890 (1917); Carson v. Woodram, 95 W. Va. 197, 120 S. E. 512 (1923); Princeton Power Co. v. Calloway (W. Va.) 128 S. E. 89 (1925). And denied in Healy v. Sidone (N. J. Ch.) 127 A. 520 (1923); Fulton L., H. & P. Co. v. Seneca River P. Co., 123 Misc. Rep. 585, 205 N. Y. S. 821 (1924). See 24 Col. Law Rev. 528 (534).

The principal case is discussed in 37 Harv. Law Rev. 395.

[7] Part of the opinion and a marginal note are omitted.

ington, dismissing a bill brought to enjoin the enforcement of section 4 of chapter 111 of the Laws of Washington of 1921. That section prohibits common carriers for hire from using the highways by auto vehicles between fixed termini or over regular routes, without having first obtained from the director of public works a certificate declaring that public convenience and necessity require such operation. The highest court of the state has construed the section as applying to common carriers engaged exclusively in interstate commerce. Northern Pacific Ry. Co. v. Schoenfeldt, 123 Wash. 579, 213 P. 26; Schmidt v. Department of Public Works, 123 Wash. 705, 213 P. 31. The main question for decision is whether the statute so construed and applied is consistent with the federal Constitution and the legislation of Congress.

Buck, a citizen of Washington, wished to operate an auto stage line over the Pacific Highway between Seattle, Wash., and Portland, Or., as a common carrier for hire exclusively for through interstate passengers and express. He obtained from Oregon the license prescribed by its laws. Having complied with the laws of Washington relating to motor vehicles, their owners and drivers (Carlsen v. Cooney, 123 Wash. 441, 212 P. 575), and alleging willingness to comply with all applicable regulations concerning common carriers, Buck applied there for the prescribed certificate of public convenience and necessity. It was refused. The ground of refusal was that, under the laws of the state, the certificate may not be granted for any territory which is already being adequately served by the holder of a certificate, and that, in addition to frequent steam railroad service, adequate transportation facilities between Seattle and Portland were already being provided by means of four connecting auto stage lines, all of which held such certificates from the state of Washington. In re Buck, P. U. R. 1923E, 737. To enjoin interference by its officials with the operation of the projected line, Buck brought this suit against Kuykendall, the director of public works. The case was first heard, under section 266 of the Judicial Code, before three judges, on an application for a preliminary injunction. They denied the application. 295 F. 197. A further application for the injunction made after amending the bill was likewise denied. 295 F. 203. Then the case was heard by the District Judge upon a motion to dismiss the amended bill. The final decree dismissing the bill was entered without further opinion. See, also, Interstate Motor Transit Co. v. Kuykendall, 284 F. 882.[8]

That part of the Pacific Highway which lies within the state of Washington was built by it with federal aid pursuant to Act July 11, 1916, c. 241, 39 Stat. 355, as amended by Act Feb. 28, 1919, c. 69, 40 Stat. 1189, 1200 (Comp. St. Ann. Supp. 1919, § 7477bb), and Federal Highway Act Nov. 9, 1921, c. 119, 42 Stat. 212 (Comp. St. Ann. Supp. 1923, § 7477¼ et seq.). Plaintiff claimed that the action taken by the Wash-

[8] See, also, Liberty Highway Co. v. Michigan Public Utilities Commission (D. C. Mich.) 294 F. 703 (1923).

ington officials, and threatened, violates rights conferred by these federal acts and guaranteed both by the Fourteenth Amendment and the commerce clause. In support of the decree dismissing the bill this argument is made. The right to travel interstate by auto vehicle upon the public highways may be a privilege or immunity of citizens of the United States. Compare Crandall v. Nevada, 6 Wall. 35, 18 L. Ed. 745. A citizen may have, under the Fourteenth Amendment, the right to travel and transport his property upon them by auto vehicle. But he has no right to make the highways his place of business by using them as a common carrier for hire. Such use is a privilege which may be granted or withheld by the state in its discretion, without violating either the due process clause or the equal protection clause. Packard v. Banton, 264 U. S. 140, 144, 214 S. Ct. 257, 68 L. Ed. 596. The highways belong to the state. It may make provision appropriate for securing the safety and convenience of the public in the use of them. Kane v. New Jersey, 242 U. S. 160, 37 S. Ct. 30, 61 L. Ed. 222. It may impose fees with a view both to raising funds to defray the cost of supervision and maintenance and to obtaining compensation for the use of the road facilities provided. Hendrick v. Maryland, 235 U. S. 610, 35 S. Ct. 140, 59 L. Ed. 385. See, also, Pierce Oil Corporation v. Hopkins, 264 U. S. 137, 44 S. Ct. 251, 68 L. Ed. 863. With the increase in number and size of the vehicles used upon a highway, both the danger and the wear and tear grow. To exclude unnecessary vehicles—particularly the large ones commonly used by carriers for hire—promotes both safety and economy. State regulation of that character is valid even as applied to interstate commerce, in the absence of legislation by Congress which deals specifically with the subject. Vandalia R. R. Co. v. Public Service Commission, 242 U. S. 255, 37 S. Ct. 93, 61 L. Ed. 276; Missouri Pacific Ry. Co. v. Larabee Flour Mills Co., 211 U. S. 612, 29 S. Ct. 214, 53 L. Ed. 352. Neither the recent federal highway acts, nor the earlier post road acts (Rev. Stat. § 3964 [Comp. St. § 7456]; Act March 1, 1884, c. 9, 23 Stats. 3 [Comp. St. § 7457]), do that. The state statute is not objectionable because it is designed primarily to promote good service by excluding unnecessary competing carriers. That purpose also is within the state's police power.

The argument is not sound. It may be assumed that section 4 of the state statute is consistent with the Fourteenth Amendment; and also, that appropriate state regulations adopted primarily to promote safety upon the highways and conservation in their use are not obnoxious to the commerce clause, where the indirect burden imposed upon interstate commerce is not unreasonable. Compare Michigan Public Utilities Commission v. Duke, No. 283, 266 U. S. 570, 45 S. Ct. 191, 69 L. Ed. 445, 36 A. L. R. 1105, decided January 12, 1925. The provision here in question is of a different character. Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines, not the manner of use, but

the persons by whom the highways may be used. It prohibits such use to some persons, while permitting it to others for the same purpose and in the same manner. Moreover, it determines whether the prohibition shall be applied by resort, through state officials, to a test which is peculiarly within the province of the federal action—the existence of adequate facilities for conducting interstate commerce. The vice of the legislation is dramatically exposed by the fact that the state of Oregon had issued its certificate which may be deemed equivalent to a legislative declaration that, despite existing facilities, public convenience and necessity required the establishment by Buck of the auto stage line between Seattle and Portland. Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden, but to obstruct, it. Such state action is forbidden by the commerce clause. It also defeats the purpose of Congress, expressed in the legislation giving federal aid for the construction of interstate highways. * * *

Reversed.[9]

Mr. Justice McREYNOLDS dissenting.

SATTERLEE et al. v. GROAT.

(Supreme Court of New York, 1828. 1 Wend. 272.)

This was an action on the case, against the defendant as a common carrier, tried at the Albany circuit in August, 1827, before Hon. William A. Duer, one of the circuit judges. The facts of the case are stated in the opinion pronounced, except that the motion for a new trial was supported by an affidavit that the plaintiffs were surprised on the trial, by the proof adduced by the defendant, that he had discontinued the business as a common carrier, which they stated they would be able to contradict, in case a new trial was granted. The cause was submitted to the court on written arguments.

By the Court, SUTHERLAND, J.* The defendant was a common carrier between Schenectady and Albany, previous to 1819. He then sold out all his teams but one, which he kept for agricultural purposes on his farm. One witness, however, testified, that defendant employed his team in the carrying and forwarding business, as occasions offered, until

[9] See the companion case of Bush & Sons v. Maloy, 267 U. S. 317, 45 S. Ct. 326, 69 L. Ed. 627, decided the same day as the principal case. Mr. Justice McReynolds dissented in each case and delivered one opinion covering both. It is omitted. See 25 Col. Law Rev. 670.

For an account of the motor bus service, its rapid growth, and its relationship to railroads, see "Roads—Motor and Rail," by George W. Anderson, in the March, 1925, Atlantic Monthly.

* Part of the opinion is omitted.

1822 or 1823. But subsequent to that period, there is no evidence whatever of his carrying or forwarding a single load, until April, 1824, when one John Dows applied to him, very urgently, to bring some loads for him from Albany to Schenectady, to which the defendant reluctantly consented, and dispatched one Asia with his team for the purpose, with special instructions to bring nothing for any other person; if Dows' goods were not ready, to come back empty. He brought two loads and returned for a third, under the same instructions, repeated again and again; but Dows' third load not being ready, instead of returning empty as he was directed to do, he applied to the plaintiffs for a load, which they furnished him, to be carried to Frankfort, in Herkimer county. He arrived at Schenectady late at night. The next morning it was discovered that one of the boxes had been broken open, and a part of the goods stolen. The defendant disavowed all responsibility for the goods, before it was discovered that any of them had been taken, and declared that Asia had violated his express instructions in bringing them. Asia was subsequently convicted of the theft, and sent to the state prison. The defendant gave immediate notice to the plaintiffs of all the facts, and that he did not hold himself responsible for the goods.

The judge charged the jury, that if the defendant was responsible at all, it was either on the general liability of a common carrier, and that depended upon the fact, whether he was, at the time, a common carrier or not; or upon a special contract for carrying the goods. That it was for the jury to determine, whether the defendant was, at the time, acting in the capacity of a common carrier; and if they believed that the teamster had been specially employed by the defendant, for a particular purpose and object, then he could not bind the defendant by a contract beyond his special employment. The jury found for the defendant.

The law was correctly laid down by the judge. The defendant stood upon the same footing, as though he had never been engaged in the forwarding business. He had abandoned it entirely certainly one year, and according to the weight of evidence, four years previous to this transaction.[10] He makes a special contract with Dows to bring goods for him from Albany, and gives his teamster express instructions to bring goods for no one else. He was acting under a special contract, and not in the capacity of a common carrier. Is he then responsible for the act of his servant, done in violation of his instructions, and not in the ordinary course of the business in which he was employed? If a farmer send his

10 "If an inn-keeper taketh down his signe, and yet keepeth an hosterie, an action upon the case will lie against him, if he do deny lodging unto a travailer for his money; but if he taketh down his signe, and giveth over the keeping of an inn, then he is discharged from giving lodging." Extract from Anonymous, King's Bench, Godbolt, 345, 78 Reprint, 203 (1623). "Indeed, we are by no means certain that the charter [of a corporation under a special act with power to hold land for the purpose of conducting a public hotel] imposes any duty on the defendant of carrying on the hotel." Conklin v. Prospect Park Hotel Co., 48 Hun, 619, 1 N. Y. S. 406 (1888). See, also, 24 Col. Law Rev. 528.

servant with a load of wheat to market, and he, without any instructions from his master, applies to a merchant for a return load, and absconds with it, is the master responsible? Most clearly not. * * *

The verdict is according to the weight of evidence. There is nothing in the ground of surprise; if there was, it should have been the subject of a special motion.

Motion for new trial denied.

BROOKS-SCANLON CO. v. RAILROAD COMMISSION OF LOUISIANA.

(Supreme Court of the United States, 1920. 251 U. S. 396, 40 S. Ct. 183, 64 L. Ed. 323.)

Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit by the Brooks-Scanlon Company, a Minnesota corporation organized to manufacture and deal in lumber and to carry on other incidental business, against the Railroad Commission of Louisiana. It seeks to set aside an order (Number 2228) of the Commission requiring the plaintiff either directly or through arrangements made with the Kentwood and Eastern Railway Company, to operate its narrow gauge railroad between Kentwood and Hackley in Louisiana upon schedules and days to be approved by the Commission. The plaintiff alleges that the order cannot be complied with except at a loss of more than $1,500 a month, and that to compel compliance would deprive the plaintiff of its property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States, with other objections not necessary to be mentioned here. The defendant denies the plaintiff's allegations and in reconvention prays for an injunction against the tearing up or abandoning of the road and for a mandate upholding the order. In the Court of first instance a preliminary injunction was issued in favor of the Commission, but was dissolved upon bond. Subsequently a judgment was entered denying a motion of the Commission to set aside the order dissolving the injunction, and after a trial on the merits judgment was entered for the plaintiff, declaring the order void. The defendant appealed from both judgments to the Supreme Court of the State. That Court reversed the decision below and reinstated the injunction granted on the defendant's prayer.

It seems that the Banner Lumber Company, a Louisiana corporation, formerly owned timber lands, sawmills and this narrow gauge railroad. The road was primarily a logging road but it may be assumed to have done business for third persons as a common carrier. The Banner Lumber Company sold the whole property to the Brooks-Scanlon Lumber Company on November 1, 1905, the stockholders of which obtained a charter for the railroad as the Kentwood and Eastern Railway Com-

pany on December 5 of the same year. In the interim it was managed by them with separate accounts. An oral lease of the road was made to the new company and soon afterwards the Brooks-Scanlon Lumber Company transferred its property to the Brooks-Scanlon Company, the plaintiff in error. On the first of July, 1906, the Brooks-Scanlon Company made a written lease of the road to the Railway Company and sold to it all the rolling stock and personal property used in connection with the road. Thereafter the road was run as before, doing a small business as a common carrier but depending upon the carrying of logs and lumber to make it a profitable rather than a losing concern. In course of time the timber of the Brooks-Scanlon Company was cut and it terminated the lease to the Railway Company, which discontinued business on April 22, 1918, with the assent of the Railroad Commission, and sold its rolling stock. At that time the Commission being advised that it had no power did nothing more. But later, subsequent to a decision by the Supreme Court in May, it issued notice to the Brooks-Scanlon Company and the Railway to show cause why the road should not be operated, gave a hearing, and issued the order complained of here. The Supreme Court, after saying that the two corporations were one under different names stated that the only question left for determination was whether the plaintiff could be compelled by the Commission to operate its railroad, and concluded that although the railroad showed a loss, the test of the plaintiff's rights was the net result of the whole enterprise—the entire business of the corporation—and on that ground made its decree.

We are of opinion that the test applied was wrong under the decisions of this Court. A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage. On this point it is enough to refer to Northern Pacific Ry. Co. v. North Dakota, 236 U. S. 585, 595, 599, 600, 604, 35 S. Ct. 429, 59 L. Ed. 735, L. R. A. 1917F, 1148, Ann. Cas. 1916A, 1, and Norfolk & Western Ry. Co. v. West Virginia, 236 U. S. 605, 609, 614, 35 S. Ct. 437, 59 L. Ed. 745. It is true that if a railroad continues to exercise the power conferred upon it by a charter from a State, the State may require it to fulfill an obligation imposed by the charter even though fulfillment in that particular may cause a loss. Missouri Pacific Ry. Co. v. Kansas, 216 U. S. 262, 276, 278, 30 S. Ct. 330, 54 L. Ed. 472. But that special rule is far from throwing any doubt upon a general principle too well established to need further argument here. The plaintiff may be making money from its sawmill and lumber business but it no more can be compelled to spend that than it can be compelled to spend any other money to maintain a railroad for the benefit of others who do not care to pay for it. If the plaintiff be taken to have granted to the public an interest in the use of the railroad it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss.[11] Munn v. Illinois, 94 U. S. 113,

11 "The power of the Legislature to compel continuity in a business can only arise where the obligation of continued service by the owner and its employees is direct and is assumed when the business is entered upon. A common

126, 24 L. Ed. 77. The principle is illustrated by the many cases in which the constitutionality of a rate is shown to depend upon whether it yields to the parties concerned a fair return.

While the decision below goes upon the ground that we have stated, it is thrown in at the end as a makeweight that the order of the Commission calls upon the plaintiff "to submit a new schedule for transportation which may be operated at much less expense to it than the former schedule cost, and at a profit for plaintiff." This is merely the language of hope. We cannot take it to be a finding of fact, for we perceive nothing in the evidence that would warrant such a finding. The assumption upon which the Court made its ruling was that the plaintiff's other business was successful enough to stand a loss on the road.

Finally a suggestion is made in argument that the decision rested also upon another ground that cannot be reconsidered here. At the end of the opinion it is stated that the plaintiff has not petitioned the Railroad Commission for leave to discontinue this business and that until it has done so the courts are without jurisdiction of the matter. It is not impossible that this is an oversight since it seems unlikely that after the Commission has called the plaintiff before it on the question and against its strenuous objection has required it to go on, such an empty form can be required. But in any case it cannot be meant that the previous discussion which occupies the whole body of the opinion is superfluous and irrelevant to the result reached; nor can the words be taken literally, since the court proceeded to take jurisdiction and reinstated an injunction in favor of the defendant. Whatever may be the forms required by the local law it cannot give the Court or Commission power to do what the Constitution of the United States forbids, which is what the order and injunction attempt. Pennsylvania R. R. Co. v. Public Service Commission of Pennsylvania (November 10, 1919) 250 U. S. 566, 40 S. Ct. 36, 63 L. Ed. 1142.

Decree reversed.[12]

carrier, which accepts a railroad franchise, is not free to withdraw the use of that which it has granted to the public. It is true that if operation is impossible without continuous loss (Brooks-Scanlon Co. v. R. R. Commission, 251 U. S. 396, 40 S. Ct. 183, 64 L. Ed. 323 [1920]; Bullock v. R. R. Commission, 254 U. S. 513, 41 S. Ct. 193, 65 L. Ed. 380 [1921]), it may give up its franchise and enterprise, but, short of this, it must continue. Not so the owner, when by mere changed conditions his business becomes clothed with a public interest. He may stop at will, whether the business be losing or profitable." Taft, C. J., in Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A. L. R. 1280 (1923).

[12] See note, "Compelling a Public Utility to Operate at a Loss," 37 Harv. Law Rev. 368. See, also, 32 Yale Law J. 75. For earlier cases, see "The Withdrawal from Service of Public Utility Companies," by Oliver P. Field, 35 Yale Law J. 169, at page 171 (1925); and "Limitation upon the Right of Withdrawal from Public Employment," by H. W. Chaplin, 16 Harv. Law Rev. 555 (1903).

CITY OF GAINESVILLE v. GAINESVILLE GAS & ELECTRIC POWER CO.

(Supreme Court of Florida, 1913. 65 Fla. 404, 62 So. 919, 46 L. R. A. [N. S.] 1119.)

Bill by the City of Gainesville, a municipality, against the Gainesville Gas & Electric Power Company, a corporation. From an order dissolving an injunction, plaintiff appeals.

WHITFIELD, J.[13] The city of Gainesville obtained an injunction restraining the Gas & Electric Company "from closing down or discontinuing its public service business" of furnishing electricity to the city and its inhabitants. A demurrer to the bill of complaint was interposed. This appeal is from an order "that the injunction be and the same is dissolved, with the right of the complainant to amend the bill in ten days from this date or the bill may be dismissed without prejudice to such other action as the complainant may be advised is proper." The question to be determined is whether there was error in dissolving the injunction.

The bill of complaint alleges, in effect: That the municipality has all the usual powers of cities in this state, and is authorized "to provide for the lighting of the streets of said city and to provide for the lighting of the said city by gas and other illuminating material and to do and perform all such other acts as shall seem necessary and best adapted to the improvement and general interest of said city, or as shall be necessary for the health, convenience and safety of its citizens." That a charter was granted by the state to the defendant as a corporation, authorizing the corporation to exist for 99 years and, among other things, to engage in the business of manufacturing, generating, and selling electric current for lighting and power purposes; such business to be engaged in in the city of Gainesville. That thereafter the company erected "and constructed within the corporate limits of said city of Gainesville an electric lighting and power plant and by and with the permission of said city aforesaid, erected and constructed its poles and wire for the distribution of electric current over and along a large number of the streets of said city, and from that date until the present time has been continuously engaged in the manufacture and sale of electricity for illuminating and power purposes. That during all that time and to this date the said Gainesville Gas & Electric Power Company have been continuously furnishing electricity to said city for the lighting of the streets, public places, and public buildings of said city, and are now furnishing electricity therefor; and that during all of said time it has furnished electricity to the inhabitants of said city who desired to procure the same and who paid therefor and that complied with the rules and regulations of such company; and that continuously from the time when

[13] Parts of the opinion are omitted.

said Gainesville Gas & Electric Power Company began the manufacture, generation, and sale of such electricity it has sought to increase the number of consumers of its products among the inhabitants of said city and to induce them to abandon other systems and methods of illumination and to become consumers of its electric products; and that at the present time there are about six hundred sixty (660) dwellings, stores, and other buildings within said city which are supplied by it with electricity as the only means of illumination. That, in addition thereto, said Gainesville Gas & Electric Power Company have been furnishing and selling electric motors for the furnishing of power for the operation of manufacturing plants and ginneries and has equipped and supplied its motors to cotton gins in said town which it is estimated will gin during the coming season in the aggregate about 1,000 bales of cotton. * * *

That said company is the only "person, firm, or corporation in the said city of Gainesville engaged in the manufacture, generation, and sale of electricity. That it has acquired and holds a valuable easement from said city in the permission granted it to use and in the use of the streets of said city wherein it has erected its poles and placed its wires for the purpose of conveying and by means of which it conveys its electric current, and that as a corporation authorized by the state of Florida to engage in the business of supplying a public utility it is the duty of said Gainesville Gas & Electric Power Company to continue to supply electric current as aforesaid to said city and those of its inhabitants who are consumers thereof, and that it is without power or authority to cease and discontinue such service to the said city, or such of its inhabitants who are consumers thereof, and that said city of Gainesville will be without ability to light the streets, or to properly protect the lives and property of its inhabitants. That such of its inhabitants who are consumers of electric current will be without adequate means for the illumination of their homes and places of business. That the producers of cotton who rely upon the ginning thereof by the ginneries located in said city will be obliged to haul their products for long distances to reach other ginneries, and that the operation of the university of the state, the giving of its course of study, and the opportunity properly to pursue the same, will be greatly impaired and retarded in the event the said Gainesville Gas & Electric Power Company shall cease the manufacture and sale of electricity as it has announced its intention so to do, and that neither the said city of Gainesville, nor the other consumers of electricity among its inhabitants as aforesaid, can be adequately compensated in damages in the event of the wrongful discontinuance of the manufacture and sale of electricity by the said Gainesville Gas & Electric Power Company, and that your orator is without adequate remedy at law in the premises." "That the company has published its intention to discontinue the public service it has undertaken to perform."

The policy of the law is to require by mandatory process the performance by public utility corporations of their duties to the public.

State ex rel. Ellis v. Tampa Waterworks Co., 57 Fla. 533, text 539, 48 So. 639, 22 L. R. A. (N. S.) 680.

A corporation engaged in furnishing electricity to a municipality or its inhabitants and using public streets or exercising other franchises or privileges in doing so is thereby performing services of a public nature, within the meaning of the Constitution and laws of this state, and such a corporation is subject to lawful governmental regulations to enforce its duties to the public it undertakes to serve. Such a corporation is manifestly a "public service" or "public utility" corporation, and is subject to the rules of law applicable to corporations or companies engaged in performing or rendering service of a public nature. See 1 Wyman, Pub. Ser. Cor. § 113.

As the gas and electric company had received and accepted from the state a corporate charter authorizing it to engage in the business of manufacturing, generating, and selling electric current for lighting and power purposes to the municipality and its inhabitants, and had by and with the permission of the city constructed its plant using the streets of the city for its poles and wire by means of which the public service of furnishing electric current to the city and its inhabitants for lighting and power purposes was performed, for which the company was entitled under the Constitution and laws of this state to receive a reasonable compensation in return for service rendered, the company assumed the duty imposed by implication of law to render a reasonably adequate service during the time its rights and duty may lawfully continue, and such duty may be enforced where no adequate excuse for nonperformance is appropriately shown. See Gaslight Co. v. Zanesville, 47 Ohio St. 35, 23 N. E. 60. An express contract is not essential to establish reciprocal rights between a public service company and the public it undertakes to serve. Such rights arise by implication of law. See State ex rel. Ellis v. Atlantic Coast Line R. Co., 53 Fla. 650, 44 So. 213, 13 L. R. A. (N. S.) 320, 12 Ann. Cas. 359.

The defense undertaken to be shown when the injunction was dissolved is in substance that the ordinances passed by the city regulating the company's service and compensation are in effect confiscatory and unduly arbitrary and burdensome to the company. This is not a sufficient reason for a discontinuance of the public service. While it is the duty of the company to observe all lawful municipal regulations, the company has a right to receive a reasonable compensation for the public service it renders to the city and its inhabitants and to the equal protection of the laws in every department of the government. If the regulations imposed by the city are in law and in fact illegal for any reason, the company has its complete and adequate remedy by appropriate proceedings; but the company, being engaged in rendering a public service, must continue to do so in a reasonably adequate manner until relieved of its duty by due process of law. Illegal municipal regulations are not binding; but persons and corporations cannot be permitted to arbitrarily assume to remedy an alleged wrong by refusing to render a

public service voluntarily undertaken. The service to the public must be performed, and the law will upon proper proceedings enforce the right to reasonable compensation for service rendered. An ordinary action at law would not afford an adequate remedy to the public. * * *

While the public service must be performed in a reasonably adequate manner, unlawful regulations as to rates should not be enforced. The court may on a proper showing enjoin illegal regulations of the rates to be charged; the duty of the company being to render the service undertaken, and its right being to charge a reasonable compensation for service rendered.

The decree dissolving the injunction is reversed, and the cause is remanded, with directions to retain the bill of complaint for the purposes of appropriate injunction orders, with leave to the defendant company by cross-bill or other procedure to test the validity of the municipal regulations of which it complains.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

BULLOCK, Circuit Judge, et al. v. STATE OF FLORIDA ex rel. RAILROAD COMMISSION OF STATE OF FLORIDA et al.

(Supreme Court of the United States, 1921. 254 U. S. 513, 41 S. Ct. 193, 65 L. Ed. 380.)

Prohibition proceeding by the State of Florida, on relation of the Railroad Commission of the State of Florida and others, against W. S. Bullock, Judge of the Circuit Court of the Fifth Judicial Circuit of the State of Florida, and another. Prohibition was granted (State v. Bullock, 82 So. 866, 8 A. L. R. 232; Id., 83 So. 701), and defendants bring error, and apply for a writ of certiorari.

Mr. Justice HOLMES * delivered the opinion of the Court.

This is a proceeding by the relators seeking a prohibition forbidding a State judge of a lower court to confirm a sale of a railroad "for the purpose of and with the privilege on the part of the purchaser of dismantling the same" as authorized by a foreclosure decree. The trustee of the mortgage under foreclosure was made a party to the proceeding and demurred upon the ground that the prohibition would deprive him of his property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States. The Supreme Court of Florida granted the prohibition, State v. Bullock, 82 So. 866, 8 A. L. R. 232; Id., 83 So. 701, and thereupon this defendant sued out a writ of error and filed a petition for a writ of certiorari from this Court. Action upon the latter was postponed to the

* Part of the opinion is omitted.

hearing on the writ of error. Certiorari being the only remedy the petition is granted, as the case is deemed a proper one to be reviewed.

The road concerned is that of the Ocklawaha Valley Railroad Company. It succeeded by foreclosure of a previous mortgage to a logging road, and gave the present mortgage to Hood, one of the plaintiffs in error, in trust for the bondholders. The bonds are held by the Assets Realization Company. Before the present bill for foreclosure was filed the Railroad Company had applied to the Railroad Commission for leave to cease operations, had been refused, and the State, by the Railroad Commission, had obtained an injunction forbidding the dismantling of the road and requiring it to go on. It ceased operations however on December 7, 1917. On December 10, 1917, the bill to foreclose was filed. On the same day the State filed a bill in the same Court, ancillary to its other bill, asking for a receiver to operate the road until further order, and a few days later sought to have its bill consolidated with the foreclosure suit. This was denied and the State's bill was dismissed. The decree of foreclosure complained of was entered on December 24, 1917, but on January 22, 1918, in deference to the State's contention that the road could be run at a profit, although the State had not been admitted formally as a party, H. S. Cummings was appointed a receiver, he being the most available man and being able by his connections to give the road a good deal of business in the way of carrying lumber. After nearly a year's trial the Court was satisfied that the road could not go on and thereupon ordered a sale which was made on February 3, 1919. On March 27, 1919, the Court admitted the State as a party and informed counsel that if it turned out as the Receiver and State insisted, "that the road was operating so as to pay expenses of operation and the taxes and had some reasonable show for business the sale would not be confirmed." On May 5, 1919, the Court entered an order finding that the road was hopelessly insolvent and could not be operated so as to have any net income whatever but postponing confirmation of the sale until May 12, before which time the proceedings for prohibition were begun.

The foreclosure decree of December 24, 1917, provided for a first offer of the road to be used as a common carrier, but if less than $200,000 was bid, there was to be a second offer with the privilege of dismantling. If, however, the bid on the second offer did not exceed by $100,000 the bid under the first offer, if there was one, the bid under the first offer was to be accepted. The trustee for bondholders was authorized to use the indebtedness of the company in bidding and to apply his bid, if accepted, to the same. There was no bid on the first offer and the Assets Realization Company bought the property under the second. The prohibition is against confirming the sale and against so much of the foreclosure decree as authorized the second offer or dismantling the road. The ground of decision was that in the absence of statute a railroad company has no right to divert its property to other uses without the consent of the State and that the lower Court

had no jurisdiction to make the prohibited portion of the decree in a proceeding to which the State was not a party until after the decree had been made.

It is not questioned that the lower Court had jurisdiction of the foreclosure and it is not suggested that any statute forbids the decree that was made. The decision of the Court proceeds upon a doctrine as to the duty of the railroad company, again a duty not based upon statute, and although stated in terms of jurisdiction, depends entirely upon a determination of what the rights of the company are. If the company had the right to stop its operations and dismantle its road we do not understand that it is doubted that the decree might embody that right in its order of sale. * * *

Apart from statute or express contract people who have put their money into a railroad are not bound to go on with it at a loss if there is no reasonable prospect of profitable operation in the future. Brooks-Scanlon Co. v. Railroad Commission of Louisiana, 251 U. S. 396, 40 Sup. Ct. 183, 64 L. Ed. 323. No implied contract that they will do so can be elicited from the mere fact that they have accepted a charter [14] from the State and have been allowed to exercise the power of eminent domain.[15] Suppose that a railroad company should find that its road was a failure, it could not make the State a party to a proceeding for leave to stop, and whether the State would proceed would be for the State to decide. The only remedy of the company would be to stop, and that it would have a right to do without the consent of the State if the facts were as supposed. Purchasers of the road by foreclosure would have the same right.

But the foreclosure was not a proceeding in rem and could confer no rights except those existing in the mortgagor. A purchaser at the sale would acquire all such rights as the mortgagor had to stop operations, whatever words were used in the decree, and, whatever the words, would get no more. The prohibition excluding from the decree the words purporting to authorize dismantling the road did not cut down the future purchaser's rights, any more than did the presence of those words enlarge them. Therefore the action of the Supreme Court is not open to objection under the Constitution of the United States, although it may be that it hardly would have been taken if the authority to dismantle had not sounded more absolute than it could be in fact, considering the nature of the proceeding. Without previous statute or contract to compel the company to keep on at a loss would be an unconstitutional taking of its property. But the prohibition does not compel the company to keep on, it simply excludes a form of authority

[14] For a case illustrating a method of interpreting statutes in order to determine whether they become a part of the charter contract, see Railroad Commission of Texas et al. v. Eastern Texas R. Co. et al., 264 U. S. 79, 44 S. Ct. 247, 68 L. Ed. 569 (1924).

[15] But see Day v. Tacoma Ry. & Power Co., 80 Wash. 161, 141 P. 347, L. R. A. 1915B, 547 (1914).

from the decree that gives the illusion of a power to turn the property to other uses that cannot be settled in that case.

As the state voluntarily made itself a party to the foreclosure suit before the decree went into effect, as indeed the decree never has, it might seem that the State ought to be bound in a way that otherwise it would not be. But if in a revisory proceeding the higher State Court says that the State should not be bound and that the decree was wrong in this particular, that is a local question with which we have nothing to do. The result is that although the State Court may have acted on questionable or erroneous postulates there is nothing in its action that calls for a reversal of its judgment.

Writ of error dismissed.

Writ of certiorari granted.

Judgment affirmed.[16]

STATE v. CENTRAL IOWA RY. CO. et al.

(Supreme Court of Iowa, 1887. 71 Iowa, 410, 32 N. W. 409, 60 Am. Rep. 806.)

This is a proceeding to compel the defendant, the Central Iowa Railway Company to equip, maintain, and operate that part of its line of road from Manly Junction to Northwood, in Worth County. A mandatory injunction was ordered by the district court in accord with the prayer of the petition. The defendants appeal.

ROTHROCK, J. 1. The material facts in the case are not in dispute. They are as follows:

The Central Railroad of Iowa was organized as a corporation on the twenty-third day of June, 1869. The object of the corporation, as declared in its charter or articles of incorporation, was "to acquire, construct, maintain, and operate a railroad, from the south to the north line of the state of Iowa, beginning at the state line of Missouri, at or near the terminus of the North Missouri Railroad, and running thence north, on the sixteenth meridian of longitude west from Washington, or as near thereto as practicable." A railroad was constructed from Albia, in Monroe county, north, through the cities of Oskaloosa, Grinnell, Marshalltown, Eldora, and Mason City, to Northwood, the county-seat of Worth county, which last-named place is within a few miles of the north line of the state. The road was constructed, and the cars running thereon, to Northwood, in October, 1871. The said railroad company became insolvent, and its creditors placed its road and other property in the hands of a receiver, and in May, 1879, the road and its fran-

[16] See In re Duluth & N. M. Ry. Co., 150 Minn. 30, 184 N. W. 186 (1921), for an unusual situation involving statutory limitations on the power of the commission to permit a railroad to abandon its road, and comment thereon in 6 Minn. Law Rev. 81.

chises were sold upon a decree of foreclosure. The defendant, the Central Iowa Railway Company, was the purchaser at the foreclosure sale. This company was organized in May, 1879. In its articles of incorporation the object of the corporation was declared to be "to acquire, construct, equip, maintain, and operate a railway from the north to the south line of the state of Iowa, embracing the road and property, both real and personal, of the Central Railroad Company of Iowa."

The road of the Burlington, Cedar Rapids & Northern Railroad Company, successor to the Burlington, Cedar Rapids & Minnesota Company, is a line of railroad constructed and operated from the city of Burlington, in a northerly direction, through the cities of Cedar Rapids, Vinton, Waterloo, and Cedar Falls, to a junction with the line of the Central Iowa Railroad at Manly Junction, about 11 miles south of Northwood. In the year 1877, and while the Central road was under the management of the receiver, he made a contract with the Burlington, Cedar Rapids & Northern Company, by which both of said companies run their trains over the line from Manly Junction to Northwood, to the same depot. The Burlington, Cedar Rapids & Northern Company constructed a road from Northwood to the north line of the state, and on to Albert Lea, there connecting with another line to St. Paul, Minnesota. The last-named company, by this joint running arrangement, was thus enabled to operate through trains from Burlington to St. Paul. It has ever since that time operated through trains between the points named, using the road from Manly Junction to Northwood as part of the line. Both roads continued to use and operate that part of the line between the points last named until the year 1881, when they entered into a written agreement by which the Burlington, Cedar Rapids & Northern Company took full possession of the road from Manly Junction to Northwood, as lessee of the Central Iowa Railway Company. By the terms of this lease the lessee agreed to pay $14,000 per year to the lessor as rent, and to keep the road in repair, pay all taxes and assessments upon that part of the road, and to have the exclusive use of the same for 25 years. Exclusive possession was taken by the lessee under this agreement, and since it was executed such possession has been retained, and the Central Iowa Company has not since that time run its trains north of Manly Junction.

In the year 1870, at a special election held in the township in which Northwood is situated, a tax of 5 per cent. upon the taxable property was voted to aid the Central Railroad Company in constructing its railroad through said township. The tax, amounting to $12,608, was collected and paid to the company. There were also certain lands at Northwood conveyed to the company for depot purposes, by private parties, for which no money consideration was paid. A conveyance of certain alleged swamp lands was made by the county to the company, but as the company took no lands of any value by the conveyance, this alleged aid to the road demands no consideration.

The proceedings in the case at bar originated before the railroad commissioners of this state, under chapter 133 of the Laws of 1884. The people of Northwood made complaint to the commissioners, and the defendants herein were cited to appear, and such proceedings were had that on the thirteenth day of February, 1883, the said commissioners ordered and adjudged "that the Central Iowa Railway is under legal obligations to equip, maintain, and operate its road from Manly Junction to Northwood, and to do so as a part of, and in connection with, its entire and continuous line between Albia and Northwood; and that a failure to so equip, maintain, and operate the portion of the road between Manly Junction and Northwood, and its entire road, is a violation of its charter duties and obligations, and contrary to law." The Central Railroad Company refused to comply with this order, and this action was brought to compel obedience thereto.

The statute above cited provides that the rulings, orders, and regulations of the railroad commissioners for the direction and guidance of railroad companies in this state may be enforced by proper decrees, injunctions, and orders in the district court, and that the proceedings therefor shall be instituted by the attorney general in the name of the state. Said act further provides that "if the court shall find that such rule, regulation, or order is reasonable and just, and that, in refusing compliance therewith, said railway company is failing and omitting the performance of any public duty or obligation, the court shall decree a mandatory and perpetual injunction, compelling obedience to and compliance with such rule, order, or regulation. * * *"

The ultimate question to be determined in the case is this: Has the Central Iowa Railway Company the legal right to lease that part of its road from Manly Junction to Northwood, and surrender the exclusive use of it to another company, and cease to operate its line north of Manly Junction? It is not claimed in behalf of the plaintiff that the defendant had no legal right to lease its line of road, and we fail to discover why such a lease would not be valid. If the whole line were leased and operated by another company, the integrity of the line would be preserved, and the people of Northwood would have the same means and facilities for transportation from one end of the line to the other as if the owner of the road should retain possession of it, and operate it. But the complaint is that by the lease and surrender of part of the line Northwood is practically deprived of the use of the whole line of road, because it is, in effect, situated some 11 miles north of its northern terminus. The question to be determined is one of very great importance. It involves the rights of railroad companies to lease part of their roads, and thus destroy or break up a continuous road, and deprive localities of the benefit of competing lines, and whether a sale of a railroad under a decree of foreclosure releases the purchasing company from the obligations and liabilities which its predecessors owed to the public, and what are the rights of the public in such cases.

Railroad companies have the undoubted power to mortgage their property (Dunham v. Isett, 15 Iowa, 284), and, as we have said, the power of a railroad company to lease its whole line of road is not questioned. Indeed, the power to lease is expressly given by section 1300 of the Code. We come, then, to the question whether the Central Iowa Railway Company had the power to lease the part of its line involved in this controversy. And it is proper, at the outset, that some general principles applicable to the relation between the state or sovereignty and corporations be stated. A corporation is created by legislative power. It can have no power to do any corporate acts without legislative authority, and its power and authority is limited to such acts as are expressly given to it by its charter, or such as are necessarily implied from the powers expressed. Formerly corporations were chartered by special act of the legislature. Now, they are incorporated under general laws, which, with the articles of incorporation adopted by the incorporators, create the same relation between the state and the corporation which would exist if the general laws applicable to the corporation and the articles of incorporation were embodied in a special act of the legislature, creating the corporation, and defining its powers. A railroad corporation differs in some important respects from private corporations in general. It cannot acquire the right to construct its road over private property, against the will of the owner, without an exercise of sovereign power. Eminent domain is an attribute of sovereignty, and, when a railroad company condemns land for right of way upon which to construct its road, it is not the act of an individual. It is the exercise of sovereign authority, and the corporation is the agency through which the state executes the power. And this state authorized towns, cities, and townships to vote taxes to railroad companies to aid in the construction of their roads. This also was an exercise of sovereign power. It is true, the power was not exercised by railroad corporations. But the law authorized taxes to be voted by the legal voters upon all the property in their towns and townships; and those who voted against the tax, and the owners of property who were not voters, were required to pay the tax voted upon them.

The people of Northwood voted the tax, collected and paid it to the railroad company, to the end that they might secure the benefits of the line of road then being constructed by the Central Railroad Company. They did not extend this aid for the building of a line through their township alone. It cannot be admitted that they would have been willing to aid in the construction of a railroad having its beginning and ending in their township without any connection with any other railroad. It is claimed, however, that this is a mere private controversy between the people of Northwood and the railroad company; that no public right is involved; and that the voting of a tax did not create any contractual relations between the tax-payers and the railroad company; and we are cited to Railway Co. v. Horton, 38 Iowa, 33; Trust Co. v. Davis,

6 Kan. 257; Railway Co. v. Kenton, 12 B. Mon. (Ky.) 150; and other cases. But these were all cases brought to enforce the levy or payment of taxes, or the issue of bonds in pursuance of a vote of the people. It may be admitted that no contract exists between the people and the railroad company; but when taxes are voted, collected, and paid to the company, and it has thus availed itself of public aid from taxation, it assumes a relation to the public of a higher and more sacred character than a mere contract between private individuals. It would be at war with every principle of natural justice to hold that it might avail itself of this public aid, and then violate its obligations to the public incurred by reason of the aid thus received.

It is insisted by counsel for appellants that the authority given by section 1300 of the Code to any railroad company to sell or lease "its railway property and franchises," includes the power to lease any part of the line, upon the principle that the power to lease the whole includes the power to lease a part. We think this does not follow. If a lease of a part of the line is a breach of a just and binding obligation to the public, the lease would be illegal. It may be assumed that the Central Railroad Company was not bound to construct the road. A railroad corporation is under no legal obligation to construct a railroad because of its articles of incorporation. Its charter is not a contract with the state to build a railroad. People v. Albany & V. R. Co., 24 N. Y. 261. But, having constructed and put in operation its road, in part at least, by public aid in the way of taxation, the right to abandon or rather turn over part of its line to another company, to the injury of any locality on the line, is quite another question. We do not undertake to determine the question whether, under the mere charter rights of the corporation to build and operate its road, the corporation may abandon part of its line, or lease it to another company so as to destroy competition at points on the line. There appears to be a conflict of authority upon this question. See Black v. Canal Co., 22 N. J. Eq. 410; Com. v. Fitchburg Ry. Co., 12 Gray, 180; State v. Hartford & N. H. R. Co., 29 Conn. 538; Peoria & R. I. R. Co. v. Coal V. M. Co., 68 Ill. 489. It would seem from some of these authorities, and others cited by counsel, that a corporation may abandon its line, and cease to operate it for good and sufficient cause; and, in the case where the business of a railroad will not pay operating expenses, it would be a most unjust rule to require it to be operated by proceedings in mandamus. But that question is not necessarily in this case. The Central Railroad Company was the recipient of more from the public than the mere right of invoking the power of the state to condemn land for a right of way. It received from the public taxes levied and collected to aid in the construction of the road. Its relation and obligation to the public is therefore different from that of a company, not having received any such aid. It appears from chapter 118 of the Laws of 1879 that it was contemplated by the legislature that the obligation to operate a railroad is incurred by accepting taxes in aid of

its construction. That act in effect provides that upon a proper proceeding a railway line may be changed or removed, but upon the condition that all such taxes shall be repaid. It is true, the act applies to such railroads only as were constructed prior to the year 1866, and probably is not applicable to the road in question. But the act indicates that the legislature regarded the obligation to operate the road, as contemplated by the company when it accepted the aid, as binding upon it.

2. We come now to another question in the case, and that is whether this obligation to operate the road passed with the foreclosure sale, and became binding upon the defendant to the same extent as against its predecessor. * * * It is true, the purchaser took the road unincumbered by the debts of the old company. But the obligation to operate the road to Northwood was more than a debt. It inhered in the franchise, so to speak, and pertained to the right to operate the road. It did not pass by an assignment proper; it passed to the grantee as a burden or limitation upon the right to operate the road. Campbell v. Marietta & C. R. Co., 23 Ohio St. 168.

Without further elaboration, our conclusion is that the Central Iowa Railway Company had no power to execute the lease, and thus abandon the part of its line in controversy, and compel its former patrons at Northwood to transport passengers and freight some 11 miles to reach the terminus of a railroad which the defendant was bound to maintain at Northwood. We think that the order of the railroad commissioners, which was approved by the district court, was "reasonable and just," and should be complied with. It will be understood that we do not determine that a contract providing for a joint running arrangement over that part of the line from Manly Junction to Northwood would be illegal. It is the surrender by the Central Railway Company of any right to operate the line, and giving the exclusive right to the Burlington, Cedar Rapids & Northern Railway Company to operate it, that we hold to be unauthorized by law.

Affirmed.[17]

FT. SMITH LIGHT & TRACTION CO. v. BOURLAND et al., City Com'rs.

(Supreme Court of the United States, 1925. 267 U. S. 330, 45 S. Ct. 249, 69 L. Ed. 631.)

Mr. Justice BRANDEIS delivered the opinion of the Court.

The Ft. Smith Light & Traction Company owns and operates in that city a street railway system with about 22 miles of line. Included in the system is a line extending, for a third of a mile, on Greenwood avenue. Under the law of Arkansas, a street railway is not permitted to aban-

[17] Part of this opinion and the dissenting opinion of Seevers, J., are omitted.

don any part of its line without leave of the city commission which exercises the powers of a public utility commission. The company applied to that board for leave to abandon the line on Greenwood avenue because it was, and would be, unremunerative. It appeared, among other things, that the city had concluded to change the grade of Greenwood avenue; that in accepting its franchise the company had agreed to conform to the city ordinances; that these required a street railway, in case of any change in the grade of a street, to make the grade of the tracks conform thereto; that the cost of so relaying the tracks on Greenwood avenue was estimated at $11,000; that the allocated daily earnings of this small part of the system were $2.40, the cost of operating it $8.25; and that the total net earnings of the system in 1922 were $16,000, which amount is about 1.7 per cent. of $934,540, the estimated value of the property. The request to abandon the Greenwood avenue line was denied. This suit was then brought in a court of the state to set aside the order on the ground among others, that it deprived the company of its property in violation of the due process clause of the Fourteenth Amendment. The trial court denied the relief sought. Its judgment was affirmed by the highest court of the state. 160 Ark. 1, 254 S. W. 481. The case is here on writ of error under section 237 of the Judicial Code (Comp. St. § 1214).

The Greenwood avenue line had been in operation nearly 20 years. No change in conditions had supervened which required the commission to permit the abandonment, unless it were the fact that this particular part of the system was being operated at a loss; that continued operation would involve practical rebuilding of that part of the line; that such rebuilding would entail a large expenditure; and that the system as a whole was not earning a fair return upon the value of the property used and useful in the business. The order complained of does not deal with rates. Nor does it involve the question of the reasonableness of service over a particular line. Compare Atlantic Coast Line R. R. Co. v. Corporation Commission, 206 U. S. 1, 23–27, 27 S. Ct. 585, 51 L. Ed. 933, 11 Ann. Cas. 398; Railroad Commission v. Mobile & Ohio R. R. Co., 244 U. S. 388, 37 S. Ct. 602, 61 L. Ed. 1216. It merely requires continued operation. We cannot say that it is inherently arbitrary. A public utility cannot, because of loss, escape obligations voluntarily assumed. Milwaukee Electric Ry. Co. v. Milwaukee, 252 U. S. 100, 105, 40 S. Ct. 306, 64 L. Ed. 476, 10 A. L. R. 892. The fact that the company must make a large expenditure in relaying its tracks does not render the order void. Nor does the expected deficit from operation affect its validity. A railway may be compelled to continue the service of a branch or part of a line, although the operation involves a loss. Missouri Pacific Ry. Co. v. Kansas, 216 U. S. 262, 279, 30 S. Ct. 330, 54 L. Ed. 472; Chesapeake & Ohio Ry. Co. v. Public Service Commission, 242 U. S. 603, 607, 37 S. Ct. 234, 61 L. Ed. 520. Compare Railroad Commission v. Eastern Texas R. R. Co., 264 U. S. 79, 85, 44

S. Ct. 247, 68 L. Ed. 569. This is true even where the system as a whole fails to earn a fair return upon the value of the property.[18] So far as appears, this company is at liberty to surrender its franchise and discontinue operations throughout the city. It cannot, in the absence of contract, be compelled to continue to operate its system at a loss. Brooks-Scanlon Co. v. Railroad Commission of Louisiana, 251 U. S. 396, 40 S. Ct. 183, 64 L. Ed. 323. But the Constitution does not confer upon the company the right to continue to enjoy the franchise or indeterminate permit and escape from the burdens incident to its use.

Affirmed.

PITTSBURGH & SHAWMUT COAL CO. et al. v. DELAWARE & N. R. CO.

(District Court of the United States, N. D. New York, 1923. 289 F. 133.)

Proceeding by the Pittsburgh & Shawmut Coal Company and others against Delaware & Northern Railroad Company, in which the receivers of the Railroad Company made application for an order authorizing the abandonment of a branch of the railroad, which application was resisted by the Town of Andes and certain of its residents.

COOPER, District Judge. Application is made by the receivers of the defendant, Delaware & Northern Railroad Company, for an order authorizing the abandonment of the Andes branch of said railroad, extending from Andes Junction, near Union Grove, to the village of Andes, in the county of Delaware, a distance of 8 miles, and the disposal of the property used in the operation of said branch, including its real estate and right of way.

This railroad company was incorporated under the railroad laws of the state of New York and its railroad is situated entirely in the county of Delaware, in the state of New York, and is about 46 miles in length, including this Andes branch. It has been operated by the receivers since March 16, 1921. During the latter part of the receivership the road has, as a whole, been operated at a profit.

The opponents of this application sharply contest the claim of the receivers that the Andes branch is being operated at a loss of about $7,000 per year, that the traffic is all upgrade from Union Grove to the terminus at Andes, and that the physical conditions are such that the expenses of maintenance are excessive. It will, however, be assumed for the purpose of the argument that the allegations of the receivers are correct, that the branch is operated at a substantial annual loss, that the maintenance charge is excessive, and that the traffic is largely one way.

[18] See State of Iowa v. Old Colony Trust Co., 215 F. 307, 131 C. C. A. 581, L. R. A. 1915A, 549 (1914).

At the threshold of this application, the contention is made that this court has no power to authorize the abandonment of a part of a railroad operated under a franchise from the state of New York. If this be so, it disposes of this application. Little question is raised but that the owners of a railroad may abandon the entire road, if it cannot be operated without continuous loss, and there is no reasonable prospect of profitable operation in the future. Brooks-Scanlon Co. v. Railroad Com., 251 U. S. 396, 40 S. Ct. 183, 64 L. Ed. 323; Bullock v. State of Florida, 254 U. S. 513, 41 S. Ct. 193, 65 L. Ed. 380.

This right of abandonment, being constitutional in its nature, cannot be impaired by subsequent legislative enactment, either federal or state. The abandonment of a part of a railroad, without the consent of the state, because the operation of such part entails a loss, while the profitable part of the road is continued in operation, is quite another question.

The courts of the state of New York seem to have held that a railroad company may not abandon a part of its railroad, and operate the remainder, without the consent of the state. In People v. Albany & Vermont Railroad Co., 24 N. Y. 261, 82 Am. Dec. 295, it appeared that defendant's predecessor was organized for the purpose of operating a railroad between Albany and Eagle Bridge. Soon after acquiring the property at foreclosure, the defendant railroad abandoned a portion of the road running from Waterford Junction to Eagle Bridge, but continued to operate the remainder. The court held that the abandonment was illegal, and that the franchise could only be legally exercised by a corporation operating its entire road, and that it had no privilege or right to abandon part thereof and operate the remainder.

In Paige v. Schenectady Railroad Co., 178 N. Y. 102, 70 N. E. 213, the doctrine that a public railroad corporation cannot abandon a portion of its road at its mere pleasure, is re-asserted. The rule thus applied has been consistently accepted as the doctrine in this state. See Public Service Commission v. New York R. Co., 77 Misc. Rep. 487, 136 N. Y. S. 720, and cases therein cited.

Outside of the state of New York, the great preponderance of authorities supports the same rule. See State of Nebraska v. S. C. & P. R. R. Co., 7 Neb. 359; Colorado & Southern R. Co. v. State Railroad Commission, 54 Colo. 64, 129 P. 506; State ex rel. Naylor v. Dodge City M. & T. R. R. Co., 53 Kan. 377, 36 P. 747, 42 Am. St. Rep. 295; Attorney General v. West Wisconsin Ry. Co., 36 Wis. 466; Brownell v. Old Colony R. Co., 164 Mass. 29, 41 N. E. 107, 29 L. R. A. 169, 49 Am. St. Rep. 442. The courts of the United States have also held that, where a railroad franchise has been accepted by a railroad corporation, it must fulfill all its charter obligations and may not elect to carry out the profitable part and abandon the unprofitable part.

In Missouri Pacific R. Co. v. Kansas, 216 U. S. 262, 30 S. Ct. 330, 54 L. Ed. 472, the Supreme Court of Kansas granted a mandamus to enforce an order of the Kansas Railroad Commission ordering the

defendant company to operate a passenger train over a branch upon which it had discontinued regular passenger service. The Supreme Court of the United States, in affirming the judgment of the state court, said:

"The fact that the performance of the duty commanded by the order which is here in question may, as we have conceded for the purpose of the argument, entail a pecuniary loss, is of course, as declared in the Atlantic Coast Line Case as a general rule, a circumstance to be considered in determining its reasonableness, as are the other criteria indicated in the opinion in that case. But where a duty which a corporation is obliged to render is a necessary consequence of the acceptance and continued enjoyment of its corporate rights, those rights not having been surrendered by the corporation, other considerations are in the nature of things paramount, since it cannot be said that an order compelling the performance of such duty at a pecuniary loss is unreasonable. To conclude to the contrary would be but to declare that a corporate charter was purely unilateral, that is, was binding in favor of the corporation as to all rights conferred upon it and was devoid of obligation as to duties imposed, even although such duties were the absolute correlative of the rights conferred."

In Brooks-Scanlon & Co. v. Railroad Commission, 251 U. S. 396, 40 S. Ct. 183, 64 L. Ed. 323, the court while deciding that the entire railroad enterprise should be abandoned because incapable of operation without loss, also said:

"It is true that if a railroad continues to exercise the powers conferred upon it by a charter from a state, the state may require it to fulfill an obligation imposed by the charter, even though a fulfillment in that particular may cause a loss."

The ground upon which these decisions are based is that a railroad franchise or corporate charter granted by a state may not be altered or modified, or the railroad released from any of its corporate obligations, without the consent of the state. For this court to permit its receiver to abandon this Andes branch, while the remainder of the railroad continues to be operated by the receiver, would be for the court, without the consent of the state, to alter or modify the corporate charter or franchise granted by the state, and to release the railroad from some of its obligations, which turned out to be undesirable and burdensome, while retaining the desirable ones. This should not be done without ample authority.

Counsel for the receivers cites, as authority for the proposition that the court has power to authorize the receiver to abandon a portion of the road, the case of State v. Old Colony Trust Co., 215 F. 307, 131 C. C. A. 581, L. R. A. 1915A, 549. In that case, however, justification for a departure from the rule set forth in the foregoing cases is based upon the fact that the statute of the state of Iowa, in which the road in that case was located, directly conferred upon the courts authority to change or remove a line of road after it had been permanently located

and constructed. Code Iowa 1897, §§ 2092–2098. No such power is conferred upon the court by the statutes of New York. Section 16 of the Railroad Law (Consol. Laws, c. 49) applies to a change of route before construction, and has no relation to alteration or abandonment after construction.

No authority has been cited by the counsel for the receivers, except the Iowa case above referred to, and none has been found in which any federal court has ever authorized a railroad company operating in a single state to abandon, without the consent of the state, the operation of a portion of a railroad while continuing to operate the remainder. The rate cases cited by counsel for the receiver have no analogy to the question here. The authority, therefore, to sustain the contentions of the receivers, is lacking.

There being no constitutional question, no question of interstate commerce, nor of the scope of the federal power in respect to interstate commerce in this case, there would seem, therefore, to be no justification, in view of the authorities above cited, for this court to assert a power which otherwise it does not possess, namely, power to modify the franchise contract between the state, and the state's corporate creation.

Moreover, the federal statute expressly provides that a receiver appointed by a federal court to operate a railroad within a state shall operate such railroad according to the valid laws of that state, in the same manner that the owner would be bound to do if in possession thereof, and provides a penalty for disobedience. Section 1047 of the Compiled Statutes; Judicial Code, § 65; Erb v. Morasch, 177 U. S. 584, 20 S. Ct. 819, 44 L. Ed. 897; Westinghouse, etc., v. Binghamton R. Co. (D. C.) 255 F. 378. Assuming that this provision of the federal statute covers all the laws of the state, and is not confined to safety regulations, etc., the receiver not only could not abandon the Andes branch of the road without consent of the state, but could be punished for abandonment in any way other than as provided in the state statutes.

A federal court may therefore, as shown, in the protection of rights guaranteed by the federal Constitution, permit its receiver to abandon an entire railroad enterprise, whose further operation will result only in the confiscation of the owner's invested capital, but that, in the absence of any interstate commerce questions, is the extent of judicial interference with the corporate rights and obligations embodied in the franchise to the railroad company from the state.

In view of the foregoing conclusions it is not necessary to discuss any other questions raised.

The application must be denied.

CITY OF SPARTANBURG et al. v. SOUTH CAROLINA GAS & ELECTRIC CO. et al.

(Supreme Court of South Carolina, 1924. 130 S. C. 125, 125 S. E. 295.)

Original proceeding in mandamus by the City of Spartanburg and others against the South Carolina Gas & Electric Company and others.

FRASER, J. This is a proceeding in mandamus. The city of Spartanburg passed an ordinance which granted to F. D. McEowen and his associates and assigns the right to construct, maintain, and operate a street railway through, on, and along the streets and avenues in said city. The ordinance provided for the extension of its lines beyond the city limits, to some suburban cotton mills. The ordinance further provided a franchise for the use of its streets for electric lights and power lines, and the operation of gas conduits, etc. The ordinance was accepted by McEowen, and it is admitted that the respondent here is operating under that franchise, which was accepted in writing. The suburban lines were not completed for a while, and the Spartanburg Railway & Gas Company, then the owner of the franchise, refused to complete it. Action for specific performance was brought, and this court held, in Thomas v. Spartanburg Ry. & Gas Co., 114 S. C. 74, 103 S. E. 149, that the accepted ordinance was a contract and required the suburban lines to be completed under it.

I. It has been adjudged by this court that the ordinance accepted in writing is a binding contract and must be enforced, even as to the suburban lines which lie outside of the city.

II. The respondent claims that the Legislature has passed an act putting electric railways under the jurisdiction of the Railroad Commission, and this court has no jurisdiction in the matter. In its argument the respondent thus states its claim:

"On February 3, 1923, an act was duly approved, amending and to some extent modifying, the original act. This modification first excludes from the jurisdiction of the Railroad Commission public utilities owned by municipalities or any agency thereof; secondly it takes from the said commission the right to alter any charge for service that is the subject of any existing contract, franchise, or ordinance, etc. Neither section of this modification of the acts empowering said commission has any bearing whatever on this proceeding. The clear object and intent of the Legislature was to create a commission with the necessary machinery to enable it to regulate, supervise, and control the public utilities within the state, other than those owned by municipalities."

It will be observed that the power claimed is to "regulate, supervise, and control." That refers, and can only refer, to a going concern. It does not, in any way, pretend to give the Commission the power to annul or destroy the operation of public utilities. The Legislature did not pretend to give to the Railroad Commission nor could it have

given to the Railroad Commission, or to the courts, the power to destroy or impair the obligations of a contract.

III. The respondents claim that the street railway can only be operated at a loss, and therefore it would amount to a confiscation of private property to require it to operate at a loss. The respondent's statement before the Railroad Commission is:

"Q. What does your franchise embrace? A. The franchise embraces the right to manufacture and sell gas, electric power, electric lights, electric energy, I might say, and engage in the business of transportation."

"Q. How is it you contend that the railroad can go into bankruptcy without these other subsidiary lines? How is it when you discontinue railway service you do not discontinue gas and electric service? A. No question of bankruptcy is involved. Finding one of the departments absolutely useless to the people, they ask the privilege of cutting off that arm of its service. It is merely a question of abandonment. Now, the other question was: Why do we not also ask the same as to the other branches of service? We are not asking any favors at all. We would not ask you to consider our petition relative to this railroad company, were we in a different financial position. This company, as a public utility, has got to go on operating, but the law does not require it to operate at a loss. We haven't asked to discontinue the gas for this reason. The gas company is growing all the time. Everybody that builds a new house wants gas and electric service. If we cannot give it to a man, he will go to you. We are not asking you to cut out the gas. We could not show you the people had abandoned the use of gas. The gas is paying its way, and it has a future before it. In the old times, people did not use gas stoves, but in the modern homes they all put in gas stoves. We can make that go by great economy and hard work. Now, the electric light business—there is a great demand for electricity. People are availing themselves of all sorts of modern conveniences. We can make money on these two things, because there is a demand for them. There is no demand for the street railroad, except by 3 per cent. of the people, and we ask to cut off that dead arm of our service. That is the basis we are here on."

It will be observed that three businesses are included in this one ordinance, and they are linked together in its contract. Whatever may be said about the separateness of the gas franchise, the electric light and power business is linked to its electric railway business. The respondent admits that its electric light and power franchise is valuable and it is a paying business. If the street railway does not pay with all the advantages it derives from its electric light and power adjunct, then an electric railway alone must fail. It is inevitable that Spartanburg must be without a street railway, if the respondent be allowed to keep the one and destroy the other. They stand or fall together as an entire contract. It could not be held that, if A. makes a contract to buy from B. a certain tract of land of 100 acres, at $100 per acre,

A. could force B. to reserve 10 acres of bone and pay him only $9,000 for the 90 acres of good land. The contract is one transaction, and the $1,000 paid for the 10 acres of worthless land is not confiscation. The 10 acres may be separated from the 90 acres, but the railway and power business cannot be separated.

IV. The proposition of respondents, that a bus line had been substituted for the street railway, is ineffective. Neither the Railroad Commission nor the courts are authorized to substitute for the thing contracted for something else that is "just as good," if it be just as good. Governmental agencies have no right to substitute one contract for another. It is adjudged that the showing of the relators is sufficient, and that the writ of mandamus do issue, requiring the respondent to restore its lines and operate the same according to law.

GARY, C. J., and WATTS, J., concur.[19]

BOARD OF TRUSTEES OF VILLAGE OF WATERVILLE v. WATERVILLE GAS & ELECTRIC CO.

(Public Service Commission of New York, 1917. P. U. R. 1917F, 126.)

IRVINE, Commissioner. The Waterville Gas & Electric Company discontinued supplying gas to the citizens of Waterville, whereupon about 60 of such citizens filed a complaint asking that the company be compelled to re-establish the service. The village board passed a resolution protesting against the discontinuance of the service and asking that the Commission investigate the matter as to whether the board should be obliged to accept such discontinuance. On the hearing it appeared that the Waterville Gas Company was incorporated in the year 1880, and in 1881 received a franchise to lay mains in the streets of the village. In 1882 permission to light the streets was granted. In 1899 the Waterville Electric Light Company was incorporated and granted a franchise to erect poles, etc., in the streets and other public places of Waterville. These franchises were concurrently exercised by the two companies until 1903, when they were consolidated, and the Waterville Gas & Electric Company, the consolidated company, continued to exercise both franchises and to serve the people of Waterville with gas and electricity. It also erected and has maintained a steam-heating plant. September 22, 1916, a large part of the gas plant was destroyed by fire. The company then decided not to rebuild the plant and to discontinue the gas service, and made a formal surrender of its gas franchise to the village. The village board has not acted upon this surrender.

Waterville is a village of not more than 1,500 inhabitants, and has been diminishing in population for many years. The residents are, for

[19] The separate dissenting opinions of Cothran and Marion, JJ., are omitted.

the most part, well-to-do, but there are no industries of such a character as to indicate any prospect of future growth. The early establishment of the gas plant led to the piping of a number of buildings for the use of gas, and at the time of the fire there were about ninety consumers of gas for heat and light, and it is claimed that about 60 of these use gas for lighting purposes exclusively. Some of these have since equipped their houses for electricity.

The company is apparently not overcapitalized, having a capital stock of $19,100, and bonds outstanding of $2,500. It has apparently been operated in an economical manner. The following table shows results of operation so far as gas is concerned since the consolidation.[20]

* * *

It will be observed that there has been a deficit in the gas operation each year since 1911, that in 1913 and 1915 the operating expenses exceeded the revenue, and that in all four years, except 1914, the operating revenues were insufficient to cover operating expenses and taxes. In 1914 the operating revenues exceeded the operating expenses and taxes by $16.04, but the taxes for that year are reported at $19.56 only, while in other years they ranged from $137.93 to $155.40. There is no explanation of this remarkable drop in taxation, but a comparison of the figures for the electric and steam business of the company indicates that it was due to a change in that year in the method of allocation of the tax burden among the three departments of the company's business. No item for depreciation has ever been charged, and what remains of the gas plant, including mains, would probably have to be renewed soon.

The reports of the company show that the electric and steamheating departments yield a profit, although the failure to accumulate a reserve for depreciation makes the profit appear greater than it really is.

The Commission, from reports in its possession and the experience of its own engineers, may take notice of the fact that the manufacture and distribution of gas has been a business of diminishing profits as the use of electricity has increased, and that in communities much larger than Waterville the business cannot now be conducted at any profit except under unusual circumstances. The evidence shows that if the company should restore its Waterville plant its gas business would be conducted at a distinct loss under present conditions, and at a greater loss when imminent renewals of mains and other equipment should be required. There is no doubt that a considerable portion of the people of Waterville have been accustomed to the use of gas, and that in time more or less remote a very considerable amount of money has been expended in equipping buildings for such use. A number desire to continue the use of gas for lighting. Others desire to continue its use as fuel. To deprive them of gas works a considerable hardship. The question is thus sharply presented, whether the Commission is justified in directing a corporation which happens to be conducting three different kinds of

[20] The table is omitted.

business to continue in all three lines because it once undertook them, although one branch of the business must apparently continue to be conducted at a loss.

Undoubtedly public service corporations as long as they remain in business must at times be required to furnish some service without adequate compensation. Probably every railroad operates certain trains the revenues of which, segregated from the remainder of the business, are insufficient to pay expenses. Gas corporations have been required to make extensions of mains in the interest of the public in cases where the present revenues from the extensions were insufficient to meet all charges properly attributable thereto. This case, however, presents a question not of an incidental loss incurred in rendering a small portion of a public service on the whole remunerative, but a loss evidently permanent and probably increasing, in a distinct department of business. If the companies were still separate there could be no question that an order of the Commission requiring the gas company to continue business would be confiscatory and void. If in the present case such an order would not have the same effect, it would only be because the consumers of electricity and of steam would be required to assume the burden and make up the losses due to the gas operation. It is possible that new methods or processes may be devised which will enable the company to resume its gas service without further loss, but this must be left to the company to determine. The Commission cannot devise such means, or order the company to devise them. It must act according to existing circumstances. If any respect is to be paid to the principles announced by the Supreme Court of the United States in Northern P. R. Co. v. North Dakota, 236 U. S. 589, 35 S. Ct. 429, 59 L. Ed. 739, L. R. A. 1917F, 1148, Ann. Cas. 1916A, 1, P. U. R. 1915C, 277, and Norfolk & W. R. Co. v. Conley, 236 U. S. 605, 35 S. Ct. 437, 59 L. Ed. 745, P. U. R. 1915C, 293, the Commission can make no such order as the one here sought under the circumstances. The complaint must therefore be dismissed.

In re BUTTERS' EXPRESS.

(Department of Public Utilities of Massachusetts, 1921. P. U. R. 1921B, 452.)

BY THE DEPARTMENT.[21] It appears that about 43 years ago, one Holmes established a messenger service in the city of Boston, by which he undertook to convey messages, delivered to him by merchants, to the various express offices located in Boston at which local expressmen were accustomed to call and receive messages from customers. At first the business as established by Holmes was carried on by means of telephones from the various subscribers to his service, namely, the

[21] Only the opinion of the Department is printed. The dissenting opinion of Commissioner Wells is omitted.

merchants, to a central office conducted by Holmes, from which he distributed the messages by means of messenger boys. Later he developed a system of connecting the various express offices with telephone lines and eliminated the messenger boys. The various telephone connections between the merchants and the central office, and the central office and the various express offices, were installed by Holmes and became his personal property. Holmes continued this business some years, until the telephone company then engaged in the general telephone business in Boston, a predecessor of the New England Telephone Company, acquired from Holmes the messenger business carried on by him. This business was then conducted by the predecessors of the New England Telephone Company and by the New England Telephone Company from the time of its acquisition down to the present time.

Upon the adoption of chapter 784 of the Acts of Massachusetts of 1913, which gave the Public Service Commission jurisdiction over all companies engaged in the transmission of intelligence by electricity, by means of telephone lines or telegraph lines or any other method or system of communication, and required such companies to file rates and terms upon which such service would be thereafter furnished, the New England Telephone Company placed this messenger service in their so-called "obsolete" class, and filed no rates in relation thereto, taking the attitude that it would continue to furnish the messenger service, until otherwise determined, to those then receiving the service, but would engage to give the service to no others. The telephone company claims to have been justified in taking this action by the provisions of section 20 of said chapter 784, as follows:

"Nothing in this act shall be construed to prevent any telegraph or telephone corporation from continuing to furnish the use of its lines, equipment, or service under any contract or contracts in force at the date when this act takes effect, or upon the taking effect of any schedule or schedules of rates subsequently filed with the Commission, as hereinafter provided, at the rate or rates fixed in such contract or contracts: Provided, however, that when any such contract or contracts are or become terminable by notice, the Commission shall have power in its discretion to direct by order that such contract or contracts shall be terminated by the telegraph or telephone corporation party thereto." * * *

On October 21, 1920, the petitioner, who had for many years maintained an express office and received the express messenger service of the New England Telephone Company, petitioned this Department for an order requiring the New England Telephone Company to give him the messenger service at a new office to which he had removed by reason of being obliged to vacate his original office. Upon the consideration of the petition the Commission found that the refusal to give service of this character to Butters, while it was being given to others similarly situated, constituted an unjust discrimination, and on De-

cember 3, 1920, ordered that the discrimination be removed. Subsequently, the telephone company gave notice to all those receiving the express service that after February 1, 1921, the messenger service would be entirely discontinued and that the company would abandon that kind of service.

We have no doubt that if the service had been continued by Holmes he could abandon it. On the other hand, it seems equally plain that if Holmes had continued the service he would have been subject to the provisions of the said chapter 784. The question arises whether the New England Telephone Company, by acquiring the business from Holmes and undertaking to carry it on, so merged it with its own system as to give this department jurisdiction to order its continuance. While this service is conducted independently of the general telephone system of the company, having a separate exchange, separate wires and instruments to transmit and receive the telephone messages, and is different in character from its other telephone business, nevertheless the wires are located in the ducts upon the locations granted to the New England Telephone Company for carrying on the business of transmitting intelligence by electricity. We are inclined to the view that we have jurisdiction to order the service to be furnished to merchants and to express offices desiring it, and we understand that the company acquiesces in this view. The question, therefore, resolves itself to a consideration of the merits of the petition, which were not considered in the previous decision.

1. The company contends that it ought not to be required to continue this separate business as it is a specialty and will tend to demands of various people for service of a like character, and that in its nature it is not a telephone business, but analogous to the service furnished by telegraph companies or companies furnishing ticker service. With most of these contentions we are disposed to agree, and if the company had not voluntarily assumed this public undertaking we would not require it. On the other hand, the service has been maintained for a period of 43 years. The business of local expressing has been developed through this instrumentality and has been carried on largely by means thereof. No one has suggested that it is not a public convenience to the merchants and the expressmen alike, or that it has resulted in any serious hardship to the telephone company. No claim is made that rates cannot be made to merchants and express offices adequate to maintain the system and yield return upon the company's investment. Its continued maintenance will thus in no way throw a burden upon the company or the other subscribers thereof. Its discontinuance means more or less of a revolution in the manner of carrying on the express business in the city of Boston. It will result in no public good, and may result in harm. The company, having acquired and undertaken to carry on the service established by Holmes, should, it seems to us, continue the service until such time as it proves that it cannot

be maintained at a profit, or an adequate substitute can be furnished in its place.

It was suggested at the hearing that in no other place was such a service maintained, and thus it was the only exchange of the character maintained by telephone companies. The short answer to this, it seems to us, is that in no other place has any telephone company undertaken to perform such a service. The fact that the service has continued for a period of 43 or more years fortifies us in our judgment. Accordingly, it is

Ordered, that the New England Telephone & Telegraph Company continue to maintain the service, heretofore known as its "express telephone service," and that it forthwith file rates thereto applicable.

McCRAN, Atty. Gen., v. PUBLIC SERVICE RY. CO.

(Court of Chancery of New Jersey, 1923. 95 N. J. Eq. 22, 122 A. 205.)

Proceeding by Thomas F. McCran, Attorney General, for and in behalf of the State, against the Public Service Railway Company. On application for mandatory injunction in aid of suits at law.

WALKER, Ch.[22] The Attorney General has filed an information on behalf of the state, in which he shows that the defendant company was organized and created under a consolidation agreement dated August 20, 1907, between sundry street railway companies, and shortly thereafter it entered into an agreement of consolidation with certain other street railway companies operating in the northern part of the state, and thereby became possessed of all rights, privileges, and franchises, subject to all restrictions, disabilities, and duties of the corporations so consolidated. Under the act of consolidation and merger it was provided that all rights, privileges, and franchises, and property of each of such corporations were transferred to and vested in such new corporation; and that it has also acquired other street railways by long term leases, thus forming a united and complete system of about 850 miles of street railway tracks in 142 municipalities, and took possession of such railways and operated such system from the dates of such leases and entry upon the properties respectively, until August 1, 1923, carrying in recent years about 1,000,000 passengers per day; that prior to August 1, 1923, employees of the defendant company voted that a strike should go into effect on said date unless the terms and demands of the employees were met or conceded by the corporation, which it refused; such strike went into effect, and the company has failed to operate its cars from that date up to the present time notwithstanding the duty imposed upon it, a common carrier, having franchises from the state to provide proper service for the citizens thereof, and more

[22] Parts of the opinion are omitted.

particularly for the inhabitants in the communities served by such corporation. The information also charges that the failure of the defendant to operate its cars deprives the state and its municipalities of revenue to which it is lawfully entitled by way of taxes on its gross income, and jeopardizes the investments of its bondholders and stockholders, and those of its subsidiaries; that it deprives the citizens, and more particularly the inhabitants of the municipalities, of the service to which they are entitled by the company; and that the corporation has obligations which it cannot meet unless its road is operating, thereby working irreparable injury upon the state, its subdivisions, and citizens. Further, that the board of public utility commissioners of this state, on August 9, 1923, served a notice upon the defendant of a hearing in the matter of its refusal to operate its road, and, after hearing, and on August 14, 1923, made an order directing the defendant forthwith to furnish adequate and proper service and keep and maintain its property and equipment in such condition as to enable it to do so; that the defendant failed to comply with the terms of said order, and on August 17, 1923, the board made application to the New Jersey Supreme Court for a writ of mandamus to compel the company to obey the said order, and on the date last aforesaid an alternative writ of mandamus was allowed, and served upon the defendant company on August 28th, to which the company filed an answer wherein it set forth that by reason of the increased cost of operation it was impossible for it to comply with the order of the board, which proceedings are pending and undetermined; that, by reason of the company possessing exclusive grants to operate its railway system, it is bound to perform that duty until it has lawfully surrendered, suspended or abandoned its franchises and privileges by the legally expressed consent of the state. This information further shows that on September 4, 1923, the Attorney General filed an information for a quo warranto, inquiring by what right the defendant company exercises the franchises and privileges acquired by it at the time of the consolidation and merger agreements aforesaid, and by what right it refuses to operate its cars and perform the duty required of it under and by virtue of the privileges and franchises acquired by it as aforesaid.

The information before me prays that, in aid of the mandamus and quo warranto proceedings mentioned, and in order to preserve the rights of the public, a mandatory injunction be issued requiring the defendant company forthwith, and pending the determination of said suits at law, to resume the operation of its railways and render service to the citizens of New Jersey; or, in the alternative, upon the continued refusal of the defendant company to operate its railways and discharge its public duty as aforesaid, that a receiver be appointed to take charge of the property of said company and operate the same until the final determination of the actions at law now pending. This succinctly states the issue tendered by the Attorney General on behalf of the state.

The defendant company has answered, and, while this is not a final

hearing, the case has been fully submitted on pleadings and affidavits on both sides. The gravamen of the answer is that the company cannot operate without loss, and it claims that therefore it should not be compelled to operate at all. That present operation—that is, operation pending a settlement of its dispute with its employees—would be at a loss, may be conceded for the purpose of the decision of the matter before me.

In arriving at a determination in this matter, I deem it unnecessary to consider the question of the prospective loss of taxes to the state or municipalities, or of interest of the bondholders or dividends of stockholders of the company. The question transcends any such considerations and, to my mind, turns upon the single question of the power of this court to grant the injunction prayed for because of the public duty owed by defendant company to the citizens of this state, and that irrespective of whether such operation can be carried on with profit or with loss. * * *

The important question is: May this court lay a public utility corporation under a mandatory injunction to operate its works for the benefit of the public where to do so would appear to entail a loss upon the company? The only cases in this state which I have found that bear upon the question are Pub. Serv. Corp. v. American Lighting Co. and Pub. Serv. Gas Co. v. Newark, supra [67 N. J. Eq. 122, 57 A. 482], and there the question was as to a reasonable price for gas, and it was held that injunctions would issue to compel the companies to serve the public with gas for lighting at a reasonable price where the companies demanded more. But in Georgia and New York it has been held that a utility corporation could be compelled to serve the public even if that service would be unprofitable.

In Savannah, etc., Co. v. Shuman, 91 Ga. 400, 17 S. E. 937, 44 Am. St. Rep. 43, the court held that so long as the corporation retains its franchise it will not be allowed to urge as an excuse for failing to perform any duty required of it by its charter that service would be unprofitable.[23] It cannot consistently keep the franchise and reason that such performance would be unremunerative. And in People v. N. Y. Central & H. R. R. Co., 28 Hun (N. Y.) 543, the court said that the question was: Could a railroad corporation refuse or neglect to perform its public duties upon a controversy with its employees over the cost and expense of doing them? That the question admitted of but one answer; that the excuse had no validity in law; that the duties imposed must be discharged at whatever cost; that they could not be laid down or abandoned or suspended without the legally expressed con-

[23] May a public service corporation voluntarily surrender its charter, as any other business corporation, under the general statute relating to dissolution? See Freeo Valley R. Co. v. Hodges, 105 Ark. 314, 151 S. W. 281 (1912); Jeffries v. Commonwealth, 121 Va. 425, 93 S. E. 701 (1917); Moore v. Lewisburg & R. E. Ry. Co., 80 W. Va. 653, 659, 93 S. E. 762, L. R. A. 1918A, 1028 (1917).

sent of the state; that the trusts were active, potential, and imperative, and must be executed until lawfully surrendered.

After all, that is the test. The duty resting upon a quasi public corporation must be performed, or its privileges and franchises must be surrendered. It cannot assume to discharge its duty to the public on and off, as it may find it profitable to do so. And this apparently has the sanction of the Supreme Court of the United States, for in Brooks-Scanlon Co. v. Railroad Commission of Louisiana, 251 U. S. 396, 399, 40 S. Ct. 183, 184, 64 L. Ed. 323, at page 326, that court while holding that a carrier cannot be compelled to carry on business at a loss (a question of fact which doubtless concerns the Public Utility Commission and the Supreme Court on mandamus), nevertheless observed that "it is true that if a railroad continues to exercise the power conferred upon it by a charter from a state, the state may require it to fulfill an obligation imposed by the charter, even though fulfillment in that particular may cause a loss."

And that is the point I make, for, it seems to me, on an application for injunction to restore the status, it is not for me to make an exhaustive investigation of facts, and to adjudicate whether or not the company could be operated at a profit, but that it is enough if it appears that it is obliged to operate under a charter which it has not surrendered. See, also, Atlantic C. L. R. Co. v. North Carolina Corp. Com., 206 U. S. 1, at page 26, 27 S. Ct. 585, 595, 51 L. Ed. 933, at page 945, 11 Ann. Cas. 398, where the court said that "the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so, as an incident some pecuniary loss from rendering such service may result." To the same effect is Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A. L. R. 1280. In my judgment this is the view that I should adopt on the application before me, leaving to the Supreme Court the ultimate decision as to the reasonableness or unreasonableness of rates on final hearing on mandamus.[24]

The condition with which the court is dealing is appalling. I have never known anything like it to exist in this state. To say that in its presence, there is no court competent to give needed prompt relief, is to assert that there is a defect in the law itself. If the defendant can cease to operate its lines for the benefit of the public under a charter which requires it to do so (which charter it sought and received), then the great steam railroads, even the transcontinental roads, can do so, and thus paralyze transportation business over a wide territory, to the untold loss and inconvenience of a suffering public.

Now, in order to grant relief admittedly, the damage must be extreme and serious; it must be material and irreparable. It is all these and more. It is not an answer to say that the company cannot operate

[24] For cases involving continued operation pending determination of the right to withdraw, see 35 Yale Law J. 169, 182, note 51, and for cases requiring notice to be given of discontinuance of service, see Id. 187, note 79.

at a profit, and therefore it should not be obliged to run at all. The answer to that answer is: It stands still at a loss, and if it stands still long enough it will be absolutely ruined. This would ultimately result in an insolvency receiver, who would be directed to operate the road under order of the court. Such an ending would be disastrous to those owning the bonds and stock of the company and to its other creditors, unless the property at receiver's sale brought sufficient to discharge all its obligations in full, which is not likely. No one hopes more than I do that that calamity will never befall this great corporation with its numerous security holders. Nor do I think that ordering operation will have that effect. I think, on the contrary, that the effect will be to stimulate negotiations to settle the many difficulties with which the company is confronted. But, be that as it may, I think it my duty to order the injunction prayed for to restore the status quo ante in aid of the suits at law.

If the injunction were not obeyed, then it appears the informant would be entitled to the appointment of a receiver, under the general equity powers of the court, to carry out its mandate by operating the road. See Stockton v. Central R. R. Co., 50 N. J. Eq. 489, 25 A. 942. And the Attorney General could make an application to that end.
* * *

Mandatory injunction accordingly.[25]

PEOPLE ex rel. HUBBARD, Atty. Gen., v. COLORADO TITLE & TRUST CO. et al.

PUBLIC UTILITIES COMMISSION OF STATE OF COLORADO v. SAME.

(Supreme Court of Colorado, 1918. 65 Colo. 472, 178 P. 6.)

Suit to foreclose railroad mortgage by the Colorado Title & Trust Company, as trustee, wherein A. E. Carlton was appointed receiver of the Colorado Midland Railroad Company, and applied for court order allowing abandonment of service upon and directing sale of the road and all its equipment. Such order was entered without notice to the Public Utilities Commission of the state, and thereafter the Board of County Commissioners of Park County, and others filed complaints with the Commission against it permitting the junking of the road; individual protests being also filed. The railroad and receiver file pleas to the jurisdiction of the Commission. The Commission objected in the district court to the portion of its order directing the receiver to cease

[25] For a discussion of the principal case, particularly as compared with Brooks-Scanlon Co. v. Railroad Commission of Louisiana, ante, see 37 Harv. Law Rev. 368. See, also, 33 Yale Law J. 565.

operations on the road, and moved for a modification or vacation on the ground that the court was without jurisdiction to enter such an order, the receiver and the railroad filing pleas to the jurisdiction. The Attorney General, Leslie E. Hubbard, appeared and asked leave to file petition in intervention, raising the same question, claiming that the jurisdiction of the Commission was exclusive. The Commission, ruling on the question of its jurisdiction, overruled demurrers before it, and held it had exclusive jurisdiction, and the district court ruled that it had jurisdiction to enter its order. The people, by the Attorney General, and the Public Utilities Commission bring error. * * *

GARRIGUES, J.[26] 1. Though the Legislature has the power, it would be impracticable for it to directly determine the abandonment of service upon and dismantling of a railroad. Therefore it may delegate such power to a commission. One of the questions in the case is, Was such power delegated?

The Legislature may prescribe the method for the administration of public service corporations. The state has inherent power to regulate and control public utilities within the state, and, to this end, it is well settled the Legislature may create a commission to which it may delegate governmental authority and supervision, and that the right to do so exists without any constitutional provision; that is, the power of the Legislature to regulate the service of public utilities may be exercised through a commission, although the Constitution is silent on the subject. The powers of the commission in such cases are administrative. Its duties are to administer the law and carry into effect the will of the Legislature.

The only complaint of plaintiff in error is that the receiver failed to make application to, and obtain from, the commission its assent and sanction to abandon service and dismantle the road, and such failure is the only question involved that will be considered. That is, whether the district court or the commission was vested with exclusive jurisdiction over the abandonment of service and the dismantling of the Midland Railroad lying wholly within the state. If the commission possesses the exclusive jurisdiction, then the court order of July 2d is void, and all other questions in the case are immaterial. There is no question about the jurisdiction of the district court to entertain the foreclosure suit, appoint a receiver, and order the sale of the property on foreclosure. The point is, Did it have the right to go further and hear and determine the matter of ceasing to operate and "junking" the road? If the commission had gone ahead regardless of the court's order, it would either have had to concur therein or direct the receiver to do something different, and in the latter event there would have been a conflict of jurisdiction, and an apparent contempt of court. To avoid this happening, if the jurisdiction of the commission was usurped by the court, the commission, under the circumstances had a right

[26] A part of the statement of facts is omitted.

to appear in court and ask the court to vacate or modify the order to avoid a conflict of jurisdiction, and, in case the court refused, to have the ruling reviewed.

3. Whether the commission has jurisdiction over the ceasing of service upon and the dismantling of a railroad is a judicial question for the court, but the exercise of that jurisdiction by the commission is the exercise of administrative power delegated to the commission by the Legislature. Under the act power is conferred upon the commission to regulate the service, which includes power over the operation of the railroad and the maintenance of the tracks. Power to regulate service necessarily includes power over the thing to be regulated. This act confers upon the commission sufficient authority, when the public interest requires that no change should be made, to prevent a railroad company from ceasing service upon and dismantling the road without the consent of the commission. Railroad Commission v. K. C. S. Ry. Co., 111 La. 133–139, 35 So. 487; State ex rel. v. Brooks-Scanlon Co., 143 La. 539, 78 So. 847.

We therefore conclude that the Public Utilities Act confers exclusive jurisdiction upon the commission to determine whether a railroad company may abandon service upon and dismantle a railroad, lying wholly within the state.

4. Was the receiver appointed by the court subject to the same control as the railroad before the appointment of the receiver? Yes. The act, as amended in 1915, gives the commission jurisdiction over receivers appointed by any court whatsoever. By section 2 receivers of railroads appointed by the court are declared to be common carriers and subject to the act. The act provides that the commission shall enforce all statutes of the state affecting public utilities unless the enforcement is placed specifically in some other tribunal. Nowhere is power vested specifically in the district court by any statute to enter such an order. In State ex rel. v. Flannelly, 96 Kan. 372, 381, 152 P. 22, 26, it is said:

"The next question is, Are the receivers subject to the control of the Public Utilities Commission, under the Public Utilities Act? * * * The Kansas Natural Gas Company, whose property is now in the possession of the receivers, and whose business is now being conducted by them, was engaged in the business of a public utility. When the receivers continue to do the same business and render the same service as that performed by the Kansas Natural Gas Company, they are a public utility, as defined in the Public Utilities Act, and are subject to the provisions of the act. The appointment of receivers to carry on the business of a public utility does not withdraw that public utility or its receivers from the control of the laws of the state. The Public Utilities Commission can make the same orders, rules and regulations governing these receivers and the property in their control that they could have made concerning the Kansas Natural Gas Company and its property before the receivers were appointed. The receivers have the same right

to appeal to the courts that the Kansas Natural Gas Company had—no greater, no less."

5. We are satisfied the statute, if free from constitutional objections, delegates to the commission exclusive jurisdiction over the operation, cessation of operation upon, and the dismantling of railroads within, the state.

The constitutional objection raised to the statute is that it confers judicial power upon a commission. It is also claimed that the motion of the receiver for a "junking" order called into play the district court's inherent equity power to determine a judicial question, and, being a constitutional court, the statute, in so far as it attempts to confer exclusive jurisdiction upon the commission and take it away from the district court, if it does, is unconstitutional, and the court having previously acquired jurisdiction and decided the matter, its determination is conclusive upon the commission.

The Public Utilities Commission is not a court, but is an administrative commission, having certain delegated powers, and charged with the performance of certain executive and administrative duties, and its powers are subject to the action of the courts in matters of which the courts have jurisdiction. The Legislature did not give the commission power to render judicial decisions or jurisdiction over remedial rights as exercised by the courts. Judicial powers relate to the authority exercised by courts through the instrumentality of judicial remedies. The Legislature did not confer upon the commission such judicial powers as courts are required to exercise in suits between litigants. The power to ascertain from the facts whether a railroad company should discontinue service upon and dismantle the road is delegated by the Legislature to a commission. The commission acts upon the existence of facts which it must determine, but this is not the exercise of judicial power in a constitutional sense. In administering the law in such a case the commission must necessarily determine many things and facts. This involves investigation and the exercise of judgment and discretion, incidental to the administration of the law. Because it is of a judicial nature or the exercise of quasi judicial functions does not contravene the Constitution. The determination of certain facts or things in the operation of the law is merely incidental to the administrative powers of the commission. The Legislature could delegate power to determine the facts and things upon the decision of which the operation of the law is made to depend. This is not the exercise of judicial power by a commission in the sense that courts administer judicial remedies, but is incidental to the exercise of delegated administrative powers. The exercise of judgment and discretion as an incident to such power is not the exercise of judicial power within the meaning of the Constitution. The authority delegated to the commission relates to the administration of the law, and not to the exercise of judicial remedies. The preliminary determination of facts required to be solved by investigation and the exercise of judgment and discretion are but incidental to the

commission's administrative duties. Consumers' League v. C. & S. Ry. Co., 53 Colo. 54, 74, 125 P. 577, Ann. Cas. 1914A, 1158; C. & S. Ry. Co. v. Railroad Commission, 54 Colo. 64, 129 P. 506; D. & S. P. Ry. Co. v. City of Englewood, 62 Colo. 229, 161 P. 151; Locke's Appeal, 72 Pa. 491, 13 Am. Rep. 716; State ex rel. v. Mo. Pac. Ry. Co., 76 Kan. 467, 92 P. 606; State ex rel. v. Kan. P. T. C. Co., 96 Kan. 298, 305–306, 150 P. 544; State ex rel. v. Andrae et al., 216 Mo. 617, 629, 116 S. W. 561; State ex rel. v. Chittenden, 127 Wis. 468, 502, 107 N. W. 500; State ex rel. v. Public Service Com., 94 Wash. 274, 279, 162 P. 523.

The following cases are also in line as sustaining the exclusive jurisdiction and powers of the commission: Borough of New Brighton v. New Brighton Water Co., 247 Pa. 232, 93 A. 329; St. Clair Borough v. Tamaqua Co., 259 Pa. 462, 103 A. 289; Pittsburg Rys. Co. v. City of Pittsburg, 103 A. 959.

Reversed, with directions to the district court to vacate that portion of the order of July 2d directing the receiver to cease operations upon and to dismantle the road.

Reversed, with directions.

TELLER, J. (concurring specially). I concur in the judgment of reversal upon the sole ground that the court erred in denying the application of the Attorney General to intervene on behalf of the people.[27]

I cannot agree that the Public Utilities Commission has exclusive jurisdiction of the question of dismantling the road under the circumstances presented by this record. The Constitution gives to the district court "original jurisdiction of all causes at law and in equity," and that includes the foreclosure of mortgages and all matters incident thereto. As an incident to their powers, courts of equity, in foreclosure proceedings, determine how property subject to a lien in process of foreclosure shall be sold, in what parcels and upon what terms, with a view to giving full relief to the mortgagee, with as little sacrifice as may be to the owner of the incumbered property, or others interested therein.

In this case it was incumbent upon the court to make all orders necessary to give the plaintiff the benefit of its security in such a way as to cause the least loss to the parties interested in the property either as owners, or otherwise; this in pursuance of the chancery rule of doing complete equity to all parties before the court.

The continued operation of the road being a matter of public interest, the state is entitled to be heard upon the question of dismantling the road. This fact appears to have been recognized in recent cases, which are authority also on the question of jurisdiction.

In State of Iowa v. Old Colony Trust Co., 216 F. 307, 131 C. C. A. 581, L. R. A. 1915A, 549, the state was a party in a suit in which the

[27] See Equitable Trust Co. of N. Y. v. Chicago, P. & St. L. Ry., 314 Ill. 96, 145 N. E. 290 (1924), and comment thereon in 25 Col. Law Rev. 381, 38 Harv. Law Rev. 694, and 34 Yale Law J. 561.

jurisdiction of a court of equity, in a foreclosure suit to direct the dismantling of a railroad, was directly involved. The Circuit Court of Appeals held that the lower court had such jurisdiction. The opinion, after stating the condition of the road as disclosed by the record, says:

"In these circumstances, what could the court, charged with the duty of caring for and protecting the whole property, have done except order the abandonment of the steam line and the sale of its salvage?"

In N. Y. Trust Co. v. P. & E. St. Ry. Co. (C. C.) 192 F. 728, the court said:

"The conclusion reached is that a court of equity, having possession of the res, with the parties before it, including the Attorney General, the proper representative of the state, has the power, in an insolvent situation like this, to dispose of the property in any reasonable way which may be for the best interests of the mortgagee, and if necessary, * * * in order to realize anything from the property to order a sale in the alternative."

The order was that the road be offered as a going concern, and, if not sold at a price equal to its salvage value, that it be sold for dismantling.

The district court, having jurisdiction of the question, could not be deprived of it by legislative enactment; and, having taken jurisdiction of the cause, should, after allowing the people to be represented, proceed to try the question of dismantling the road.

I am authorized to state that Mr. Justice BAILEY concurs in this opinion.[28]

SECTION 2.—SELF-SERVICE AND COLLATERAL BUSINESS

CENTRAL ELEVATOR CO. et al. v. PEOPLE ex rel. MOLONEY, Atty. Gen.

(Supreme Court of Illinois, 1898. 174 Ill. 203, 51 N. E. 254, 43 L. R. A. 658.)

Informations in equity by the People, on relation of Maurice T. Moloney, attorney general, against the Central Elevator Company and eight others. From a decree for complainant in each case, defendants appeal.

[28] For the provisions of the Transportation Act of 1920, relating to the beginning or discontinuance of service, and their application, see Texas v. Eastern Texas R. Co., 258 U. S. 204, 42 S. Ct. 281, 66 L. Ed. 566 (1922). For further cases on and discussion of the general subject considered in this section, see "The Withdrawal from Service of Public Utility Companies," by Oliver P. Field, 35 Yale Law J. 169 (1925).

CARTWRIGHT, J.[29] Appellants in these nine cases were defendants in the circuit court of Cook county to informations in equity filed by the attorney general against them as licensed proprietors of warehouses of class A in Chicago, or stockholders of corporations so licensed. The informations made the same general allegations in each case—that defendants had stored grain owned by themselves in the particular warehouse of which they were proprietors; that not less than three-fourths of all the grain received in the public warehouses in Chicago was owned by the warehousemen; that the grades for inspection of grain were such that the grain of each grade was not of the same quality, but that separate car loads of different quality and value were graded in the same grade; that by reason of advantages of the defendants, as owners of warehouses, in mixing and manipulating grain, and rebating storage charges, and otherwise, they had been enabled to drive out competition, and to hold and enjoy the privilege of buying grain free from competition; and that such storing of grain was unlawful and injurious to the public. All the informations prayed for the same relief—a perpetual injunction to restrain defendants, as warehousemen, from storing grain in their own warehouses. The answers admitted in each case that defendants were operating public warehouses of class A, in which grain was stored in Chicago, and that they had stored grain owned by them in their own warehouses, and claimed the right to do so. The answers also set up a general custom of 30 years' standing, under which the proprietors of public warehouses were accustomed to store their own grain and mix it with the grain of their customers, and also that the warehouse commissioners had construed the act of 1871 as permitting that custom, and that such purchases of grain and such custom had a beneficial effect upon producers, shippers of grain, and dealers in grain throughout Illinois and the Northwest. A great amount of evidence was taken, and a decree was entered in each case granting the relief prayed for. Where the defendant was a corporation, the stockholders were enjoined from storing their own grain in the elevators of their own corporations. These appeals were prosecuted from the decrees so entered. The cases were argued together, and were all submitted upon the same briefs and arguments. * * *

The constitution declares that warehouses such as defendants are licensed to carry on are public warehouses, and that it shall be the duty of the general assembly to pass all necessary laws to give full effect to that article of the constitution, which shall be liberally construed to protect producers and shippers. In compliance with the requirements of the constitution the warehouse act of 1871 was enacted, by which defendants were permitted to exercise the business of public warehousemen, and to conduct such public warehouses. They procured their licenses, and thereby voluntarily submitted their property to the law. The right of the state to control them in that business is conceded, and the

[29] Parts of the opinion are omitted.

right of the state, through its attorney general, to restrain them in the use of their public warehouses, within the limitations of the law, and to prevent resulting public injury, is not foreign to the powers or jurisdiction of a court of equity. Defendants could not operate their warehouses and devote them to such uses without a license, and the giving of a bond to faithfully comply with the law. The attorney general alleged injury to the public from violations of the laws governing them and their warehouses, and this authorizes the court of equity to protect the public right,—at least, where there is no objection that the law furnished an adequate remedy.

It is a firmly established rule that, where one person occupies a relation in which he owes a duty to another, he shall not place himself in any position which will expose him to temptation of acting contrary to that duty, or bring his interest in conflict with his duty. This rule applies to every person who stands in such a situation that he owes a duty to another, and courts of equity have never fettered themselves by defining particular relations to which alone it will be applied. They have applied it to agents, partners, guardians, executors, administrators, directors, and managing officers of corporations, as well as to trustees, but have never fixed or defined its limits. The rule is founded upon the plain consideration that the one charged with duty shall act with regard to the discharge of that duty, and he will not be permitted to expose himself to temptation, or be brought into a situation where his personal interests conflict with his duty. Courts of equity have never allowed a person occupying such a relation to undertake the service of two whose interests are in conflict, and then endeavor to see that he does not violate his duty, but forbid such a course of dealing, irrespective of his good faith or bad faith. If the duty of the defendants as public warehousemen stands in opposition to personal interest as buyers and dealers in grain storing the same in their own warehouses, then the law interposes a preventative check against any temptation to act from personal interest, by prohibiting them from occupying any such position.

The public warehouses established under the law are public agencies, and the defendants, as licensees, pursue a public employment. They are clothed with a duty towards the public. The evidence shows that defendants, as public warehousemen storing grain in their own warehouses, are enabled to, and do, overbid legitimate grain dealers, by exacting from them the established rate for storage, while they give up a part of the storage charges when they buy or sell for themselves. By this practice of buying and selling through their own elevators, the position of equality between them and the public whom they are bound to serve is destroyed; and by the advantage of their position they are enabled to crush out, and have nearly crushed out, competition in the largest grain market of the world. The result is that the warehousemen own three-fourths of all the grain stored in the public warehouses of Chicago, and upon some of the railroads the only buyers of grain are the warehouse-

men on that line. The grades established for different qualities of grain are such that the grain is not exactly of the same quality in each grade, and the difference in market price in different qualities of the same grade varies from 2 cents per bushel in the better grades to 15 cents in the lower grades. The great bulk of grain is brought by rail and in car loads, and is inspected on the tracks, and the duty of the warehousemen is to mix the car loads of grain as they come. Such indiscriminate mixing gives an average quality of grain to all holders of warehouse receipts. Where the warehouseman is a buyer, the manipulation of the grain may result in personal advantage to him. Not only is this so, but the warehouse proprietors often overbid other dealers as much as a quarter of a cent a bushel, and immediately resell the same to a private buyer at a quarter of a cent less than they paid, exacting storage, which more than balances their loss. In this way they use their business as warehousemen to drive out competition with them as buyers. It would be idle to expect a warehouseman to perform his duty to the public as an impartial holder of the grain of the different proprietors, if he is permitted to occupy a position where his self-interest is at variance with his duty. In exercising the public employment for which he is licensed, he cannot be permitted to use the advantage of his position to crush out competition, and to combine in establishing a monopoly by which a great accumulation of grain is in the hands of the warehousemen, liable to be suddenly thrown upon the market whenever they, as speculators, see profit in such course. The defendants are large dealers in futures on the Chicago Board of Trade, and together hold an enormous supply of grain ready to aid their opportunities as speculators. The warehouseman issues his own warehouse receipt to himself. As public warehouseman he gives a receipt to himself as individual, and is enabled to use his own receipts for the purpose of trade, and to build up a monopoly and destroy competition. That this course of dealing is inconsistent with the full and impartial performance of his duty to the public seems clear. The defendants answer that the practice had a beneficial effect upon producers and shippers, and naturally were able to prove that when, by reason of their advantages, they were overbidding other dealers, there was benefit to sellers, but there was an entire failure to show that in the general average there was any public good to producers or shippers. * * *

The stockholders who were made defendants occupy such a relation to their corporations that they cannot be permitted to use the property which they have devoted to public use to carry on their individual business with substantially the same effect and the same deleterious result to the public interest as if done by the corporation. These persons were made respondents as stockholders, and the only relief sought against them was in that relation. The charges and findings against them were on account of the existence of that relation, and, as we interpret the decree, the permanent injunctions are against them as stockholders.

They are permanent only so long as the relation and interest on which they are based exist.

The decree of the circuit court is affirmed.

Decree affirmed.[30]

UNITED STATES ex rel. ATTY. GEN. v. DELAWARE & HUDSON CO.

(Supreme Court of the United States, 1908. 213 U. S. 366, 29 S. Ct. 527, 53 L. Ed. 836.)

Six Writs of Error to the Circuit Court of the United States for the Eastern District of Pennsylvania to review judgments denying mandamus to compel certain railway carriers to refrain from interstate transportation of coal from the Pennsylvania anthracite regions. Also

Six Appeals from the Circuit Court of the United States for the Eastern District of Pennsylvania to review decrees dismissing bills in equity seeking to accomplish the same result by injunction.

Mr. Justice WHITE [31] delivered the opinion of the court. * * *

The text of the commodities clause upon which the cases depend is as follows:

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any state, territory, or the District of Columbia to any other state, territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

The government insists that this provision prohibits railroad companies from transporting in interstate commerce articles or commodities other than the excepted class, which have been manufactured, mined, or produced by them or under their authority, or which they own or may have owned, in whole or in part, or in which they have or may have had any interest, direct or indirect. These prohibitions, it is further insisted, apply to the transportation by a railroad company in interstate commerce of a commodity which has been manufactured, mined, or produced by a corporation in which the transporting railroad company is a stockholder, irrespective of the extent of such stock ownership. This construction of the provision rests not only upon the

[30] See Hannah v. People, 198 Ill. 77, 64 N. E. 776 (1902), discussed in a note in 16 Harv. Law Rev. 209.

[31] Parts of the opinion, the marginal notes by the court, and the dissenting opinion of Mr. Justice Harlan, are omitted.

meaning which the government insists should be given to its text, but on the significance of the text as illumined by what it is insisted was the result intended to be accomplished by the enactment of the clause. The purpose, it is contended, was not merely to compel railroad companies to dissociate themselves before transportation from articles or commodities manufactured, mined, produced, or owned by them, etc., but moreover to divorce the business of transporting commodities in interstate commerce from their manufacture, mining, production, ownership, etc., and thus to avoid the tendency to discriminate, forbidden by the act to regulate commerce, which, it is insisted, necessarily inheres in the carrying on by a railroad company of the business of manufacturing, mining, producing, or owning, in whole or in part, etc., commodities which are by it transported in interstate commerce.

The construction relied on is thus summed up in the argument of the government: "It (the clause) forbids the carrier who owns the mines and sells coal, to transport that coal in interstate commerce * * * This is not trifling with the question. It states the exact fact and the reality." And, in accordance with this principle, the insistence in argument is that it was the duty of the carriers who owned and worked coal mines, or who had stock in such mines, or who owned coal, in order to bring themselves within the law, to dispose absolutely of all their interest in coal-producing property, in whatever form enjoyed, and to cease absolutely from acquiring like rights in the future. It was, doubtless, because of the far-reaching effect of this construction upon the enormous property interests involved which caused the result of the provision to be thus stated in the argument for the government: "This is undoubtedly a searching and radical law, and was meant to be so." * * *

Let us, as a prelude to an analysis of the clause, for the purpose of fixing its true construction, and determining the constitutional power to enact it when its significance shall have been rightly defined, point out the questions of constitutional power which will require to be decided if the construction relied upon by the government is a correct one. * * *

Let it be conceded at once that the power to regulate commerce possessed by Congress is, in the nature of things, ever-enduring, and therefore the right to exert it to-day, to-morrow, and at all times in its plenitude must remain free from restrictions and limitations arising or asserted to arise by state laws, whether enacted before or after Congress has chosen to exert and apply its lawful power to regulate. For our present purposes, moreover, although we may have occasion to examine the subject hereafter, we entirely put out of view all the contentions based upon the assumption that even, although the provisions of the clause be, in and of themselves, lawful regulations of commerce, if prospectively applied, nevertheless they cannot be so considered, because of their retroactive effect upon the rights of the defendants, al-

leged to have been secured by valid state laws. We further concede, for the purpose of the inquiry we are at present making, although we may also have occasion to examine the subject hereafter, that the power of Congress to regulate commerce can be constitutionally so exerted as to compel a railroad company engaged in interstate commerce to dissociate itself in interest from the commodities which it transports in interstate commerce, even although, by existing state laws, the railroad company may have a lawful right of ownership or association with the commodity upon which the regulation operates.

With these concessions in mind, and despite their far-reaching effect, if the contentions of the government as to the meaning of the commodity clause be well founded, at least a majority of the court are of the opinion that we may not avoid determining the following grave constitutional questions: (1) Whether the power of Congress to regulate commerce embraces the authority to control or prohibit the mining, manufacturing, production, or ownership of an article or commodity, not because of some inherent quality of the commodity, but simply because it may become the subject of interstate commerce. (2) If the right to regulate commerce does not thus extend, can it be impliedly made to embrace subjects which it does not control, by forbidding a railroad company engaged in interstate commerce from carrying lawful articles of commodities because, at sometime prior to the transportation, it had manufactured, mined, produced, or owned them, etc.? And involved in the determination of the foregoing questions we shall necessarily be called upon to decide: (a) Did the adoption of the Constitution and the grant of power to Congress to regulate commerce have the effect of depriving the states of the authority to endow a carrier with the attribute of producing as well as transporting particular commodities—a power which the states from the beginning have freely exercised, and by the exertion of which governmental power the resources of the several states have been developed, their enterprises fostered, and vast investments of capital have been made possible? (b) Although the government of the United States, both within its spheres of national and local legislative power, has in the past, for public purposes, either expressly or impliedly, authorized the manufacture, mining, production, and carriage of commodities by one and the same railway corporation, was the exertion of such power beyond the scope of the authority of Congress, or, what is equivalent thereto, was its exercise but a mere license, subject at any time to be revoked and completely destroyed by means of a regulation of commerce?

While the grave questions thus stated must necessarily, as we have said, arise for decision if the contention of the government, as to the meaning of the commodity clause be correct, we do not intend, by stating them, to decide them, or even in the slightest degree to presently intimate, in any respect whatever, an opinion upon them. It will be time enough to approach their consideration if we are compelled to

do so hereafter, as the result of the further analysis which we propose to make in order to ascertain the meaning of the commodities clause.

It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. Knights Templars' & M. Life Indemnity Co. v. Jarman, 187 U. S. 197, 205, 47 L. Ed. 139, 145, 23 S. Ct. 108. And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional, and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. Harriman v. Interstate Commerce Commission, 211 U. S. 407, 53 L. Ed. 253, 29 S. Ct. 115.

Recurring to the text of the commodities clause, it is apparent that it disjunctively applies four generic prohibitions; that is, it forbids a railroad carrier from transporting in interstate commerce articles or commodities (1) which it has manufactured, mined, or produced; (2) which have been so mined, manufactured, or produced under its authority; (3) which it owns in whole or in part; and (4) in which it has an interest, direct or indirect.

It is clear that the two prohibitions which relate to manufacturing, mining, etc., and the ownership resulting therefrom, are, if literally construed, not confined to the time when a carrier transports the commodities with which the prohibitions are concerned, and hence the prohibitions attach and operate upon the right to transport the commodity because of the antecedent acts of manufacture, mining, or production. Certain also is it that the two prohibitions concerning ownership, in whole or in part, and interest, direct or indirect, speak in the present, and not in the past; that is, they refer to the time of the transportation of the commodities. These last prohibitions, therefore, differing from the first two, do not control the commodities if, at the time of the transportation, they are not owned in whole or in part by the transporting carrier, or if it then has no interest, direct or indirect, in them. From this it follows that the construction which the government places upon the clause as a whole is in direct conflict with the literal meaning of the prohibitions as to ownership and interest, direct or indirect. If the first two classes of prohibitions as to manufacturing, mining, or production be given their literal meaning, and therefore be held to prohibit, irrespective of the relation of the carrier to the commodity at the time of transportation, and a literal interpretation be applied to the remaining prohibitions as to ownership and interest, thus causing them only to apply if such ownership and interest exist at the time of transportation, the result would be to give to the statute

a self-annihilative meaning. This is the case, since, in practical execution, it would came to pass that where a carrier had manufactured, mined, and produced commodities, and had sold them in good faith, it could not transport them; but, on the other hand, if the carrier had owned commodities and sold them it could carry them without violating the law. The consequence, therefore, would be that the statute, because of an immaterial distinction between the sources from which ownership arose, would prohibit transportation in one case and would permit it in another like case. An illustration will make this deduction quite clear: A carrier mines and produces and owns coal as a result thereof. It sells the coal to A. The carrier is impotent to move it for account of A in interstate commerce because of the prohibition of the statute. The same carrier at the same time becomes a dealer in coal, and buys and sells the coal thus bought to the same person, A. This coal the carrier would be competent to carry in interstate commerce. And this illustration not only serves to show the incongruity and conflict which would result from the statute if the rule of literal interpretation be applied to all its provisions, but also serves to point out that, as thus construed, it would lead to the conclusion that it was the intention, in the enactment of the statute, to prohibit manufacturing and production by a carrier, and, at the same time, to offer an incentive to a carrier to become the buyer and seller of commodities which it transported.

But it is said, on behalf of the government, in view of the purpose of Congress to prohibit railroad companies engaged in interstate commerce from being, at the same time, manufacturers, producers, owners, etc., of commodities which they carry, despite the literal sense of some of the prohibitions, they should all be construed so as to accomplish the result intended; and therefore their apparent divergence and conflict should be removed by construing them all as prohibiting the transportation because of the causes stated, irrespective of the particular relation of the railroad company to the commodities at the time of transportation. This suggestion, however, simply invites us, under the assumption that Congress had a particular intention in enacting the clause, to so construe the clause as to cause it to be essential to decide the grave constitutional questions which we have hitherto pointed out. On the contrary, as the prohibitions concerning ownership in whole or in part, and interest, direct or indirect, are susceptible only of the construction that the dissociation of the carrier with the products which it transports was contemplated, our duty is, if possible, to treat the other and apparently conflicting prohibitions as embracing a like purpose, and thus harmonize the provisions of the clause and prevent the necessity of approaching and passing upon the grave constitutional questions which would necessarily arise from pursuing the contrary course. This, it is urged, cannot be done, since to do so would be in effect to expunge the prohibitions against manufacturing, mining, and production from the clause, as ownership in whole or in part or

interest, direct or indirect, would embrace everything which could possibly have been intended to be expressed by the terms manufacturing, mining, and production, if the proposed reconciliation of the conflict between the prohibitions be brought about.

We think, however, that a brief reference to a ruling of this court concerning the effect of the interstate commerce law prior to its amendment by the Hepburn act, will serve to make clear the unsoundness of the proposition. The case referred to is that of New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. Ed. 515, 26 S. Ct. 272. In that case, after much consideration, it was held that the prohibitions of the interstate commerce act as to uniformity of rates and against rebates operated to prevent a carrier engaged in interstate commerce from buying and selling a commodity which it carried in such a way as to frustrate the provisions of the act, even if the effect of applying the act would be substantially to render buying and selling by an interstate carrier of a commodity which it transported practically impossible. In thus deciding, however, it became necessary (pages 399, 400) to refer to rulings of the Interstate Commerce Commission construing the act to regulate commerce, made not long after the enactment of the statute, in which it was held that where interstate commerce carriers were engaged in manufacturing, mining, producing, and carrying commodities in virtue of state charters authorizing them so to do, granted prior to the enactment of the act to regulate commerce, that act could not be applied without confiscation, except in so far as the requirement of reasonableness of rates was concerned. While referring to those administrative rulings, and declaring that, in view of their long standing, the construction which had been thus given to the act should not be departed from, "at least, until Congress has legislated on the subject" (page 401), it was nevertheless plainly intimated that legislation which compelled a carrier, even although authorized by its charter before the passage of the act to regulate commerce to engage in the production as well as transportation of commodities, to dissociate itself before transportation from the products which it manufactured, mined, or produced, would not, when enforced by proper rules and regulations, amount to confiscation. When, therefore, the subject of ownership, in whole or in part, or the interest of a carrier, direct or indirect, in the product which it transported, came to be considered, and the duty to dissociate before transportation came to be legislatively imposed, it is quite natural, in view of the prior administrative rulings and the intimations of this court, conveyed in the opinion in the New York, N. H. & H. R. Co. Case, to assume that the provisions as to manufacturing, mining, and production, while they may be somewhat redundant, were nevertheless expressed for the purpose of leaving no possible room for the implication that it was not the intention to include ownership resulting from manufacture, mining, production, etc., even although the right to manufacture, mine,

and produce was sanctioned by state charters prior to the enactment of the act to regulate commerce.

Looking at the statute from another point of view the same result is compelled. Certain it is that we could not construe the statute literally without bringing about the irreconcilable conflict between its provisions which we had previously pointed out, and therefore some rule of construction is essential to be adopted in order that the statute may have a harmonious operation. Under these circumstances, in view of the far-reaching effect to arise from giving to the first two prohibitions a meaning wholly antagonistic to the remaining ones, we think our duty requires that we should treat the prohibitions as having a common purpose; that is, the dissociation of railroad companies, prior to transportation, from articles or commodities, whether the association resulted from manufacture, mining, production, or ownership, or interest, direct or indirect. In other words, in view of the ambiguity and confusion in the statute, we think the duty of interpreting should not be so exerted as to cause one portion of the statute which, as conceded by the government, is radical and far-reaching in its operation if literally construed, to extend and enlarge another portion of the statute which seems reasonable and free from doubt if also literally interpreted. Rather it seems to us our duty is to restrain the wider, and, as we think, doubtful prohibitions, so as make them accord with the narrow and more reasonable provisions, and thus harmonize the statute. * * *

It remains to determine the nature and character of the interest embraced in the words "in which it is interested, directly or indirectly." The contention of the government that the clause forbids a railroad company to transport any commodity manufactured, mined, or produced, or owned in whole or in part, etc., by a bona fide corporation in which the transporting carrier holds a stock interest, however small, is based upon the assumption that such prohibition is embraced in the words we are considering. The opposing contention, however, is that interest, direct or indirect, includes only commodities in which a carrier has a legal interest, and therefore does not exclude the right to carry commodities which have been manufactured, mined, produced or owned by a separate and distinct corporation, simply because the transporting carrier may be interested in the producing, etc., corporation as an owner of stock therein. If the words in question are to be taken as embracing only a legal or equitable interest in the commodities to which they refer, they cannot be held to include commodities manufactured, mined, produced, or owned, etc., by a distinct corporation merely because of a stock ownership of the carrier. Pullman's Palace Car Co. v. Missouri P. R. Co., 115 U. S. 588, 29 L. Ed. 499, 6 S. Ct. 194; Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. Ed. 1113, 23 S. Ct. 728. And that this is well settled also in the law of Pennsylvania is not questioned. * * *

The contention of the government substantially rests upon the assumption that, unless the words be given the meaning contended for,

they are without significance. That this is clearly not the case is well illustrated by the New York, N. H. & H. R. Co. Case, supra. In that case the Chesapeake & Ohio Railway Company it was shown at one time not only directly engaged in buying, selling, and transporting coal, but subsequently, when a statute was passed in West Virginia prohibiting such dealings, it resorted to indirect methods for the continuance of its previous practice. It may well be that the very object of the provision was to reach and render impossible the successful employment of methods of the character referred to. Certain it is, however, that, in the legislative progress of the clause in the Senate, where the clause originated, an amendment in specific terms, causing the clause to embrace stock ownership, was rejected, and immediately upon such rejection an amendment, expressly declaring that interest, direct or indirect, was intended, among other things, to embrace the prohibition of carrying a commodity manufactured, mined, produced, or owned by a corporation in which a railroad company was interested as a stockholder, was also rejected. 40 Cong. Rec. pt. 7, pp. 7012–7014. And the considerations just stated, we think, completely dispose of the contention that stock ownership must have been in the mind of Congress, and therefore must be treated as though embraced within the evil intended to be remedied, since it cannot in reason be assumed that there is a duty to extend the meaning of a statute beyond its legal sense, upon the theory that a provision which was expressly excluded was intended to be included. If it be that the mind of Congress was fixed on the transportation by a carrier of any commodity produced by a corporation in which the carrier held stock, then we think the failure to provide for such a contingency in express language gives rise to the implication that it was not the purpose to include it. At all events, * * * we hold the contention of the government not well founded.

We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (a) When the article or commodity has been manufactured, mined, or produced by a carrier or under its authority, and, at the time of transportation, the carrier has not, in good faith, before the act of transportation, dissociated itself from such article or commodity; (b) when the carrier owns the article or commodity to be transported, in whole or in part; (c) when the carrier, at the time of transportation, has an interest, direct or indirect, in a legal or equitable sense, in the article or commodity, not including, therefore, articles or commodities manufactured, mined, produced, or owned, etc., by a bona fide corporation in which the railroad company is a stockholder.

The question then arises whether, as thus construed, the statute was inherently within the power of Congress to enact as a regulation of commerce. That it was, we think is apparent; and if reference to authority to so demonstrate is necessary, it is afforded by a consideration of the ruling in the New York, N. H. & H. R. Co. Case, to which we

have previously referred. We do not say this upon the assumption that, by the grant of power to regulate commerce, the authority of the government of the United States has been unduly limited, on the one hand, and inordinately extended, on the other, nor do we rest it upon the hypothesis that the power conferred embraces the right to absolutely prohibit the movement between the states of lawful commodities, or to destroy the governmental power of the states as to subjects within their jurisdiction, however remotely and indirectly the exercise of such powers may touch interstate commerce. On the contrary, putting these considerations entirely out of mind, the conclusion just previously stated rests upon what we deem to be the obvious result of the statute as we have interpreted it; that it merely and unequivocally is confined to a regulation which Congress had the power to adopt and to which all pre-existing rights of the railroad companies were subordinated. Armour Packing Co. v. United States, 209 U. S. 56, 52 L. Ed. 681, 28 S. Ct. 428. * * *[32]

UNITED STATES OF AMERICA v. LEHIGH VALLEY R. CO.

(Supreme Court of the United States, 1911. 220 U. S. 257, 31 S. Ct. 387, 55 L. Ed. 458.)

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania to review a decree refusing to allow an amendment to the bill, and dismissing a suit by the Federal government to enjoin a railway carrier from interstate transportation of a commodity with which it is associated or in which it is interested.

Mr. Chief Justice WHITE delivered the opinion of the court:[33]

This case is one of what were known as the commodity cases, previously decided and reported in 213 U. S. 366, 53 L. Ed. 836, 29 S. Ct. 527. The controversy now is but a sequel to that disposed of in the previous cases. To understand the question now for consideration it is essential to have in mind the contentions which arose for decision upon the previous appeal and the disposition which was made of them. We therefore refer to those subjects.

The United States proceeded, both by suits in equity and mandamus,

[32] The judgments were reversed. See 164 F. 215, for the report of the case below, and comment thereon in 7 Mich. Law Rev. 253, and 57 Univ. of Pa. Law Rev. 35. See, also, "Constitutional Questions Involved in the Commodity Clause of the Hepburn Act," by Wm. Draper Lewis, 21 Harv. Law Rev. 595, appearing before the decision, and "The Commodities Clause and the Fifth Amendment," by Learned Hand, 22 Harv. Law Rev. 250, appearing after the decision. For a discussion of the principal case, see "The Commodities Clause Decision," Anonymous, 9 Col. Law Rev. 523, and a note, "State and Federal Power over Commerce under the Commodities Clause," 9 Col. Law Rev. 534, and also, "The Commodities Clauses: Are They Ordinances of Property, or Regulations of Commerce?" by Edward L. Andrews, 9 Col. Law Rev. 677.

[33] Parts of the opinion are omitted.

against certain railroad companies, including the Lehigh Valley, to prohibit them from transporting coal in interstate commerce in violation of what were deemed to be the prohibitions of * * * the commodities clause of the Hepburn act. [After quoting the commodities clause and summarizing the construction thereof in U. S. v. Delaware & H. Co., supra, p. 238, the court proceeded:]

Thus construed, the clause was held to be within the power of Congress to enact. As this conclusion rendered it necessary to reverse the action of the court below, which had been exclusively predicated upon the unconstitutionality of the statute, the question arose as to what disposition should be made of the cases. That is to say, the constitutionality of the statute being settled and its true meaning being expounded, the question was whether the cases should be finally disposed of or should be left in such a position as to give the government the right to proceed to apply and enforce the prohibitions of the statute against the various corporations which were defendants, if it deemed a good case existed for so doing. Disposing of this subject in the light of the consent upon which the cases had been tried in the court below, and of the error which had obtained as to the true meaning of the statute, and of the consequent concentration of the attention of the court and of the parties to the question of the constitutionality of the statute, instead of its application to the facts, when correctly construed, it was determined that the decree should not conclude the right of the United States in the respective causes to further proceed to enforce the statute as construed, and hence that that subject should be left open for future action. * * *

Accordingly, the mandate of this court provided that the cause "be, and the same is hereby, remanded to the said circuit court for further proceedings in conformity with the opinion of this court."

Upon the filing of the mandate, the court below vacated its decree dismissing the bill in this (the equity) cause, and reinstated the case upon the docket. The United States then presented an amended bill and asked leave to file it. The amendment contained copious averments in regard to the actual relations existing between the railroad company and one of the coal companies mentioned in the original bill, viz., the Lehigh Valley Coal Company. In substance it was averred that as to this particular coal company, the railroad company was not only the owner of all the stock issued by the coal company, but that the railroad company so used the power thus resulting from its stock ownership as to deprive the coal company of all real, independent existence, and to make it virtually but an agency or dependency or department of the railroad company. In other words, in great detail facts were averred which tended to establish that there was no distinction in practice between the coal company and the railroad company, the latter using the coal company as a mere device to enable the railroad company to violate the provisions of the commodities clause. * * *

On the objection of the railway company, the court denied the request of the United States for leave to file the amended bill. The United States then moved for a decree dismissing its original bill without prejudice, and after argument that motion also was denied. Thereupon counsel for the railroad company moved to dismiss the bill absolutely, and upon the statement of counsel for the United States that it "would not proceed any further, in view of the fact that the proposed amendment had been disallowed," the court reached the conclusion "that the bill should be dismissed absolutely upon the allegations of the bill and answer." A decree to that effect was entered, and the government prosecutes this appeal, relying for reversal upon the error which it is insisted was committed in refusing to allow the proposed amended bill to be filed, and in dismissing the suit.

At the threshold it is insisted by the railroad company that the action of the court below in refusing to permit the proposed amendment, however germane that amendment may have been to the cause of action stated in the original bill, and even although the subject-matter of the amendment was not foreclosed by our previous decision, is not susceptible of being reviewed, because the allowance of amendments to pleadings is discretionary with a trial court, and the action of the court below in refusing to permit the amendment, even though erroneous, may not be reversed for error unless a gross abuse of discretion was committed. The principle is elementary, but is inapplicable to this case for a twofold reason: First, because the analysis which we have hitherto made of the opinion of this court on the prior hearing makes it certain that the undoubted object was not to foreclose the right of the government to enforce in the pending causes the commodities clause as correctly construed, and therefore in this regard the discretion of the court below was controlled by the action of this court. Second, because, in view of the express reservations in the opinion and the explicit language of the mandate of this court, the conclusion cannot be escaped that an absolute abuse of discretion resulted from refusing to permit the amendment, even although such abuse was obviously occasioned by a misconception of the character of the action of this court and the scope of the mandate.

It remains only to consider, first, whether the proposed amendment was germane to the original cause of action, and if it was, whether it was foreclosed by our previous decision.

As to the first question: When it is borne in mind that the suit was brought by the government to enforce as against the defendant the commands of the commodities clause, the fact that the proposed amendment was germane to such cause of action is too apparent to need anything but statement. Indeed, in the argument at bar on behalf of the railroad company this is in effect conceded, since it is insisted that the amendment should not have been allowed, because in substance its averments virtually constituted part of the original cause of action. And we think it is equally clear that the grounds of the amendment were

not foreclosed by our former decision. While that decision expressly held that stock ownership by a railroad company in a bona fide corporation, irrespective of the extent of such ownership, did not preclude a railroad company from transporting the commodities manufactured, mined, produced, or owned by such corporation, nothing in that conclusion foreclosed the right of the government to question the power of a railroad company to transport in interstate commerce a commodity manufactured, mined, owned, or produced by a corporation in which the railroad held stock, and where the power of the railroad company as a stockholder was used to obliterate all distinctions between the two corporations. That is to say, where the power was exerted in such a manner as to so commingle the affairs of both as by necessary effect to make such affairs practically indistinguishable, and therefore to cause both corporations to be one for all purposes. To what extent the amendment charged this to be the case will become manifest by again particularly considering its averments concerning the use by the railroad company of the coal company as a purchaser of coal, as also the direct charge made in the proposed amendment that by such acts the railroad company was enabled to control all or a greater portion of the coal produced in the region tributary to its road, and thus to dominate the situation and fix the price, not only at which all the coal could be bought, but at which it could be sold at the seaboard for consumption.

That the facts thus averred and the other allegations contained in the proposed amended bill tended to show an actual control by the railroad company over the property of the coal company and an actual interest in such property beyond the mere interest which the railroad company would have had as a holder of stock in the coal company is, we think, clear. The alleged facts, therefore, brought the railroad company, so far as its right to carry the product of the coal company is concerned, within the general prohibitions of the commodities clause, unless for some reason the right of the railroad company to carry such product was not within the operation of that clause. The argument is that the railroad company was so expected, because any control which it exerted or interest which it had in the product of the coal company resulted from its ownership of stock in that company, and would not have existed without such ownership. The error, however, lies in disregarding the fact that the allegations of the amended bill asserted the existence of a control by the railroad company over the coal corporation and its product, rendered possible, it is true, by the ownership of stock, but which was not the necessary result of a bona fide exercise of such ownership, and which could only have arisen through the use by the railroad of its stock ownership for the purpose of giving it, the railroad company, as a corporation, for its own corporate purposes, complete power over the affairs of the coal company, just as if the coal company were a mere department of the railroad. Indeed, such a situation could not have existed had the fact that the two corporations were separate and

distinct legal entities been regarded in the administration of the affairs of the coal company.

Granting this to be the case, however, it is in effect urged, as the railroad company held all the stock in its coal company, and therefore any gain made or loss suffered by that company would be sustained by the railroad company, no harm resulted from commingling the affairs of the two corporations and disregarding the fact that they were separate juridical beings, because, ultimately considered, they were but one and the same. This, however, in substance but amounts to asserting that the direct prohibitions of the commodities clause ought to have been applied to a case of stock ownership—particularly to a case where the ownership embraced all the stock of a producing company—and therefore that a mistake was committed by Congress in not including such stock ownership within the prohibitions of the commodities clause. We fail, however, to appreciate the relevancy of the contention. Our duty is to enforce the statute, and not to exclude from its prohibitions things which are properly embraced within them. Coming to discharge this duty it follows, in view of the express prohibitions of the commodities clause, it must be held that while the right of a railroad company as a stockholder to use its stock ownership for the purpose of a bona fide separate administration of the affairs of a corporation in which it has a stock interest may not be denied, the use of such stock ownership in substance for the purpose of destroying the entity of a producing, etc., corporation, and of commingling its affairs in administration with the affairs of the railroad company, so as to make the two corporations virtually one, brings the railroad company so voluntarily acting as to such producing, etc., corporation within the prohibitions of the commodities clause. In other words, that by operation and effect of the commodities clause there is a duty cast upon a railroad company proposing to carry in interstate commerce the product of a producing, etc., corporation in which it has a stock interest, not to abuse such power so as virtually to do by indirection that which the commodities clause prohibits—a duty which plainly would be violated by the unnecessary commingling of the affairs of the producing company with its own, so as to cause them to be one and inseparable.

Deciding, as we do, that error was committed in denying leave to file the proposed amended bill, the decree below is reversed and the cause remanded with directions for further proceedings in conformity with this opinion.[34]

[34] See 24 Harv. Law Rev. 672, and 69 Univ. of Pa. Law Rev. 66. For other cases, see United States v. Delaware, L. & W. R. Co., 238 U. S. 516, 35 S. Ct. 873, 59 L. Ed. 1438 (1915); United States v. Reading Co., 253 U. S. 26, 40 S. Ct. 425, 64 L. Ed. 760 (1920), and also 253 U. S. 478, 40 S. Ct. 585, 64 L. Ed. 1022 (1920); United States v. Lehigh Valley R. Co., 254 U. S. 255, 41 S. Ct. 104, 65 L. Ed. 253 (1920).

DELAWARE, L. & W. R. CO. v. UNITED STATES.

(Supreme Court of the United States, 1913. 231 U. S. 363, 34 S. Ct. 65, 58 L. Ed. 269.)

In error to the District Court of the United States for the Western District of New York to review a conviction of a carrier for violating the commodities clause of the Hepburn act.

Mr. Justice LAMAR [35] delivered the opinion of the court:

The Delaware, Lackawanna, & Western Railroad Company was indicted for hauling, over its lines, between Buffalo, New York, and Scranton, Pennsylvania, twenty carloads of hay, belonging to the company, but not necessary for its use as a common carrier. This transportation was charged to be in violation of the commodity clause of the Hepburn act. * * *

On the trial it appeared that the defendant was not only chartered as a railroad, but had also been authorized to operate coal mines. The hay, referred to in the indictment, had been purchased for the use of animals employed in and about the mines at Scranton—all the coal taken therefrom being sold for use by the public, except the steam coal which was used as fuel for the company's locomotives.

The defendant was found guilty and sentenced on each of the twenty counts. It brought the case here, insisting that the commodity clause violated the 5th Amendment, deprived the company of a right to contract, and prevented it from carrying its own property needed in a legitimate intrastate business, conducted under authority of a charter granted by the state of Pennsylvania, many years before the adoption of the Hepburn bill.

1. This contention must be overruled on the authority of United States ex rel. Atty. Gen. v. Delaware & H. Co., 213 U. S. 366, 416, 53 L. Ed. 835, 852, 29 S. Ct. 527. It is true that the decision in that case related to shipments of coal from mine to market, while here the merchandise was transported from market to mine. But the statute relates to "all commodities, except lumber, owned by the company," and includes inbound as well as outbound shipments. Both classes of transportation are within the purview of the evil to be corrected, and therefore subject to the power of Congress to regulate interstate commerce. The exercise of that power is, of course, limited by the provisions of the 5th Amendment. Monongahela Nav. Co. v. United States, 148 U. S. 336, 37 L. Ed. 471, 13 S. Ct. 622; McCray v. United States, 195 U. S. 27, 49 L. Ed. 78, 24 S. Ct. 769, 1 Ann. Cas. 561; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. Ed. 523, 27 S. Ct. 367. But the commodity clause does not take property, nor does it arbitrarily deprive the company of a right of property. The statute deals with railroad companies as public carriers, and the fact that they may also be en-

[35] Parts of the opinion are omitted.

gaged in a private business does not compel Congress to legislate concerning them as carriers so as not to interfere with them as miners or merchants. If such carrier hauls for the public and also for its own private purposes, there is an opportunity to discriminate in favor of itself against other shippers in the rate charged, the facility furnished, or the quality of the service rendered. The commodity clause was not an unreasonable and arbitrary prohibition against a railroad company transporting its own useful property, but a constitutional exercise of a governmental power intended to cure or prevent the evils that might result if, in hauling goods in or out, the company occupied the dual and inconsistent position of public carrier and private shipper.

It was suggested that the case is not within the statute because, as the company could buy, in Scranton, hay that had already been transported over its line, no possible harm could come to any one if it bought the same hay in Buffalo, and then hauled it to Scranton for use at the mine, but not for sale in competition with other dealers in stock food. But the courts are not concerned with the question as to whether, in a particular case, there had been any discrimination against shippers or harm to other dealers. The statute is general, and applies not only to those particular instances in which the carrier did use its power to the prejudice of the shipper, but to all shipments which, however innocent in themselves, come within the scope and probability of the evil to be prevented.

2. In this case the hay was purchased for use in operating mines where 75 per cent. of the coal produced was "assorted sizes" intended to be sold for domestic purposes. The remaining 25 per cent. was steam coal—all of which was used as fuel on the company's locomotives. This steam coal was in the nature of a by-product from a mine operated primarily for the purpose of obtaining coal for sale. Hay purchased for use in such mining cannot be said to have been necessary for the use of the company in the conduct of its business as a common carrier. * * *

Judgment affirmed.

Mr. BRUCE WYMAN, "Business Policies Inconsistent with Public Employment," 20 Harv. Law Rev. 511, at page 528 (1907):

"Those who are engaged in private business may conduct another business if they please, and then they may put in force policies to foster that business, many of which it is certain that those who conduct a public business may not employ to protect a collateral business. The open recognition of this law, limiting the rights of one engaged in a public employment if he enters into competition with members of the public in various businesses in which his services are requisite, constitutes the latest development in the rapid growth of the law governing public callings. The question has as yet come before the courts for

adjudication only a few times; but even the most conservative courts recognize the necessity of regulation here, while the radical courts are willing in certain instances to go to the extent of prohibition. Indeed, it is feared by many people, who are examining into the dangers affecting modern commerce from these new conditions, that unless those in common callings are held to the strictest accountability the competitive system with its market open to all is in the gravest peril. And the situation would become intolerable if those who control the destinies of trade through their ownership of the public utilities should be permitted to concentrate in their own hands the principal private businesses, which they might not inconceivably do if they were permitted to enter into general business and make use of their superior position to crush their competitors.

"When a public service company is also engaged in collateral business, the temptation always is to use the power in its public business to promote its collateral business. An illustration of this was shown in Louisville Transfer Co. v. American District Telegraph Co.,[36] where the rather extraordinary state of affairs transpired that the defendant telephone company also operated a carriage service, and therefore had refused to permit its patrons to call the plaintiff transfer company by telephone to order carriages. The court held that it occupied the same position toward the plaintiff as it did toward its other patrons, and must therefore give the plaintiff full telephone service in the conduct of its business.[37] Another extreme case of unfair action may be seen in Mobile v. Bienville Water Supply Co.,[38] where the city had constructed both a waterworks and a sewerage system, and had announced a single rate for both sewerage service and water supply, which was the same whether water was taken or not. It was held that the established water supply company might complain of this discrimination by one service in favor of the other as unfair competition, since it was the plain public duty of the city to furnish either service separately at a reasonable rate.[39]

"This development which is going on in the law was brought to the attention of all not long ago by a striking decision of the Supreme Court of the United States in N. Y. N. H. & H. R. R. v. Interstate Commerce Commission.[40] That case may go no further than to decide that a railroad company which is engaged in dealing in coal must charge itself its regular schedule rates or it will be guilty of illegal

[36] Ky. Law J. 1447.

[37] Cf. Electric Despatch Co. v. Bell Telephone Co., 20 Can. Sup. Ct. 83 (——), and People ex rel. Postal Telegraph Co. v. Hudson River Telephone Co., 19 Abb. N. C. (N. Y.) 466 (1887), accord.

[38] 130 Ala. 379, 30 So. 445 (1900).

[39] The court obviously holds similar views in Snell v. Clinton Electric Light, Heat and Power Co., 196 Ill. 626, 63 N. E. 1082, 58 L. R. A. 284, 89 Am. St. Rep. 341 (1902), and in Loraine v. Pittsburg, J. E. & E. R. Co., 205 Pa. 132, 54 A. 580, 61 L. R. A. 502 (1903).

[40] 200 U. S. 361, 26 S. Ct. 272, 50 L. Ed. 515 (1906).

discrimination; but much of the reasoning of the court, if carried to the logical conclusion, would seem to forbid the railroads from taking the inconsistent positions of carriers and dealers.[41] And in Illinois the court long since has taken that further step in Central Elevator Company v. People,[42] and held that it is inconsistent with the public duty which a grain warehouseman as a public servant owes its various patrons, for it to engage in the grain business and utilize its own elevator facilities in carrying it on.[43]

"These are radical views that are expressed in these last decisions, but serious situations require bold solutions. It may be regarded as already conceded that if a public service company is engaged in two kinds of business, it may not do what might be done in private enterprises—give itself preference over its rivals. Indeed it may very probably turn out that it will be decided that there is no way in which the situation can be safeguarded. When the public company has two activities, it will be content if need be with the one profit in its serving capacity, and sell its goods at cost if it must—a sort of competition which its competitor in business cannot meet. Such being the case, it may be established that it is necessary for the maintenance of the highest type of public service to forbid entangling alliances between public services and private businesses, whenever their interests might come in direct conflict with the interests of those whom they have undertaken to serve."

[41] The Interstate Commerce Commission has several times taken occasion to animadvert upon the practices of some railways in conducting collateral business. In re Grain Rates of Chicago Great Western Ry., 7 Interst. Com. Com'n R. 33 (1897); McGrew v. Missouri Pacific Ry., 8 Interst. Com. Com'n R. 630 (1901).

[42] 174 Ill. 203, 51 N. E. 254, 43 L. R. A. 658 (1898).

[43] In accord is Hannah v. People ex rel. Attorney General, 198 Ill. 77, 64 N. E. 776 (1902), a much more extreme case, holding a statute passed to permit warehousemen to store grain in their own elevators, unconstitutional because against the general clauses in the Illinois constitution declaring grain elevators public in character.

In Attorney General v. Great Northern Ry., 29 L. J. Ch. 794 (——), this public policy was instrumental in causing the court to declare the coal business ultra vires of a railroad company.

The foregoing footnotes, 36 to 43, accompanied the text in 20 Harv. Law Rev. 511. See People ex rel. v. Illinois Cent. R. Co., 233 Ill. 378, 84 N. E. 368, 16 L. R. A. (N. S.) 604, 122 Am. St. Rep. 181, 13 Ann. Cas. 285 (1908), for a case involving the power of a railroad corporation to maintain a grain elevator; Jacksonville, M., P. Ry. & Nav. Co. v. Hooper, 160 U. S. 514, 16 S. Ct. 379, 40 L. Ed. 515 (1896), re the power to maintain a hotel; and Western Maryland R. Co. v. Blue Ridge Hotel Co., 102 Md. 307, 62 A. 351, 2 L. R. A. (N. S.) 887, 111 Am. St. Rep. 362 (1905), for other cases dealing with the question whether a railroad corporation may engage in business not directly involving the carriage of persons or property. Also see 25 Col. Law Rev. 835.

SECTION 3.—RESTRAINT OF COMPETITION [44]

CHICAGO GAS-LIGHT & COKE CO. v. PEOPLE'S GAS-LIGHT & COKE CO.

(Supreme Court of Illinois, 1887. 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124.)

MAGRUDER, J.[45] This is a bill for the specific performance of a contract, the nature of which will be explained hereafter. Upon final hearing in the superior court of Cook county, the preliminary injunction which had been granted was dissolved, and the bill dismissed. The bill was filed in that court by appellee against appellant. The cause was heard upon the pleadings and exhibits thereto, and upon certain affidavits filed with the answer. The appellate court, to which an appeal was taken, reversed the decree of the superior court, and remanded the case, with directions to "enter a decree enjoining and restraining the said Chicago Gas-Light & Coke Company from laying gas mains or pipes in the said West division, or entering into contracts for supplying the city or the inhabitants in said West division with gas, and from in any manner violating said contract." The case is brought before us by appeal from the appellate court.

The Chicago Gas-Light & Coke Company was incorporated by an act of the legislature approved February 12, 1849; the second section of which is as follows: "The corporation hereby created shall have full power and authority to manufacture and sell gas to be made from any and all of the substances, or a combination thereof, from which inflammable gas is usually obtained, and to be used for lighting the city of Chicago, or the streets thereof, and any buildings, manufactories, public places, or houses therein contained, and erect all necessary works and apparatus, and to lay pipes for the conducting of the gas in any of the streets or avenues of said city: provided, that no permanent injury or damage shall be done to any street, lane, or highway in said city. The real estate which the corporation is entitled to hold shall not exceed in value fifty thousand dollars." Section 3 provides, among other things, that the capital stock of the corporation shall not exceed

[44] Cases on only a few phases of restraint of competition, wherein public service companies are involved, are printed here. For a collection of cases on the general subject, see Cases on Trade Regulation by Professor Herman Oliphant, particularly "Contracts Not to Compete," pp. 34–258, and "Combinations," pp. 703–1014. On account of the similarity of the problem involved, it may be found desirable to take up the cases in Chapter III, Section 4, immediately after concluding this section.

[45] Parts of the opinion are omitted, including a paragraph in which it was held that the contract under discussion was ultra vires of both appellant and appellee.

$300,000, and that "said company shall have the exclusive privilege of supplying the city of Chicago and its inhabitants with gas, for the purpose of affording light, for ten years." * * *

The People's Gas-Light & Coke Company (the appellee) was organized under a special charter, approved February 12, 1855. The bill states the substance of the powers conferred, and rights granted, as follows: "With power and authority to erect the necessary works for the manufacture of gas and coke within the city of Chicago, and *on and after the twelfth day of February,* 1859, to manufacture and sell gas to be made from any and all substances, or a combination thereof, from which illuminating gas is usually obtained, and to be used for the purpose of lighting the city of Chicago, or the streets thereof, and any buildings, manufactories, public places, or houses therein contained, and to erect all necessary works and apparatus for that purpose. And on and after the twelfth day of February, 1859, or sooner, and by and with the consent of the Chicago Gas-Light & Coke Company, to lay pipes for the purpose of conducting the gas in any of the streets or avenues of said city, with the consent of the city council." * * *

On April 21, 1862, a contract was made between appellant, of the first part, appellee, of the second part, and Cornelius K. Garrison, of the third part, the material portions of which are as follows:

"Third. For and in consideration of the sale and conveyance of the said improvements by the said party of the first part to the said party of the third part, as aforesaid, and of the covenants and agreements herein contained to be kept and performed by the said parties of the first part, the said parties of the second part and third part, separately, each for themselves, hereby covenant and agree, to and with the said party of the first part, that they, the said parties of the second and third parts, or either of them, will not, during the period of one hundred years from this date, either jointly or separately, in their own names, or in the names of any other party or parties, lay, or cause to be laid, any gas-mains or gas-pipes of any kind in the North and South divisions of the said city of Chicago, or in such parts of said city as now lie, or may hereafter lie, east of the North and South branches of the Chicago river, nor furnish nor sell illuminating gas to any person or persons for consumption or use within the said last-mentioned portions of the said city of Chicago; nor, during the period aforesaid, interfere with or molest, in any way whatever, the business of the party of the first part of manufacturing and selling illuminating gas and its incidents in the said last-mentioned parts of said city of Chicago.

"Fourth. For and in consideration of the purchase and payment so made, as aforesaid, by the said party of the third part, and of the covenants and agreements of the said parties of the second and third parts herein contained, the said party of the first part hereby covenants and agrees to and with the said parties of the second and third parts, severally, that the said party of the first part will not, during a like period of one hundred years from the date hereof, either directly or indirect-

ly, in its own name, or in the name of any other party or parties, lay, or cause to be laid, any gas-mains or gas-pipes of any kind, in the said West division of the city of Chicago, or in such part or parts of said city as now lie, or may hereafter lie, west of the North and South branches of the Chicago river, nor furnish nor sell illuminating gas to any persons for consumption or use within the said last-mentioned portions of said city of Chicago, nor, during the period aforesaid, interfere with nor molest, in any way whatever, the business of the said parties of the second and third parts, or either of them, in manufacturing and selling illuminating gas and its incidents in the said last-mentioned part or division of said city."

This contract appears to have been observed by both parties until May or June, 1886, when appellant obtained permission from the city council to construct a tunnel under the South branch of the Chicago river, in which to lay gas-mains to be connected with mains and service-pipes in the streets of the West division. The bill charges that appellant threatens to lay its mains and service-pipes in the West division for the purpose of supplying gas there in violation of its contract. The object of the bill is to enforce the fourth clause of the contract, as above quoted, and prevent its violation.

Under its charter, appellant had the right to make and sell gas to be used for lighting all the divisions of the city of Chicago, and all of the streets and buildings therein. It had as much power and authority to lay pipes in the streets of the West division as in those of the North and South divisions. By the contract, it agreed to lay no mains or pipes in the West division, nor to furnish or sell any gas to persons living there, for a period of 100 years. It thereby bound itself to avoid the performance of a duty which it owed to the public. The manufacture and distribution of illuminating gas by means of pipes or conduits placed, under legislative authority, in the streets of a town or city, is a business of a public character; it is the exercise of a franchise belonging to the state. The services rendered, and to be rendered, for such grant are of a public nature. Where the right to make and sell gas to the city and its inhabitants, under the conditions here named, is conferred upon a company, it is so conferred as well for the benefit of the public as of the company.

In Gas Co. v. Light Co., 115 U. S. 650, 6 S. Ct. 252, the supreme court of the United States say: "The manufacture of gas, and its distribution for public and private use by means of pipe laid, *under legislative authority*, in the streets and ways of a city, is not an ordinary business in which every one may engage, but is a franchise belonging to the government, to be granted, for the accomplishment of public objects, to whomsoever and upon what terms it pleases. It is a business of a public nature, and meets a public necessity, for which the state may make provision. It is one which, so far from affecting the public injuriously, has become one of the most important agencies of civiliza-

tion, for the promotion of the public convenience and the public safety." * * *

It is to be noted that the appellant company was organized under a private charter granted before the adoption of the present constitution of the state, and that the power and authority therein conferred are not made subject, by the terms of the charter, to the consent of the city council. Inasmuch, therefore, as by the terms of its charter the appellant owed a duty to the public, it could not avoid the performance of that duty by a contract with another corporation.

In Railway Co. v. Mining Co., 68 Ill. 489, it was held "that the duties which railroad corporations owe to the public, and which are the considerations upon which their privileges were conferred, cannot be avoided by neglect, refusal, or by agreement with other persons or corporations. Therefore, any contract to prevent the faithful discharge of any such duties will be against public policy, and void."

In Hays v. Railroad Co., 61 Ill. 423, this court says: "But a sale and transfer of the powers of one company to another, without the authority of the legislature, are against public policy, and the courts will do nothing which will promote the transfer, as it is *in utter disregard of the duties and obligations of the company.*"

And in Thomas v. Railroad Co., 101 U. S. 83, it is said "that where a corporation like a railroad company has granted to it, by charter, a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes—is a violation of the contract with the state, and is void as against public policy."

In City of St. Louis v. Gas-Light Co., supra [70 Mo. 69], the charter of the gas company gave it the "exclusive" right to manufacture and sell gas in the city of St. Louis. The company made a contract by which it surrendered and abandoned its "exclusive" right to have gas-works, lay pipes, or furnish gas in a particular district of the city north of a certain line. It simply parted with the right, given it under its charter, to exclude all other companies from that district, but did not bind itself not to do a gas business there in common with other companies, if it saw fit to do so. The supreme court of Missouri there say: "This right to exclude competition was not a right vested in the company for the benefit of the public, because in its very nature it was injurious to the public; but it was a right vested in the company for its own benefit, which it might therefore surrender with the consent of its stockholders. The right to make and vend gas to the city and its inhabitants was a right conferred upon the company for the benefit both of the company and the public, and not for the sole benefit of others; but the right to exclude competition was solely for the benefit of the

company. If, in the provision of the contract above quoted, the company surrendered and abandoned a right to make and vend gas in that portion of the city described therein, then the position taken by counsel, that it abandoned a public duty, is maintainable. We do not think that said provision is susceptible of that construction, but, on the contrary, it is expressly declared 'that both of said companies, or any other company or individual, shall be permitted to exist and do business in the aforesaid district or portion of said city without hinderance.' We think it clear that the St. Louis Gas-Light Company did nothing more than surrender its right to exclude all competition in that part of the city lying north of Washington avenue; reserving to itself the right to meet any demand which might lawfully be made upon it by the public. There is no abandonment or surrender on the part of the St. Louis Gas-Light Company of its right, or surrender or abandonment of its duty, to make and vend gas north of the south line of Washington avenue."

The appellant herein, the Chicago Gas-Light & Coke Company, had the exclusive privilege, under its charter, of supplying the city of Chicago with gas for 10 years from February 12, 1849, to February 12, 1859. So far as its privilege was exclusive, such privilege was for its own benefit, and not for the benefit of the public. If, therefore, at any time before February 12, 1859, appellant had made an agreement with the appellee or any other company foregoing its exclusive right to make and sell gas in the West division, such an agreement would have been valid, as parting only with a privilege conferred for the benefit of the company. But the appellant binds itself, by the contract now under consideration, to surrender and abandon altogether, for 100 years, all the right conferred upon it by its charter to manufacture and vend gas in the West division. By so doing "it abandoned a public duty," and a court of equity will not aid either party in the enforcement of such a contract. 2 Mor. Corp. § 656; Transportation Co. v. Pipe-Line Co., 22 W. Va. 617; State v. Railroad Co., 29 Conn. 538; Railroad Co. v. Railroad Co., 3 Rob. (N. Y.) 411; Railroad Co. v. Mathers, 71 Ill. 592.

There may be cases where a corporation may abandon a public work for reasonable cause, but this is a very different thing from disabling itself by contract from the performance of a duty to the public. Nor is the question here as to the extent to which duties imposed upon a corporation will be enforced by mandamus. The question is whether a court of equity will enforce the specific performance of such a disabling contract as is above indicated. In Marsh v. Railway Co., 64 Ill. 414, a bill in chancery was filed by Marsh for the specific performance of a contract which a railroad company had made with him "to locate passenger and freight depots of said road in Marsh's addition to Fairbury, and at no other point in said town;" and we there held that equity would not enforce the contract, because its enforcement was regarded as against public policy. This court said, in that case: "The specific execution of a contract in equity is a matter, not of absolute right in the party, but of sound discretion in the court; and, in deciding

whether specific performance should be enforced against a railway company, the court must have regard to the interests of the public."

Other provisions of the contract, in the case at bar, besides the third and fourth clauses above quoted, show that appellant and appellee had already entered upon the discharge of their duties to the public when the contract of August 21, 1862, was made between them. Appellee had laid mains and pipes east of the river, and appellant had laid such mains and pipes west of the river. The contract provides for an exchange of these properties, and the proofs show that $40,000 were paid by appellee to appellant for the excess in value of the latter's interests on the West side, over the value of appellee's interests east of the river. Moreover, the agreement of August 21, 1862, shows on its face that at that date appellant had a contract with the city for lighting the street-lamps, etc., on the West side, as well as in the other divisions of the city and appellant thereby sold and assigned so much of such contract as applied to the West side to the appellee; both parties covenanting, each with the other, "to use such reasonable and proper influence as they respectively may have with the authorities of the city of Chicago to procure a division of said contract, and a new and independent contract between said city and the said party of the second part for furnishing gas in the West division." In view of the provisions thus referred to, it is not necessary to discuss the question whether appellant's charter was permissive or compulsory, or whether it was or was not bound by the mere acceptance of its charter to enter upon the business of making and supplying gas. Inasmuch as it did actually enter upon such business in the West division, and commence supplying gas in that section to the city and the inhabitants there, a court of equity will not enforce the performance of a contract by which it agreed to abandon the discharge of its duties to the public, and not to resume the discharge of those duties for 100 years.

The contract between these corporations tends to create and perpetuate a monopoly in the furnishing of gas to the city, and is therefore against public policy. They were organized under special charters at a time when the granting of such charters was not forbidden by the constitution of this state. Appellant, under its charter, had a monopoly of the business of supplying gas up to February 12, 1859. Four years before the latter date, to-wit, on February 12, 1855, the legislature granted to appellee its charter, and therein clearly recognized appellant's monopoly, and indorsed its continuance for the balance of the 10 years; but distinctly provided that, at the expiration of the 10 years, appellee should have the same right to make and sell gas anywhere in the city as appellant had theretofore exclusively enjoyed, subject only to the consent of the common council. We think it was clearly the interest of the legislature to put an end, after February 12, 1859, to the monopoly which appellant had had prior to that time, and to give the gas business to two conflicting companies. The contract in question sought to continue the monopoly in spite of legislative action. It in-

vested the appellee with the exclusive right to furnish gas in the West division, and the appellant with such exclusive right in the North and South divisions.

The ordinary rule, that contracts in partial restraint [46] of trade are not invalid, does not apply to corporations like appellant and appellee, because they were engaged in a public business, and in furnishing that which was a matter of public concern to all the inhabitants of the city.[47] In Transportation Co. v. Pipe-Line Co., supra, it was said: "If there be any sort of business which, from its peculiar character, can be restrained to no extent whatever without prejudice to the public interest, then the courts would be compelled to hold void any contract imposing any restraint, however partial, on this peculiar business; provided, of course, it be shown clearly that the peculiar business thus attempted to be restrained is of such a character that any restraint upon it, however partial, must be regarded by the court as prejudicial to the public interest." In the West Virginia case, it was held that "whenever the legislature, by statute law, has authorized any person or corporation to condemn the lands of others, in order to carry on its business, the courts will regard this as a legislative declaration that this character of business is such as that the public has so great and direct an interest in that the courts must hold it as contrary to public policy to permit any restriction of it by private contract." If clothing a corporation with the power of eminent domain—that is, with the right to take an individual's property by paying him for it—so stamps the business of such corporation with a public character that that business may not be restricted by contract, we see no reason why the same public character should not attach to a corporation which is vested

[46] See note, "The Legality of Combinations to Restrain Competition in Services," 25 Col. Law Rev. 647.

[47] "The supplying of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort. New Orleans Gas-Light Co. v. Louisiana Light & Heat Producing & Manufacturing Co., 115 U. S. 650, 6 S. Ct. 252, 29 L. Ed. 516 (1885); Louisville Gas Co. v. Citizens' Gas-Light Co., 115 U. S. 683, 6 S. Ct. 265, 29 L. Ed. 510 (1885); Shepard v. Milwaukee Gas-Light Co., 6 Wis. 539, 70 Am. Dec. 479 (1857); Chicago Gas-Light & Coke Co. v. People's Gas-Light & Coke Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124 (1887); City of St. Louis v. St. Louis Gas-Light Co., 70 Mo. 69 (1879). Hence, while it is justly urged that those rules which say that a given contract is against public policy, should not be arbitrarily extended so as to interfere with the freedom of contract (Printing & Numerical Registering Co. v. Sampson, L. R. 19 Eq. 462 [1875]), yet, in the instance of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy. This subject is much considered, and the authorities cited, in West Virginia Transportation Co. v. Ohio River Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527 (1883); Chicago Gas-Light & Coke Co. v. People's Gas-Light & Coke Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124 (1887); Western Union Telegraph Co. v. American Union Telegraph Co., 65 Ga. 160, 38 Am. Rep. 781 (1880)." Fuller, C. J., in Gibbs v. Consolidated Gas Co. of Baltimore, 130 U. S. 396, 9 S. Ct. 553, 32 L. Ed. 979 (1889).

with the right and power to tear up and use the streets of a great city. The fee of such streets is vested in the city for the benefit of the public. Any business which requires their use, requires the use of property which belongs to the public. Telegraph Co. v. Telegraph Co., 65 Ga. 160.

It is claimed that the restraint imposed on each of these companies by the contract is only partial, because confined to a particular division of the city. In Craft v. McConoughy, 79 Ill. 346, we held that, even if the restraint imposed by the contract was but partial, yet, if it was unreasonably oppressive and injurious to the public, it would not be sanctioned in a court of equity. It was there said: "Whatever is injurious to the interest of the public is void on the ground of public policy." * * *

For the reasons here stated the judgment of the appellate court is reversed.

STATE ex rel. SNYDER, Pros. Atty., v. PORTLAND NATURAL GAS & OIL CO.

(Supreme Court of Indiana, 1899. 153 Ind. 483, 53 N. E. 1089, 53 L. R. A. 413, 74 Am. St. Rep. 314.)

Quo warranto proceedings by the state, on the relation of Frank H. Snyder, prosecuting attorney, against the Portland Natural Gas & Oil Company. From a judgment entered on sustaining a demurrer to the information, the state appeals.

JORDAN, J. This is a proceeding in quo warranto by the state of Indiana, on the relation of the prosecuting attorney of the Twenty-Sixth judicial circuit, to dissolve, and seize the corporate franchises of, appellee. The venue of the cause was changed from the Jay circuit court to the Randolph circuit court, in which court a demurrer was sustained to the information for insufficiency of facts, and judgment was rendered in favor of appellee thereon. The state appeals, and assigns error on the ruling of the court in sustaining the demurrer to the information.

The information alleges: That the defendant is a corporation duly organized in December, 1886, under the laws of the state of Indiana relating to the incorporation of manufacturing and mining companies. The object of its organization is to conduct the business of mining oil and gas, and to furnish the same for fuel and illuminating purposes and for propelling machinery, etc. Its place of business or operation is stated to be at the city of Portland, in the state of Indiana. After its incorporation it obtained from said city permission to lay gas pipes along and under the public streets of that city for the purpose of supplying its inhabitants with gas for light and fuel, and it engaged in furnishing gas to them for such purposes. That the Citizens' Natural Gas & Oil Company

was also duly incorporated in February, 1889, under the same laws and for the same purposes as was defendant, and it also was granted the privilege by the city of Portland to lay its pipes in and along the streets of the city for the same purposes as was defendant, and it engaged in supplying gas to the inhabitants of said city for fuel and light. After alleging these facts, the information charges that the defendant on the 1st day of September, 1891, "in violation of law and in the abuse of its corporate powers, and in the exercise of privileges not conferred upon it by law," entered into a certain agreement or combination with said Citizens' Gas & Oil Mining Company "to fix the rate of gas to be charged by them, and each of them, to the consumers in said city of Portland." It was further agreed by and between the defendant and said other mentioned company that "neither of said companies should or would attach the service pipes of any gas consumer in said city to its pipe lines if at the time such customer or consumer was a patron of the other company." It is further averred that the defendant has observed and complied with said agreement, and the price of gas has been fixed thereby, and it has at all times refused to sell or furnish gas to the inhabitants of said city at any other price than the one fixed by said agreement, and in pursuance of said agreement, and in order to prevent competition, it has refused, and still refuses, to supply divers inhabitants of the said city of Portland with gas, who, as it is alleged, were consumers of gas from the pipe line of the said Citizens' Gas & Oil Mining Company. It is further alleged that there is no other corporation, company, or person in said city engaged in supplying gas for light and fuel to its inhabitants.

The information is not a model pleading, and may perhaps be said to be open to the objection that in some respects it is uncertain, and in others states conclusions instead of facts. The question, however, presented for our decision, is, are the facts as therein alleged sufficient to entitle the state to demand that the appellee's corporate franchises shall be declared forfeited? Reduced to a simple proposition, the gravamen upon which it bases its demand for a forfeiture of the defendant's corporate rights is that it has, by an agreement, illegally united with the Citizens' Gas, etc., Company, a competing company, under which agreement the price of gas to be charged consumers has been fixed, and has agreed with said company that neither would furnish gas to persons who were patrons of the other company. By this agreement it appears that it was controlled, and at all times refused to furnish its product to divers inhabitants of the city of Portland, simply because they were consumers of gas from the lines of the Citizens' Gas Company. The insistence of counsel for the state is that the defendant, under the facts charged in the information, is shown to have combined with the Citizens' Gas Company to fix and maintain the price of gas, and that these companies agreed with each other not to furnish gas to consumers who were patrons of the other company, in order to prevent legitimate competition; that, in carrying out the compact or agreement, the defendant exercised powers not conferred by law,

and committed an act violative of law, and is shown to have abused the rights conferred upon it by the state, and hence it ought to be ousted from longer or further exercising its corporate rights. The Code provides that an information may be filed against a corporation when it does or omits acts which amount to a surrender or forfeiture of its rights and privileges as a corporation, or when it exercises powers not conferred by law. Burns' Rev. St. 1894, § 1145 (Rev. St. 1881, § 1131; Horner's Rev. St. 1897, § 1131, subd. 4). The statute exacts that the information "shall consist of a plain statement of the facts which constitute the grounds of the proceeding addressed to the court." Burns' Rev. St. 1894, § 1147 (Rev. St. 1881, § 1133; Horner's Rev. St. 1897, § 1133). The authorities assert, as a general rule, that courts will proceed with extreme caution in the forfeiture of corporate franchises, and a corporation will not be deprived thereof unless under express limitation, or for a plain abuse of its powers, whereby it fails to fulfill the design and purpose of its organization. When the state seeks to destroy the life of an incorporated body, it is required to show some grave misconduct—some act, at least, by which it has offended the law of its creation, or something material which tends to produce injury to the public, and not merely that which affects only private interests, for which other adequate remedies are provided. High, Extr. Rem. §§ 649, 654; People v. North River Sugar-Refining Co., 121 N. Y. 582, 24 N. E. 832; Bank of Vincennes v. State, 1 Blackf. 267. Where, however, the facts disclose that a corporation has failed in the discharge of its corporate duties by uniting with others in carrying out an agreement, the performance of which is detrimental or injurious to the public, it thereby may be said to offend against the law of its creation, and consequently forfeits its right to longer exercise its franchises, and is subject to a judgment of ouster. People v. North River Sugar-Refining Co., 54 Hun, 354, 7 N. Y. S. 406; Id., 121 N. Y. 582, 24 N. E. 832; State v. Oberlin Bldg. & Loan Ass'n, 35 Ohio St. 258; State v. Cincinnati, N. O. & T. P. Ry. Co., 47 Ohio St. 130, 23 N. E. 928; State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279; High, Extr. Rem. § 666.

Courts have enlarged the rule so that an information in the nature of a quo warranto is now regarded not only as appropriate means of testing the right to exercise corporate franchises, but such proceedings are also a proper remedy for the abuse by a corporation of the powers with which it has been invested. Beach, Priv. Corp. § 53. Of course, as asserted by the authorities previously cited, proceedings in quo warranto will not be countenanced or receive the sanction of a court, as a general rule, where the act complained of is of a trivial character, or where the abuse charged may be said to be a doubtful one, or there exists any other adequate or ample remedy therefor. Id. § 436. Corporations are recognized as creatures of the law, and they certainly owe obedience thereto; and when they fail to perform duties which they were created to discharge, and in which the public have an interest, or where they do unauthorized or for-

bidden acts, the state unquestionably has the right, and it is its duty, to object, and it may interpose by information, and wrest from the offending corporation its franchises. Id. § 840, 841; Cook, Stock, Stockh. & Corp. Law, § 635; People v. Dashaway Ass'n, 84 Cal. 114, 24 P. 277. Appellee is in its nature a public corporation, which fact has been recognized by our legislature in conferring upon companies engaged in a business of like character the right of eminent domain. Acts 1889, p. 22 (Burns' Rev. St. 1894, § 5103). Being the creature of the law, the franchises granted to it by the state—in theory, at least—were granted as a public benefit; and in accepting its rights, under the laws of the state, it impliedly agreed to carry out the purpose or object of its creation, and assumed obligations to the public, and such obligations it is required to discharge. Beach, Trusts, § 221; Thomas v. Railroad Co., 101 U. S. 71. It certainly can be said, and the proposition is sustained by ample authority, that, in furtherance of the purposes for which it was created, it owed a duty to the public. Its duty towards the citizens of the city of Portland, and their duty towards it, may be said to be somewhat reciprocal; and any dealings, rules, or regulations between it and them which do not secure the just rights of both parties cannot receive the approbation of a court. The law, among other things, exacted of appellee the duty to offer and supply gas impartially, so far as it had the ability or capacity to do so, to all persons desiring its use within the territory to which its business was confined, provided always such persons made the necessary arrangements to receive it, and complied with the company's reasonable regulations and conditions. Portland Natural Gas & Oil Co. v. State, 135 Ind. 54, 34 N. E. 818, and authorities there cited; People v. Chicago Gas-Trust Co., 130 Ill. 268, 22 N. E. 798; Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co., 121 Ill. 530, 13 N. E. 169; Milling Co. v. Mendenhall, 142 Ind. 538, 41 N. E. 1033; Telephone Co. v. Bradbury, 106 Ind. 1, 5 N. E. 721; Same v. Falley, 118 Ind. 194, 19 N. E. 604; Same v. Swoveland, 14 Ind. App. 341, 42 N. E. 1035; 8 Am. & Eng. Enc. Law, 614. It is an old and familiar maxim that "competition is the life of trade," and whatever act destroys competition, or even relaxes it, upon the part of those who sustain relations to the public, is regarded by the law as injurious to public interests, and is therefore deemed to be unlawful, on the grounds of public policy. Greenh. Pub. Pol. pp. 654, 655; Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co., supra; Gibbs v. Gas Co., 130 U. S. 396, 9 S. Ct. 553; Hooker v. Vandewater, 4 Denio, 349; Oil Co. v. Nunnemaker, 142 Ind. 560, 41 N. E. 1048; Beach, Priv. Corp. §§ 54, 55. The authorities affirm, as a general rule, that if the act complained of, by its results, will restrict or stifle competition, the law will regard such act as incompatible with public policy, without any proof of evil intent on the part of the actor, or actual injury to the public. The inquiry is not as to the degree of injury inflicted upon the public. It is sufficient to know that the inevitable tendency of the act is injurious to the public. Salt Co. v. Guthrie, 35 Ohio

St. 666; Swan v. Chorpenning, 20 Cal. 182; State v. Standard Oil Co., supra; Gibbs v. Smith, 115 Mass. 592; Richardson v. Buhl, 77 Mich. 632, 43 N. W. 1102; Factor Co. v. Adler, 90 Cal. 110, 27 P. 36; Beach, Trusts, § 82.

Recognizing and adopting the principles to which we have referred as sound law, we next proceed to apply them as a test to the facts involved in this case. It will not be unreasonable to presume that one of the objects, upon the part of the city of Portland, in granting permission to the Citizens' Gas Company to lay its pipes and mains along and under the streets of that city, after it had awarded the same rights to appellee, was that there might be a reasonable and fair competition between these two companies. By the agreement in question, when carried into effect, the patrons of one company were excluded from being supplied with gas from the other company. Each company was, by the terms of the agreement, bound to abide by and maintain the prices fixed, and each was prohibited from furnishing gas to the customers of the other. That the people of that city who desired to become consumers of gas were, by the agreement in question, deprived of the benefits that might result to them from competition between the two companies, certainly cannot be successfully denied. The exclusion of competition, under the agreement, redounded solely to the benefit of appellee and the other company, and the enforcement of the compact between them could be nothing less than detrimental to the public. By uniting in this agreement, appellee disabled, or at least professed to have disabled, itself from the performance of its implied duties to furnish gas impartially to all, and thereby made public accommodations subservient to its own private interests. The agreement in controversy, as it is disclosed by the facts averred in the information, evidently could serve, so far as the public was concerned, no other purpose than a restriction upon competition, and created at least a basis for a monopoly. The law, as we have seen, is inimical to monopolies, and recognizes the right of the public to have the benefit of a fair and healthy competition, and requires that equal facilities and reasonable rates in carrying out the purposes of such business as that in which appellee is engaged, so far as practicable, be secured to all.

In Oil Co. v. Nunnemaker, supra, we said: "The law has always been hostile to the creation of monopolies when they tend to impair the interest of the public. It is elementary that whatever is injurious to or against the public good is void on the ground of public policy. This policy unquestionably favors competition in trade, to the end that its commodities may be afforded to the consumer as cheaply as possible, and is opposed to monopolies which tend to advance prices to the injury of the public in general." In the appeal of Thomas v. Railroad Co., supra, Miller, J., speaking as the organ of the court, said: "Where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public

grant, any contract which disables the corporation from performing those functions—which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes—is a violation of the contract with the state, and is void, as against public policy." While appellee, by the agreement in controversy, cannot be said to have fully renounced autonomy, still it did so to the extent, at least, that it thereby disabled itself from supplying persons with gas who were patrons of the other company. That, by entering into this agreement and carrying it into execution, appellee violated the law and clearly abused the rights and powers conferred upon it by the state, and may be said to have offended against the law of its creation, there can be no question. Such an illegal act or agreement upon the part of a corporation like appellee cannot be permitted to override the law, and it was the manifest duty of the state to interpose, as it has done, and call it to account; and, if the charge made is established, a deserving penalty ought to be inflicted.

In addition to the prayer for the forfeiture of appellee's rights as a corporation, the information asks that such other relief be granted as is just and proper. The rule is well settled that a court, in cases in quo warranto proceedings, like this, if the facts justify, may, in the exercise of its discretion, render a judgment against defendant, declaring a forfeiture of its corporate franchises, or the judgment may be a forfeiture or ouster only of the right of the defendant to carry out or continue the illegal act or acts charged and established. State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279; Cook, Stock, Stockh. & Corp. Law, § 635. From what we have said, it follows that the court erred in sustaining appellee's demurrer to the information; and the judgment is therefore reversed, and the cause remanded, with instructions to the trial court for further proceedings consistent with this opinion.

KEENE SYNDICATE v. WICHITA GAS, ELECTRIC LIGHT & POWER CO.

(Supreme Court of Kansas, 1904. 69 Kan. 284, 76 P. 834, 67 L. R. A. 61, 105 Am. St. Rep. 164, 2 Ann. Cas. 949.)

Action by the Keene Syndicate against the Wichita Gas, Electric Light & Power Company to recover rent due under a lease. Judgment for defendant, and plaintiff brings error.

ATKINSON, J.[48] On the 14th day of May, 1897, the Wichita Electric Railway & Light Company, a corporation under the laws of Kansas, with its place of business at the city of Wichita, entered into a contract or lease in writing with the Wichita Gas, Electric Light & Power Com-

[48] Part of the opinion is omitted.

pany, a corporation under the laws of Kansas, with its place of business at the city of Wichita. By the terms of the contract or lease the former leased to the latter for a period of 10 years, at an annual rental of $3,000, payable semiannually, certain machinery and appliances, in the city of Wichita, adapted to and used by the lessor for the purpose of generating electricity for light, heat, and power. On the 20th day of March, 1900, the Keene Syndicate, a corporation, purchased of the lessor, the Wichita Electric Railway & Light Company, the property included in and covered by said lease, and also its interest in said lease, taking a written assignment thereof. The lessee, the Wichita Gas, Electric Light & Power Company, being in default of three years' rent in August, 1900, the Keene Syndicate, as assignee of the Wichita Electric Railway & Light Company, commenced its action in the district court of Sedgwick county to recover the rent, the amount claimed due it from the lessee. The petition of plaintiff presented seven causes of action, and attached thereto was a copy of the said written contract or lease. The first six causes of action were each a specific claim for recovery upon one of the semiannual payments of rent. Each cause of action made reference to said contract or lease, and made it a part thereof. The seventh and last cause of action in the petition was by plaintiff intended to state a claim for recovery of defendant upon a quantum meruit for the use of the machinery delivered to defendant under the lease, and by defendant received and used. This last or seventh cause of action made reference to the preceding causes of action, adopted portions of each, and made them a part thereof, which adoption had the effect to include also in the seventh cause of action the contract or lease attached to and made a part of the petition. The seventh cause of action became thereby also an action for recovery on the contract or lease, and not a cause of action for recovery on a quantum meruit, as was contemplated by plaintiff. Defendant filed a demurrer to the petition, which was sustained by the court. Plaintiff elected to stand upon its petition, and judgment was entered aganst it for costs. Plaintiff brings error.

Does the petition on its face disclose a cause of action—a right of plaintiff to recover from defendant? It is charged by defendant that the petition discloses the contract or lease sued upon to be against public policy and void. The district court found the contract sued upon to be void for that reason. Whether or not the petition on its face disclosed the contract or lease to be against public policy and void is the only question before us for our determination. The petition of plaintiff, by its averments, in addition to embodying the facts above stated with reference to location, corporate existence, the execution of the lease, the leasing of the machinery for the term and consideration mentioned, and the assigning of the lease by the lessor to plaintiff, may fairly be said to also disclose, by its averments, that the lessor and the lessee, at the time the lease was entered into, were rival public utility corporations, in the city of Wichita, engaged in generating and furnishing electricity for public and

private use for light, heat, and power. The petition also, in substance, avers that the assignor of plaintiff, the Wichita Electric Railway & Light Company, had delivered to defendant all the property described in the lease, under and by virtue of said lease, and had duly performed all the conditions, agreements, and stipulations in said lease to be by it performed. The contract or lease, attached to and made a part of the petition, and upon which the action for recovery is based, contains the following language: "The said first party hereby binds and obligates itself not to engage in the business of furnishing electric light and power to private or public consumers within the city of Wichita, during the period covered by this agreement, except for the purpose of operating the street railway now owned by the first party, and said first party furthermore agrees not to dispose of any of the apparatus, machinery, appliances, etc., retained by it, for producing or generating electric light and power in said city of Wichita."

The above language quoted from the contract or lease, applied to and construed with the averments of the petition of which the contract or lease formed a part, fairly discloses that the lessor obligated itself not to engage in the business of furnishing electric light and power to private and public consumers within the city of Wichita during the period of 10 years covered by the lease, and further agreed that during said period of 10 years it would not dispose of any of its machinery or appliances, retained by it, for the purpose of being used to generate electric light and power in the city of Wichita. The effect of which, if carried out, would be that the lessor, for said period of 10 years, would abandon the exercise of its corporate power to generate and furnish electric light and power for public and private use in the city of Wichita, withdraw itself from the field of competition with the lessor, its former competitor in the business, for said period of 10 years, and refrain from the sale of property to others who might thereby become competitors of the lessor in the said field of competition during said period of 10 years. But it is not necessary, for the determination of this case, to inquire whether the effect of the agreement between the lessor and the lessee was in fact detrimental to the city of Wichita or its citizens. The inquiry should be, and the true rule is, that agreements which, in their necessary or contemplated operation upon the actions of the parties to them, tend to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public or of third parties, are against the principles of sound public policy, and consequently void. Atcheson v. Mallon, 43 N. Y. 147, 3 Am. Rep. 678. * * *

It is well settled that in the law of contracts the first purpose of the court is to look to the welfare of the public, and, if the enforcement of the agreement would be detrimental to its interest, no relief should be granted to the party injured, and that even though it might result beneficially to one of the parties who made and violated the agreement. In Gibbs v. Baltimore Gas Co., 130 U. S. 396, 9 S. Ct. 553, 32 L. Ed. 979, the

court said: "Courts decline to enforce contracts which impose a restraint, though only partial, upon business of such character that restraint to any extent will be prejudicial to the public interest." The rule that contracts and agreements, when contrary to public policy, will not be enforced, is one of the great preservatives of a state. It has been the uniform rule of this court, and indeed of all courts, to hold that contracts tainted with illegality are absolutely void. Hawley v. Coal Co., 48 Kan. 593, 30 P. 14; Hinnen v. Newman, 35 Kan. 709, 12 P. 144. Plaintiff, the assignee of the lessor, the Wichita Electric Railway & Light Company, is in no better position to recover than the lessor, as the illegal consideration appears upon the face of the contract or lease. Bank v. King, 44 N. Y. 87; Setter v. Alvey, 15 Kan. 157. Whether plaintiff could maintain an action against defendant on a quantum meruit or otherwise, independently of the contract, need not be here considered. That question, in the view we have taken of the seventh cause of action of the petition, is not in the record before us. The contract or lease sued upon being in contravention of public policy, no action for a recovery upon it can be maintained.

The judgment of the district court will be affirmed. All the Justices concurring.

CHARLESTON NATURAL GAS CO. v. KANAWHA NATURAL GAS, LIGHT & FUEL CO. et al.

(Supreme Court of Appeals of West Virginia, 1905. 58 W. Va. 22, 50 S. E. 876, 112 Am. St. Rep. 936, 6 Ann. Cas. 154.)

Action by the Charleston Natural Gas Company against the Kanawha Natural Gas, Light & Fuel Company and others. Decree for defendants, and plaintiff appeals.

BRANNON, P.[49] The Charleston Natural Gas Company is a corporation chartered to furnish natural gas; having a supply field in Boone county, from which it piped gas for consumption in Charleston. The Kanawha Natural Gas, Light & Fuel Company is also a corporation for the production and sale of natural gas. It had a supply field in a territory partly in Roane county, partly in Kanawha county, and had laid pipes from that field to the city of Charleston, and was about to lay pipes in its streets to furnish gas for public use. The Charleston Company already occupied the streets with its distributing pipes. The latter company had also leased some territory in Roane county, and, its Boone county field furnishing a poor supply of gas, it was boring wells in Roane county, and was about to run a pipe line from its Roane county field to Charleston to aid its supply from Boone county. In this

[49] Parts of the opinion, including the citation and discussion of cases, is omitted.

state of things, January 20, 1903, the two corporations made a written agreement. It gave the Charleston Company "exclusive right to sell natural gas in" a certain section, comprising the main city of Charleston and a large area besides, and gave to the Kanawha Company exclusive right to sell gas in another section adjoining Charleston, also quite a large area. The agreement contained these provisions: "Second. The parties hereto mutually agree that neither of them will, during the life of this agreement, sell or distribute gas in the territory hereby allotted to the other; nor will either party permit any other person or corporation to operate or sell gas under its ordinances in the territory of the other. Third. The Charleston Company agrees that it will not operate for gas, drill wells or acquire territory for gas purposes within the territory now occupied by the Kanawha Company, and described as follows. Big Sandy district of Kanawha County, West Virginia, and the Geary and Walton Districts of Roane County, West Virginia, during the term of this agreement. Fourth. The Charleston Company agrees to take all the gas required for its business under this agreement, from the Kanawha Company, at all times during the period of this agreement, provided the Kanawha Company is able to supply the same, under the terms of this agreement." The agreement also provides that the Kanawha Company shall bring to Charleston gas from its field, and that when brought to Charleston, to its regulator, it shall be for joint use; the Kanawha Company to supply and the Charleston Company to accept from the Kanawha Company the gas necessary to supply the customers of the Charleston Company. The agreement divides the earnings in certain proportions between the two corporations, the agreement to last 20 years. This agreement was carried out, and business carried on under it. Recently a third company (the United States Gas Company) comes into the field. It is engaged in laying a gas pipe line from the city of Huntington to the supply field of the Kanawha Company in Roane and Kanawha counties to supply Huntington, and likely Portsmouth and Ironton, Ohio, and Ashland and Catlettsburg, Ky. The Kanawha Company made an agreement to transfer and assign to the United States Gas Company its assets, leases, and wells—its entire supply field in Roane and Kanawha counties—in consideration of stock and bonds of said United States Gas Company.

The Charleston Company filed its bill in the circuit court of Kanawha county, alleging that the Kanawha Company proposed to surrender its charter and discontinue business after its property and assets should be transferred to the United States Company; that the laying of a gas pipe line into said supply field for the supply of gas to other cities and sections (especially the large pipe intended to be laid) will result in a speedy depletion in the supply of gas from said gas field, and in its exhaustion within five years, and in irreparable damage to the Charleston Company, in leaving it without a supply of gas for its business, in vio-

lation of the duty and obligation of the Kanawha Company under said contract to supply the Charleston Company with gas. The bill asked an injunction enjoining the Kanawha Company from transferring its assets and property (particularly said gas territory) to the United States Company, and enjoining both companies from laying any gas line into said gas territory; asking that the said Kanawha Company be enjoined from discontinuing business, and that said agreement be specifically enforced, and said territory be held by said Kanawha Company to answer the end and purposes of said agreement. A preliminary injunction was granted, but was later dissolved, and the Kanawha Company appeals.

The plaintiff's bill for relief rests on the contract between the two gas companies. That contract is challenged as void and not a valid ground of action in a court of justice, because an unlawful agreement, contrary to public policy, as creating a monopoly in an article necessary for public use for fuel and illumination, and tending to suppress competition, and impose on the public inordinate prices for it. At one time monopoly meant a grant from King or state of an exclusive right to manufacture or sell certain things, but now it means "any combination, the tendency of which is to prevent competition, in its broad and general sense, and to control prices to the detriment of the public." 20 Am. & Eng. Ency. L. (2d Ed.) 846; 4 Bl. Com. 159. In the days of Elizabeth, monopoly grants were as numerous as flies. Hume's History of England, 335. When a list was being read in Parliament a member exclaimed, "Is not bread in the number?" "Bread?" said some one. "Yes; I assure you, if affairs go on at this rate, we shall have bread reduced to a monopoly before next Parliament." It has come to that pass verily in our day. The courts have always condemned monopoly, when brought before them. They must continue to do so. They are the bulwark of the public safety. Other branches of government may indulge monopolies. The courts cannot. They are leaning more and more against it, in every form.

These two corporations were chartered by the state for public service and benefit. "The supply of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort. Hence, while it is justly urged that those public rules which say that a given contract is against public policy, should not be arbitrarily extended so as to interfere with the freedom of contract, yet, in the instance of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy. The subject is much considered and the authorities cited in W. Va. Tr. Co. v. O. R. Pipe Co., 22 W. Va. 600, 46 Am. Rep. 527; Chicago Gas L. Co. v. People's Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124; Western Union Co. v. Union Co.,

65 Ga. 160, 38 Am. Rep. 781." Gibbs v. Consol. Gas Co., 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979. Gibbs rendered service in effecting a combination of Baltimore gas companies, fixing rates chargeable on mutual consent, and he was denied recovery for services because of the illegality of the contract. The general principles stated in Trans. Co. v. Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527, condemn this contract, because a contract between corporations giving to each exclusive right to furnish gas in certain areas, and fixing prices dependent for change upon mutual consent. This contract stifled competition and placed the public at the mercy of the corporations as to prices. Within a large extent of ground, including the city of Charleston and adjoining territory, containing thousands of people, it debarred one company from operating in one section and the other in another. It prohibited the Charleston Company from producing gas in a certain territory, though it had leases in it. It prohibited either company from allowing a competitior to sell gas under its franchise. It could not sell gas to another supplier. Nor was the Charleston Company to buy gas from another seller than the Kanawha Company. * * *

Here are two corporations licensed by the state to serve the city of Charleston, each having oil territory and appliances. The Charleston Company had been supplying the city with a main line from Boone county, with pipes ramifying through the city. Its supply is inadequate. It acquires a gas field in Roane county, intending to develop gas and pipe it to its city lines. Then comes the Kanawha Company. It has a gas field in Roane and Kanawha counties. It develops and lays a line to Charleston, but, though it got a franchise to do so, it had not yet laid pipes in the streets, but was about to do so. The two competing companies confront each other in competition. Then they overcome this crisis by the agreement. For what? To avoid competition. No other purpose. Whether that was the actual design or not is not material. Such the tendency, such the potentiality of the arrangement, such the result. The law looks at tendency, ability to do harm, at the result.[50] * * *

It is suggested that though some of the clauses of the agreement may be obnoxious to the vice of monopoly, yet those clauses are separable from the rest, and are not involved in this case. They are involved. They affect and poison the whole. The trouble is, the whole spirit, drift, object, effect of the contract promotes monopoly. It works a combine—a union against public policy. As an entirety it does so. Its warp and woof are made of monopoly. We are, as a court, asked to enforce a contract with these hurtful features and consequences inwoven in its frame. We cannot do so consistently with law.

We affirm the decree.

[50] At this point the court declared that public service corporations cannot form a partnership, but must act singly, citing Brannon's Fourteenth Amendment, p. 372.

SAN DIEGO WATER CO. v. SAN DIEGO FLUME CO.

(Supreme Court of California, 1895. 108 Cal. 549, 41 P. 495, 29 L. R. A. 839.)

Action by the San Diego Water Company against the San Diego Flume Company for specific performance of a contract, and damages for its breach. From a judgment for defendant, plaintiff appeals.

HAYNES, C.[51] Defendant's demurrer to the complaint was sustained, and, the plaintiff declining to amend, judgment of dismissal was entered, from which judgment it appeals. The only questions to be considered therefore, are those presented by the demurrer.

The complaint alleges, in substance, that both the parties to this action are corporations organized and existing under the laws of this state for the purpose of distributing, selling, and furnishing water to consumers in the county and city of San Diego; that the plaintiff is the owner of a complete distributing plant for furnishing water to the city of San Diego and its inhabitants; that the defendant is the owner of water rights, reservoirs and a supply of water outside of said city, from which the water is conducted by flumes and pipes to the city boundary, where, during all the times mentioned in the complaint, they were and are connected with the water mains and pipes of the plaintiff; that the defendant was not and is not the owner of any water pipes within the city, and was unable to distribute or furnish its water to the city or its inhabitants. Under these circumstances, the parties to this action executed two written agreements, both bearing date November 6, 1890, which are referred to as Exhibits A and B, respectively, but which constitute one contract. By the first, the flume company appoints the water company its sole agent for the exclusive sale of its water within the corporate limits of the city, as then or thereafter established, excepting the peninsula of San Diego; but all sales made by the water company "shall be subject to the approval of the party of the first part [the flume company], and no sales shall be made without the consent of the party of the first part." It was further provided that said appointment should continue and be in force during the continuance of the other contract of the same date, namely, 20 years.

The other contract—Exhibit B—is very long, but for the purpose of disposing of the questions made upon this appeal may be greatly condensed. By this agreement E. S. Babcock and J. W. Sefton, the former the president of the plaintiff corporation, and the latter the president of the defendant, were appointed trustees, to whom were given the control of the properties of these corporations, respectively, "so far as the same may be confined to the corporate limits of the city of San Diego," to operate and control the same for the use and benefit of the respective parties thereto. These trustees were selected and named,

[51] Only so much of the opinion as relates to the first ground of the demurrer is printed.

one by each corporation, and each was to hold said office of trustee at the pleasure of the party naming him, who should also appoint his successor, and the compensation of each should be fixed and paid by the party appointing him; that "the use, operation, and control of these properties by the said trustees shall be for the purpose of furnishing the water supply to the city of San Diego and its inhabitants, the profits arising therefrom to be subject to the control and use of the parties hereto, as hereinafter mentioned; said parties hereto agreeing to combine their joint endeavor for the advancement of their respective interests under this trust, subject to the conditions as hereinafter mentioned." The water company agreed to furnish its entire plant, and the flume company agreed to deliver at the city limits a sufficient quantity of good water for the supply of the city and its inhabitants, to be used by the trustees for that exclusive purpose. The trustees were to keep three separate accounts, one designated as the "operating account," another as "first-division account," and the third, as "second-division account." The second and third accounts were for the purpose of distributing the profits between the respective corporations. The agreement stated, in a general way, what should be charged to operating expenses, and except as provided, and excluding certain specified matters, the trustees were empowered to determine what should constitute a proper charge to that account. It was also provided that the flume company might use the water company's system of pipes for conducting water to parties outside the city limits, the compensation therefor to be fixed by the trustees.

The complaint further alleged that the parties thereto entered upon the performance of said agreement, that the plaintiff in all things carried out and performed the same on its part, that plaintiff and defendant and their said trustees failed to agree as to the proper basis of division of the accounts between them, and especially as to the amount to be expended for the extension of plaintiff's plant, and have been unable to agree upon a settlement of their said accounts; alleged plaintiff's willingness to settle and adjust the same, but that defendant made said differences an excuse for not furnishing the water required by the contract, and had wholly failed since May 2, 1892, to comply with said contract, though plaintiff had demanded in writing such performance; alleged that upon a true and just accounting there was due to it from defendant the sum of about $50,000, but that if the court should find otherwise, and that it was indebted to the defendant, it thereby offered to pay the same; that, by the defendant's failure to comply with its said contract, plaintiff had been damaged in the sum of $100,000; that, acting under said contract, plaintiff contracted with the city of San Diego to supply it with water for the term of 20 years at a reasonable profit, but that defendant, after furnishing water for said purpose for about a year, failed and refused to longer furnish the same, whereby plaintiff sustained special damage in the sum of $100,000.

The prayer is for an accounting, for damages, and for a specific performance of the contract, and for general relief.

The demurrer was upon several grounds, viz.: (1) For want of facts sufficient to constitute a cause of action. * * *

Whether the complaint states facts sufficient to constitute a cause of action is the principal question in the case. Respondent contends "that enough appears upon the face of the complaint to show that said contracts were void, because beyond the powers of the respective corporations, and against the public policy of the state." The questions here presented were discussed by counsel in another action between the same parties, but that case went off upon another point, and no opinion was expressed upon them. San Diego Water Co. v. San Diego Flume Co., 100 Cal. 43, 34 P. 656.

[After discussing the contention that the contract was ultra vires, the court proceeded:]

It is urged that "both corporations were formed for the purpose, among other things, of furnishing water to the city of San Diego and its inhabitants, and are, therefore, quasi public corporations," and that "the agreement is contrary to public policy, for the reason that it is a combination between the parties for the purpose of creating a monopoly for the sale of water to the city of San Diego and its inhabitants." That the contract is consistent with the purpose of the organization of each of these corporations, viz. "to furnish the city of San Diego and its inhabitants with water," is too clear for discussion. The question is therefore narrowed down to this: Does the agreement create a monopoly, or in any manner injuriously affect the interests of the city or its inhabitants? "Monopoly" signifies the sole power of dealing in a particular thing, or doing a particular thing, either generally or in a particular place. A monopoly is usually, though not necessarily, harmful or injurious to public interests, though, as that term is generally used, injury to the public is implied, and competition is therefore regarded as favorable to the public interest.

But there is a competition which tends to monopoly by driving out all but the stronger competitor, when prices are again increased so as not only to yield a profit upon the original investment, but to recoup the losses incurred in breaking down competitors; or, where the competitors are of equal strength and tenacity of purpose, it may result in the destruction of the public service by the collapse of all of them. At and before the date of the contract in question, the plaintiff was the owner of a pumping plant, and of a system of mains and pipes for the distribution of water to the city of San Diego and its inhabitants, and was engaged in supplying them with water. The defendant was the owner of a reservoir supplied with water, together with flumes and pipes by which the water was conveyed to the borders of the city; but it owned no distributing plant by which it could dispose of its water within the city. To enable it to do so, it must either purchase plaintiff's distribut-

ing plant, or construct a distributing system of mains and pipes of its own, or sell its water within the city by or through the plaintiff, under some agreement for that purpose. It is not suggested that one distributing plant is not sufficient for all the wants of the city and its inhabitants, and certainly we cannot assume that it is not. Some agreement of the character here in question which would effectuate the evident intention of the parties would appear to be to the best interest of both corporations; and if the city and its inhabitants can be properly served through one distributing system, at reasonable rates, it is obviously to its best interest that its streets should not be subjected to the burden of laying and keeping in repair an additional system of mains and pipes.

So far as the parties to this contract are concerned, the restraint is only partial. It is confined to the city of San Diego, or rather to that part of it which did not include the peninsula; and this, we think, was upon a sufficient consideration, and not an unreasonable restriction as between the parties. See Mitchel v. Reynolds, 1 Smith, Lead. Cas. (8th Ed.) 417. Nor does it injuriously affect the city or its inhabitants. Our constitution provides that "the use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law"; and it further provides that the rate or compensation to be collected for the use of water supplied to any city or town or its inhabitants shall be fixed annually by the governing body of the city and county, or city, or town, and any person or corporation collecting water rates "otherwise than as so established" shall forfeit the franchises and waterworks of such person or corporation to the city, etc. Const. art. 14, § 1. In Spring Valley Water Works v. City of San Francisco, 82 Cal. 286, 22 P. 910, 1046, it was held that, when the constitution provides for the fixing of rates or compensation for the use of water, it means reasonable rates and just compensation; that the power of regulating rates is not a power of confiscation, or to take the property of the water company without just compensation.

Under the constitution, and the construction thus given its provisions, we fail to perceive how the agreement in question can create a monopoly, or in any manner increase the rate or compensation to be paid by the city or its inhabitants for the water supplied. Indeed, it is evident that water can be supplied more cheaply through one distributing plant than through two; and the governing body of the city, in whom is vested the power to fix the water rates, is bound to take that fact into consideration, as well as all other facts which will enable it to fix "reasonable rates" and award a "just compensation." In Mor. Priv. Corp. § 1129, it is said that the same rule which applies to traffic arrangements between competing railroads applies also to telegraph, water, and gas companies; and, in relation to traffic arrangements between competing roads, it is said, at section 1131: "It is certainly not true

that all agreements or combinations restricting competition are illegal at common law. * * * Even if there were such a rule as has been claimed, applicable to competition in trade, the principle and policy of the rule would not be applicable to traffic arrangements designed merely to prevent ruinous competition and 'wars' among railroad companies. The main objection which has been urged against combinations restraining competition in trade, namely, that such combinations tend to produce monopolies and cause extortion, has no application to combinations among railroad companies; for railroad companies are prohibited by law, irrespective of any combination, to charge more than reasonable rates. * * * Public policy clearly does not demand that railroad companies operating competing lines shall engage in strife causing their financial ruin." With even greater force may it be said in this case that public policy does not condemn nor prohibit an arrangement intended to prevent a competition between these corporations which would inevitably result in the financial ruin of one or both of them, and which could not in any event benefit the city or its inhabitants. * * *

The judgment should be reversed, with directions to overrule the demurrer to the complaint.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, with directions to overrule the demurrer to the complaint.

WELD v. GAS & ELECTRIC LIGHT COM'RS.

SAME v. EDISON ELECTRIC ILLUMINATING CO. OF BOSTON.

(Supreme Judicial Court of Massachusetts, 1908. 197 Mass. 556, 84 N. E. 101.)

Petitions by Charles G. Weld for certiorari against the board of gas and electric light commissioners, to review a decision of the board, and for mandamus against the Edison Electric Illuminating Company of Boston. Cases reported to the full court.

KNOWLTON, C. J.[52] The petitioner is the owner of a house on Bay State Road in Boston, which is equipped with pipes for lighting by electricity and connections with the electric wires of the respondent in the second suit, and also with those formerly of the Brookline Gas Company which are now owned and controlled by its successor, the Boston Consolidated Gas Company. Electricity for lighting the house was formerly furnished by this respondent, but in the year 1902 an arrangement was made between the respondent and the Brookline Gas Com-

[52] Parts of the opinion are omitted.

pany, whereby the latter became the purchaser of the respondent's conduits and wires and undertook to do all the business of electric lighting on the westerly side of a line running from the Charles river through Deerfield street, Brookline avenue and Chelsea street to the Muddy river, and the respondent became the owner of the conduits and wires of the Brookline Gas Company and undertook to do the business of electric lighting on the easterly side of this line. The respondent's conduits and wires on Bay State Road, connecting with the petitioner's house, were on the westerly side of this line, and were then disconnected from its works, except that a single wire was left to furnish a direct current for the operation of an electric motor in the petitioner's house. Since October 28, 1893, when he ceased to be supplied by the respondent, the petitioner has been furnished with sufficient electricity for the purpose of lighting his house, either by the Brookline Gas Company or its successor, the Boston Consolidated Gas Company, and he has not made and does not now make any complaint as to the sufficiency or quality of the service, or the price charged therefor.

The petitioner filed with the board of gas and electric light commissioners a petition, under Rev. Laws, c. 121, § 33, as amended by St. 1903, p. 125, c. 164, for an order that the respondent be directed and required to supply him with electric light at his house, upon such terms and conditions as might be found legal and reasonable after a hearing. This petition was dismissed by the board, in the exercise of its discretion. The first of the cases before us is a petition for a writ of certiorari to obtain a reversal of this order.

The second case is a petition for a writ of mandamus to command the respondent to restore its service to the petitioner upon such terms as may be legal and reasonable.

The respondent is a corporation, organized to exercise a public franchise of importance to the community in which it conducts its business. It is its duty to exercise this franchise for the benefit of the public, with a reasonable regard for the rights of individuals who desire to be served, and without discrimination between them. It cannot relieve itself from this duty so long as it retains its charter. It enjoys public rights in the streets, which are derived from the commonwealth, through action of the board of aldermen under authority of the Legislature. It is a quasi public corporation, and as such it owes duties to the public. New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 6 S. Ct. 252, 29 L. Ed. 516; Coy v. Indianapolis Gas Co., 146 Ind. 655–659, 46 N. E. 17, 36 L. R. A. 535; Williams v. Mutual Gas Co., 52 Mich. 499–501, 18 N. W. 236, 50 Am. Rep. 266; Shepard v. Milwaukee Gas Co., 6 Wis. 539, 70 Am. Dec. 479; Gaslight Co. v. Colliday, 25 Md. 1. * * *

The fundamental principles, relied on by the petitioner as applicable to corporations of this general class, are well established. But the laws of this commonwealth in regard to gas and electric lighting companies and the facts of this case give rise to considerations very different

from those which induced the decisions in many of the cases above cited. In the first place, in reference to this department of public service, we have adopted, in this state, legislative regulation and control as our reliance against the evil effects of monopoly, rather than competitive action between two or more corporations, where such competition will greatly increase the aggregate cost of supplying the needs of the public, and perhaps cause other serious inconveniences. Under Rev. Laws, c. 121, §§ 1, 5, 6, 8, 14, 15, 26, 34, 35, the board of gas and electric light commissioners are given supervision and control over all companies furnishing gas or electricity to the public for lighting, and, among other things, they may order, under section 34, any reduction in the price of gas or electric light, or improvement in the quality thereof. Under sections 8 and 9 the courts have jurisdiction to enforce all lawful orders of the board, and all provisions of law relative to such companies. The state, through the regularly constituted authorities, has taken complete control of these corporations so far as is necessary to prevent the abuses of monopoly. Our statutes are founded on the assumption that, to have two or more competing companies running lines of gas pipe and conduits for electric wires through the same street would often greatly increase the necessary cost of furnishing light, as well as cause great inconvenience to the public and to individuals from the unnecessary digging up of the streets from time to time, and the interference with pavements, street railway tracks, water pipes and other structures. See section 26, above quoted; also Attorney General v. Walworth Light & Power Co., 157 Mass. 87, 31 N. E. 482, 16 L. R. A. 398. In reference to some kinds of public service, and under some conditions, it is thought by many that regulation by the state is better than competition.

The answer to the petition for a writ of certiorari sets forth the decision of the board upon the original petition, as it appears of record. This answer must be taken as true. The board has found that this portion of Boston, which was formerly Brookline, is at present, in large part, undeveloped, and is destined to an extensive development in the near future, and is to be an important territory for the sale of electricity. After referring to the fact that a tentative understanding between two companies, having equal rights and substantially equal facilities, relative to a division of the undeveloped territory in making future extensions of their systems, would be in harmony with the established legislative policy of the commonwealth in regard to gas and electric companies, the board says: "A careful consideration of all the circumstances of the case does not disclose any public interest requiring an order in favor of the petitioner, and does suggest, on the other hand, some positive disadvantages to the public interest if such order is made. While these disadvantages may not seem serious at the present time, their importance will later become more and more apparent as the territory is developed."

The petitioner is seeking the enforcement of an alleged public right. His private interest is not independent of the rights of the public, but he claims only through the public, and as one of the citizens who are to be served by the respondent. See Brewster v. Sherman (Mass.) 80 N. E. 821. The facts show that he has suffered nothing in the sufficiency or quality of the service, or the price charged for it. So far as appears, he is not likely to suffer in the future. Indeed, the statutes above referred to are intended to give him perfect protection.

We come, therefore, to the question whether, under our laws, an electric light or gas company, having a franchise covering a city or town in which another company has a like franchise, cannot, in conducting its business, if the public interest is not thereby affected, arrange with the other company to extend its lines into one part of the territory that is being newly developed, and leave the other company to extend its lines into another part of the territory, so that neither company will duplicate lines in streets where the other is serving the public. It seems to us that, under such conditions, this is a detail of administration which is not in violation of law. In other words, we think that a corporation making such an arrangement is not subject to prosecution under a writ of mandamus, for a failure properly to exercise its corporate franchise. We are not called upon to determine in this case whether such an arrangement could be availed of as a justification, if, unexpectedly, it should turn out that the public interest was injuriously affected. We do not suggest that a corporation can relieve itself of the performance of its duties to the public under its franchise; but only that details of administration, not inconsistent with the legislative policy of the commonwealth, may be left to the corporation, so long as adequate provision is made for the public. We go no further than to say that, under conditions like the present, the public has no grievance which the court will recognize.

We do not think it fatal to the defense that the arrangement before us includes, with the undeveloped territory into which electric lighting is expected to be extended, a street or streets in which both companies had run wires previously. The same principle applies in both cases. In neither are consumers left at the mercy of a monopoly.

The principal reasons which moved the courts to their decisions in Portland Natural Gas Co. v. State, 135 Ind. 54, 34 N. E. 818, 21 L. R. A. 639, in Brunswick Gaslight Co. v. United Gas, Fuel & Light Co., 85 Me. 532, 27 A. 525, 35 Am. St. Rep. 385, and in some of the other cases above cited, are entirely wanting in the present case. * * *

In each case the entry must be:

Petition dismissed.[53]

[53] "A state public utilities law empowered a commission to prevent exorbitant charges. A statute prohibited agreements to restrain competition in the supply of any commodity of general use. The plaintiff and the defendant, two competing telephone companies entered into a contract to divide the

ANDERSON v. JETT et al.

(Court of Appeals of Kentucky, 1889. 89 Ky. 375, 12 S. W. 670, 6 L. R. A. 390.)

BENNETT, J. The steamboats Blue Wing and Hornet were, prior to the 15th day of September, 1885, rivals in the freight and passenger trade on the Kentucky river; rather, they were rivals as public carriers on said river. On the 15th day of September, 1885, the appellant, George W. Anderson, as the sole owner of the Blue Wing, and Silas F. Douthitt, on behalf of the appellees and himself, as the controlling and managing owner of the Hornet, entered into a written agreement by which it was agreed that, in order to prevent the rivalry that then existed between said boats in said carrying business, and the consequent reduction of freight and passenger charges below a fair compensation, the said boats should thereafter share in the net profits earned by each in the proportion of 62½ per cent. to the steamboat Hornet and 37½ per cent. to the steamboat Blue Wing; that each boat should bear its own running and other expenses, and, in case the owner or owners of either boat should sell the same, such owner or owners should replace the same with another boat, just as good, to be run, and the net profits divided, as before, or, if the owner or own-

territory. Held, that the contract is specifically enforceable. McKinley Tel. Co. v. Cumberland Tel. Co., 152 Wis. 359, 140 N. W. 38 (1913).

"Apart from statutes such contracts between public service companies are generally held void, as being in restraint of trade. South Chicago City Ry. Co. v. Calumet Electric St. Ry. Co., 171 Ill. 391, 49 N. E. 576 (1898); Chicago Gas Light & Coke Co. v. People's Gas Light & Coke Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124 (1887). But cf. Ives v. Smith (Sup.) 3 N. Y. S. 645, 654 (1888). Pooling agreements are equally objectionable. Chicago, M. & St. P. Ry. Co. v. Wabash, St. L. & P. Ry. Co., 61 F. 993, 9 C. C. A. 659 (1894); Texas & P. Ry. Co. v. Southern Pacific Ry. Co., 41 La. Ann. 970, 6 So. 888, 17 Am. St. Rep. 445 (1889). But cf. Manchester & L. R. Co. v. Concord R. Co., 66 N. H. 100, 20 A. 383, 9 L. R. A. 689, 49 Am. St. Rep. 582 (1890). It is undoubtedly the theory of the common law that competition is essential to trade. See Hooker v. Vandewater, 4 Denio (N. Y.) 349, 353, 47 Am. Dec. 258 (1847). But see Kellogg v. Larkin, 3 Chand. (Wis.) 133, 159, 56 Am. Dec. 164 (1851). In private business this theory is still unquestioned by the courts, but experience has not vindicated the wisdom of its full application to public callings. The field in any given case must necessarily be very limited, and fierce competition between a few great public service corporations may often result disastrously for the public. See Averill v. Southern Ry. Co. (C. C.) 75 F. 736, 738 (1896); Hare v. London & N. W. Ry. Co., 2 Johns. & H. 80, 103 (1861). At least in the case of telephone companies, a regulated monopoly furnished better service. When a legal restraint was placed on all monopolies by the common law, the uncertain condition of public service law caused the courts to overlook the fact that in the case of public service companies, the absolute prohibition of unreasonable rates could have furnished a sure means of preventing the dangers of monopoly. See 2 Morawetz, Private Corporations (2d Ed.) § 1131. When modern legislation has made this means of regulation effective by providing for public utilities commissions, it seems reasonable for the courts to make an exception to the common-law rule in the case of public service companies. Weld v. Gas & Electric Light Commissioners, 197 Mass. 556, 84 N. E. 101 (1908)."
—26 Harv. Law Rev. 761.

ers of either boat should sell it, with a view of going out of the trade, notice thereof should be given to the owner or owners of the other boat, and the owner or owners so selling should not come into the trade again, either directly or indirectly, within one year thereafter; that the steamboat Hornet was sold by the said Douthitt, with the view of going out of the trade; that he gave proper notice of that fact; that the appellant, by reason of said sale and notice, purchased the steamboat Kerr, to take the place of the steamboat Hornet; that with the Kerr and Blue Wing the appellant was doing a thriving and profitable business which was interrupted, and destroyed by said Douthitt, contrary to the agreement, bringing the Hornet into the trade again, as a competitor for freight and passengers, which competition had the effect to destroy the appellant's profitable business, by which he was damaged, etc. The case is here on appeal from the circuit court sustaining a demurrer to the appellant's petition and amended petition.

It is to be observed that the respective owners of these boats entered into no partnership [54] in business. The property rights and responsibilities of the owner or owners of each boat remained as before the arrangement was entered into. Neither assumed any duty or obligation in reference to the other that he was not under before the agreement was entered into, except that of pooling the net profits earned by each, and dividing them in certain proportions; but neither party was under any obligation to the other party to run his boat for as much as a single day. Neither party was under any obligation to the other to keep his boat well manned, or in good and clean condition. The only tie common to both was that of dividing the net profits of each boat. There was a strong stimulation to increase the net profits by means other than that of popular favor springing out of efficient steamboat facilities and close attention to the business of shipping for reasonable charges and courteous attention to passengers at reasonable fare. Also, under this agreement, there was no incentive for each boat to run the trade, if one boat could, perchance, do all the business, though only "after a sort." It was to the interest of each for the other to lie up, thereby saving expenses and increasing the net profits; and another feature detrimental to the public interest, consists in the fact that they were not only deprived of frequent means of shipment and passenger travel, but subjected to extortionate charges. Why so? Because there is no competition in the trade, nor likely to be any; for by this combination there lies another boat at the wharf, ready, according to the written obligation, to appear in the trade, and cut the prices of freights and passage below living prices, as long as such competition could hold out. It is the competition, or fear of competition, that makes these carriers efficient, attentive, polite, and reasonable in charges. Remove competition, or the fear of it, and they become extortionate, inattentive, impolite, and negligent. The writing sued on by the appellant

54 For a case involving an ostensible partnership between operators of grain elevators, see Craft v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171 (1875).

tends to inspire just such state of case. It is said that neither was bound to charge the same as the other. That is true; but either could extort with impunity, and the other would be an equal recipient of the fruit of the extortion. There would be no motive power—rivalry in trade—to circumvent the extortion. On the contrary, self-interest would prompt, not only the encouragement of the extortion, but an imitation of the nefarious example. It is true that their contract did not, in so many words, bind them to any given charges; but it made it to the interest of each, not only to charge, but to encourage and sustain the other in charges that would amount to confiscation. Why? The facts alleged in the petition, doubtless stated as modestly as the draughtsman could, show that the combination was exceedingly profitable, and entirely unfriendly to free and untrammeled competition. This combination was more than that of a combination not to take freight or passengers at less than certain prices. In such case, the combiners have to furnish adequate means of transportation, and efficient and polite officers, and confine themselves as nearly as possible to the sum agreed upon, in order to secure the trade, or a reasonable portion of it; but here, by reason of the agreement, there is no incentive to competition. Inefficient means of transportation, unskilled or inattentive officials, are no drawback to either boat. Its share of the profits come notwithstanding.

The coal merchant whose only means of transportation is by the Kentucky river may not be able to compete with his rivals in business, if compelled to pay exorbitant freight charges; or, if such competition should not exist, the consumer of his coal would be taxed these charges. So with the merchants; and more pitiable than all the rest would be the condition of the agriculturist whose only means of transportation would be by said river. Rivalry is the life of trade. The thrift and welfare of the people depend upon it. Monopoly is opposed to it, all along the line. The accumulation of wealth out of the sweat of honest toilers by means of combinations is opposed to competing trade and enterprise. That public policy that encourages fair dealing, honest thrift, and enterprise among all the citizens of the commonwealth, and is opposed to monopolies and combinations, because unfriendly to such thrift and enterprise, declares all combinations whose object is to destroy or impede free competition between the several lines of business engaged in utterly void. The combination or agreement, whether or not in the particular instance it has the desired effect, is void. The vice is in the combination or agreement. The practical evil effect of the combination only demonstrates its character; but, if its object is to prevent or impede free and fair competition in trade, and may in fact have that tendency, it is void, as being against public policy. For the foregoing reasons the agreement is against public policy, and is therefore void.

The judgment is affirmed.

CHICAGO, M. & ST. P. RY. CO. v. WABASH, ST. L. & P. RY. CO.

(Circuit Court of Appeals of the United States, Eighth Circuit, 1894. 61 F. 993, 9 C. C. A. 659.)

This was a suit by the Central Trust Company of New York against the Wabash, St. Louis & Pacific Railway Company and others to foreclose a mortgage on the property of the railway company. The Chicago, Milwaukee & St. Paul Railway Company filed an intervening petition for a claim under certain traffic contracts. Defendant railway company answered, and, on hearing, the petition was dismissed. The intervener appealed.

CALDWELL, Circuit Judge.[55] The design of the contract on which the appellant rests its claim is not left to presumption or conjecture. Its purpose is apparent on the face of the instrument. Its object was not to avoid ruinous competition by entering into an arrangement to carry freight at reasonable rates, but its evident purpose was to stifle all competition for the purpose of raising rates. By the terms of the contract, all of the roads are to be operated, as to through traffic, "as they should be if operated by one corporation which owned all of them." These seven corporations were made one company so far as concerned their relations with each other, with rival carriers, and with the public. Between them there could be no competition or freedom of action. To the extent of the traffic covered by this contract—and it covered no inconsiderable portion of the traffic of the continent—each company practically abdicated its functions as a common carrier, and conferred them on a new creation, for the sole purpose of suppressing competition. Before they entered into this contract, each of these companies had the power, and it was its duty, to make rates for itself, and to make them reasonable; but, by the terms of this contract, every one of the companies was divested of all its powers and discretion in this respect. The contract removed every incentive to the companies to afford the public proper facilities, and to carry at reasonable rates; for, under its provisions, a company is entitled to its full percentage of gross earnings, even though it does not carry a pound of freight. The necessary and inevitable result of such a contract is to foster and create poorer service and higher rates. There is no inducement for a road to furnish good service, and carry at reasonable rates, when it receives as much or more for poor service, or for no service, as it would receive for good service and an energetic struggle for business.

A railroad company is a quasi public corporation, and owes certain duties to the public, among which are the duties to afford reasonable facilities for the transportation of persons and property, and to charge only reasonable rates for such service. Any contract by which it disables itself from performing these duties, or which makes it to its

[55] Part of the statement of facts is omitted.

interest not to perform them, or removes all incentive to their performance, is contrary to public policy and void; and, the obvious purpose of this contract being to suppress or limit competition between the contracting companies in respect to the traffic covered by the contract, and to establish rates without regard to the question of their reasonableness, it is contrary to public policy, and void. Railroad Co. v. Closser, 126 Ind. 348, 26 N. E. 159; Gulf, C. & S. F. R. Co. v. State (Tex. Sup.) 10 S. W. 81; State v. Standard Oil Co. (Ohio Sup.) 30 N. E. 279; Texas & P. Ry. Co. v. Southern Pac. Ry. Co. (La.) 6 So. 888; Gibbs v. Gas Co., 130 U. S. 396, 9 S. Ct. 553, 32 L. Ed. 979; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173; Salt Co. v. Guthrie, 35 Ohio St. 666; Stanton v. Allen, 5 Denio (N. Y.) 434; Hooker v. Vandewater, 4 Denio (N. Y.) 349; Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co., 121 Ill. 530, 13 N. E. 169; West Virginia Transp. Co. v. Ohio River Pipe Line Co., 22 W. Va. 600; W. U. Tel. Co. v. American Union Tel. Co., 65 Ga. 160; Sayre v. Association, 1 Duv. (Ky.) 143; U. S. v. Trans-Missouri Freight Ass'n, 7 C. C. A. 15, 58 F. 58.

But conceding that the contract is illegal and void, the appellant asserts that it has been performed, and that the appellee is bound to account for moneys received under the contract according to its terms. This contention rests on a misconception of the character of this suit. The appellant's claim is grounded on the illegal and void contract, and this suit is, in legal effect, nothing more than a bill to enforce specific performance of that contract.

The contract contemplated two modes of pooling—one by an actual division of the traffic, and the other by a division of the gross earnings. The traffic not having been divided, this is a suit to enforce the second method of the pool—a division of the gross earnings; or, in other words, a pooling of the earnings. The illegal and void contract has not been executed, and the appellant invokes the aid of the court to compel the Wabash Company to execute it on its part by pooling its earnings. It may be conceded that the illegal contract has been performed on the part of the appellant, though it does not appear to have done anything more than to sign the contract. The only thing it could do towards a performance of the contract was not to compete for the business. This was a violation of its duty to the public, and illegal. But a contract performed on one side only is not an executed contract. Where an illegal act is to be done and paid for, the contract is not executed until the act is done and paid for. A court will not compel the act to be done, even though it has been paid for. Neither will it compel payment, although the act has been done; for this would be to enforce the illegal contract. The illegality taints the entire contract, and neither of the parties to it can successfully make it the foundation of an action in a court of justice. The Wabash Company performed the service that earned the money the appellant is seeking to recover. The appellant earned no part of it. There is nothing in the record to show that the appellant would have carried more or the

Wabash Company less freight if the contract had never been entered into. The money demanded was received by the Wabash Company for freight tendered to it by shippers themselves, and carried by it over its own line. It was legally bound to accept the freight thus tendered, and was entitled to receive the compensation for the carriage, and cannot be compelled to pay the money thus earned, or any part of it, to the appellant on this illegal and void contract.

The case of Brooks v. Martin, 2 Wall. 70, 17 L. Ed. 732, is not in point. In that case the defendant set up an illegal contract, which had been fully performed and executed, as a defense against a demand that existed independently of the contract; whereas, in this case, the illegal contract is set up by the plaintiff as the foundation of its action. Strike this contract out, and confessedly the complaint states no cause of action; leave it in, and it states an illegal and void cause of action.

Courts will not lend their aid to enforce the performance of a contract which is contrary to public policy or the law of the land, but will leave the parties in the plight their own illegal action has placed them. Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. Ed. 55; Gibbs v. Gas Co., 130 U. S. 396, 9 S. Ct. 553, 32 L. Ed. 979; Texas & P. Ry. Co. v. Southern Pac. Ry. Co., 41 La. Ann. 970, 6 So. 888; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173; Hooker v. Vandewater, 4 Denio (N. Y.) 349. We have not overlooked the case of Central Trust Co. v. Ohio Cent. R. Co. (C. C.) 23 F. 306. The opinion in that case is not supported by the authorities, and is unsound in principle.

The decree of the court below is affirmed.

LEE LINE STEAMERS, Inc., v. MEMPHIS, HELENA & ROSEDALE PACKET CO.

(Circuit Court of Appeals of the United States, Sixth Circuit, 1922. 277 F. 5.)

Suit by the Lee Line Steamers, Incorporated, against the Memphis, Helena & Rosedale Packet Company. Demurrer to complaint sustained, and complaint dismissed, and plaintiff brings error.

PER CURIAM. Plaintiff in error (called the Lee Line) and defendant in error (called the Adams Line) owned each a steamer engaged in public transportation on the Mississippi river between Memphis, Tenn., Helena, Ark., and Friar's Point, Miss. The two lines were thus engaged in interstate commerce. On September 1, 1919, they made an agreement, ending December 30, 1920 (with provision for extension for another year by mutual consent), for the division of the entire aggregate tonnage carried by the two lines, based on each steamer making two round trips each week—the earnings from the carriage of this

aggregate tonnage to be settled for monthly on the basis of 50 per cent. for each line, after paying to the line carrying more than one-half the tonnage $1 per ton on such excess, as expense of handling the same. There was express provision that "if either carrier fails to make their allotted number of trips, then such carrier will be charged on a basis of the average tons handled, and the average price per ton received by such carrier, the same as if the actual number of schedule trips were made."

Provision was made for mutually selected landing keepers, or agents, at Helena and Friar's Point (whose salaries and expenses should be paid by the two lines in equal proportions); for the sale and conveyance by the Lee Line to the Adams Line of a one-half interest in a lease acquired from the city of Helena, and for the sale and conveyance by the Adams Line to the Lee Line of a one-half interest in a certain warehouse, as well as for the enlarging or rebuilding of the warehouse at an equal charge to each of the two lines; for the furnishing by each line to the other of a printed record of tonnage handled each trip, showing the number of shipments, the weight of each, and the revenue received therefrom—these records to be "recorded" by a "mutually chosen" secretary and paid for by the lines in equal shares, and to be made the basis of the monthly settlements, and that "each party is to have access to all records for examination when requested by secretary." It is conceded that there were no other steamships engaged in the trade in question.

In July, 1920, the newly elected president of the Adams Line repudiated the agreement, on the ground that it was illegal. The Lee Line then instituted this suit for the recovery of a claimed balance of $11,805.67 on account of tonnage handled, plus $28,000 damages by reason of defendant's repudiation of the contract. It appears from the complaint that neither party had before the agreement in question made more than two round trips per week; that the river lines were in competition with steam interstate railroads for the handling of passengers and freight between the points served by the steamer lines, the railroad routes being shorter than the river routes, and the former maintaining "daily steam railroad freight and passenger service, with which the boats of the complainant and defendant were in competition." The complaint was demurred to on the ground that the contract sued upon was illegal and void, both at common law and under the Sherman Anti-Trust Law (Comp. St. § 8820 et seq.), and also contrary to the laws of Tennessee, Arkansas, and Mississippi, as in restraint of trade. The demurrer was sustained, and (plaintiff declining to plead further) the complaint was dismissed. Judge Peck, who presided on the hearing in the District Court, filed the following opinion:

"The action is for money alleged to be due under a pooling contract between the two lines of steamers, and for damages for the repudiation of the contract during the continuance by the defendant. The defend-

ant demurs to the declaration, on the ground that the contract on which the plaintiff sues is illegal and void, both at common law and under the Sherman Anti-Trust Law, and also contrary to the laws of the states of Tennessee, Mississippi and Arkansas, as in restraint of trade. The gist of the second clause of the contract pleaded against which the demurrer is directed, is that the companies agreed to divide their gross receipts equally, after allowing the one carrying freight in excess of its proportion $1 per ton as the expense of handling the same.

"The declaration alleges that each party had been for some years engaged in the operation of a steamboat on the Mississippi river between Memphis, Tenn., Helena, Ark., and Friar's Point, Miss., and that this transportation was in competition with railroads; but it is not alleged that it was in competition with other steamboats. It is further alleged that the purposes of the agreement were to eliminate duplication of expenses at common points; to establish and maintain only such just and reasonable rates for the handling of freight and passengers as the public should pay for the services rendered, and which would make it financially possible for the parties to operate their respective boats, for which there has been and is a reasonable demand; to insure the continuation in service between the points named of at least two river steamers operating in 'free, open, and unrestrained competition, upon different schedules, instead of making probable, without said agreement, the elimination of one of said steamers, a monopoly of the trade by one of the parties hereto, and the reduction of otherwise available steamboat service to the extent of 50 per cent.' ; and to prevent discrimination in rates and accommodations between patrons of the parties, and the avoidance of rebates and preferences to and among shippers. It is alleged that it was never the purpose of the contract, nor its effect, to prevent the entry into the trade of any other boat operated by another, 'nor have the parties hereto acting under said contract ever combined to fix rates, or take any other action for the purpose of deterring the entry of any other boat into said trade.'

"It is inferred, from those allegations aforesaid which aver that the elimination of one of the boats would result in a monopoly for the other and a reduction of the available service by one-half, that there were no other steamboats operating in the trade. The court is assured in this interpretation of the pleading by the candid statement of counsel for both parties during the argument that such was indeed the fact. The question, therefore, is whether two steamship lines so situated may lawfully make an agreement to pool and divide their receipts. The contention of the plaintiff is that, notwithstanding they were to pool their receipts, the companies were free to compete for business, and would compete, because the contract was only to endure for a year, and thereafter as might be mutually determined, and that it was to the interest of each company to maintain its separate good will in anticipation of the time when its receipts from operation would once more be unrestrictedly its own. Plaintiff further insists that, unless the contract

unduly restrained or unduly interfered with the free movement of interstate commerce, and so became prejudicial to the public interest, it was not invalid; that free and unrestricted competition as to the passenger business remains, the contract touching only the freight tonnage; and that avoidance of calamitous rate wars is in the public interest, and not a restraint of trade.

"The elimination of all incentive to compete as to rates is the obvious effect of this agreement for the pooling and division of freight receipts, by the only lines of steamboats plying between the points on their routes. It resulted in the fixing of rates for the carriage of freight in interstate commerce by the combination so formed. This combination had a monopoly of the freight traffic. Such a contract, so resulting, is, in and of itself, an undue restraint of trade and interference with the free movement of such commerce, and is prejudicial to the public interest. The substance and effect are to be regarded; the garb is immaterial. United States v. American Tobacco Co., 221 U. S. 181, 31 S. Ct. 632, 55 L. Ed. 663. This contract is not to be compared with one by which trade in merchandise is to some slight extent impeded. No genuine question can arise here as to whether the restriction was reasonable or unreasonable, because on the facts pleaded the monopoly was complete. The establishment of a complete monopoly in transportation in interstate commerce, between given points, certainly cannot be justified. 'The defendants were common carriers, and it was their duty to compete, not combine; their duty takes from them palliation, subjects them in a special sense to the policy of the law.' Thomsen v. Cayser, 243 U. S. 66, 85, 37 S. Ct. 353, 61 L. Ed. 597, Ann. Cas. 1917D, 322.

"The other arguments advanced by the plaintiff to justify the monopoly on the ground that it is in fact beneficent; for the good of the public and of itself for justice of rates, maintenance of service and elimination of rate wars have been denied validity as against the Sherman Act by the Supreme Court. United States v. Trans-Missouri Freight Association, 166 U. S. 290, 17 S. Ct. 540, 41 L. Ed. 1007; United States v. Joint Traffic Association, 171 U. S. 505, 19 S. Ct. 25, 43 L. Ed. 259; Standard Oil Co. v. United States, 221 U. S. 1, 31 S. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; United States v. Union Pacific Railroad Co., 226 U. S. 87, 33 S. Ct. 53, 57 L. Ed. 124; United States v. Reading Co., 226 U. S. 324, 33 S. Ct. 90, 57 L. Ed. 243; United States v. American Tobacco Co., supra. Similar questions were ruled adversely to plaintiff in United States v. L. S. & M. S. Ry. Co. (D. C.) 203 F. 295; United States v. Great Lakes Towing Co. (D. C.) 208 F. 733.

"Giving full scope to the rule of reason laid down in Standard Oil Co. v. United States, supra, invoked by counsel for plaintiff, it is concluded, nevertheless, that the facts set forth in plaintiff's declaration disclose a contract the effect of which was a combination in restraint

of trade and an endeavor to create a monopoly in interstate commerce, and therefore void.

"The demurrer must be sustained."

We not only think the judgment of the District Court right, and that it should be affirmed, but are content to adopt Judge Peck's opinion as a sufficient statement of the reasons for our affirmance, with this very slight elaboration:

As affecting the validity of the agreement in question, it is not important that way-landing traffic was not included within the restriction, and that the agreement would not necessarily run more than a year. Although a natural inference that the parties contemplated a continuing agreement to monopolize is raised not only by the express provision for renewal of agreement, but by the allegation of the complaint that contracts of the same nature had been in existence between these same parties since the year 1909, it is enough to demonstrate the invalidity of the agreement that during at least the year in question a complete monopoly of existing facilities for freight river traffic between the points named was effected, not only potentially, but actually and intentionally. That a complete unification of river freight transportation between the points stated was contemplated and effected plainly appears by the terms of the contract, in connection with the concessions before referred to, including the provision for equal division of combined gross earnings, which effectually discouraged competition between the two lines with respect to furnishing facilities or bettering service—a monopoly made even the more certain by requiring the line failing to make its allotted number of trips to account to the other line on the basis of the average tonnage which it would have handled, and at the average price per ton which it would have received, if it had made the full number of scheduled trips. Plainly, the rights of the public were set entirely to one side, and it was left to the mercies of the combination. Against this situation allegations of good motives and intentions are futile. The facts asserted in the complaint, if made the subject of proof, could not avail to validate the monopoly. The record leaves no room for the application of the so-called "rule of reason" as validating the agreement; nor is there anything to suggest that the arrangement in question was justified as a reasonable protection against destructive rate wars.

The judgment of the District Court is affirmed.[56]

[56] See section 5 (1) of the Interstate Commerce Act (U. S. Comp. St. § 8567), for provisions relating to pooling of freight and division of earnings, and section 1 (1), being U. S. Comp. St. § 8563 (1), for applicability of the act to common carriers by water.

For a series of cases culminating under section 5 (2) of the Interstate Commerce Act, as amended by the Transportation Act of 1920 (U. S. Comp. St. Ann. Supp. 1923, § 8567 [2]), and involving the acquisition and control of one railroad by another, see United States v. Southern Pacific Co., 259 U. S. 215, 42 S. Ct. 496, 66 L. Ed. 907 (1922); Control of Central Pacific by Southern Pacific, 76 Interst. Com. Com'n R. 508 (1923); United States v. Southern Pacific Co. (D. C. Utah) 290 F. 443 (1923).

SECTION 4.—LABOR RELATIONS [57]

ADAIR v. UNITED STATES.

(Supreme Court of the United States, 1907. 208 U. S. 161, 28 S. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764.)

In Error to the District Court of the United States for the Eastern District of Kentucky to review a conviction of an agent of an interstate carrier for discharging an employee from service to such carrier because of his membership in a labor organization.

Mr. Justice HARLAN [58] delivered the opinion of the court.

This case involves the constitutionality of certain provisions of the act of Congress of June 1st, 1898 (30 Stat. at L. 424, c. 370, U. S. Comp. Stat. 1901, p. 3205), concerning carriers engaged in interstate commerce and their employees. * * *

The tenth section, upon which the present prosecution is based, is in these words:

"That any employers subject to the provisions of this act, and any officer, agent, or receiver of such employer, who shall require any employee, or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association, or organization; *or shall threaten any employee with loss of employment, or shall unjustly discriminate against any employee because of his membership in such a labor corporation, association, or organization,* * * * is hereby declared to be guilty of a misdemeanor, and, upon conviction thereof in any court of the United States of competent jurisdiction in the district in which such offense was committed, shall be punished for each offense by a fine of not less than one hundred dollars and not more than one thousand dollars."

It may be observed in passing that while that section makes it a crime against the United States to unjustly discriminate against an employee of an interstate carrier because of his being a member of a labor organization, it does not make it a crime to unjustly discriminate against

For the tentative plan for the consolidation of railroads, submitted by the Interstate Commerce Commission, under the authority conferred by section 5, paragraphs 4 and 5, of the Interstate Commerce Act, as amended by the Transportation Act of 1920, and on the basis of a report by Mr. William Z. Ripley, see 63 Interst. Com. Com'n R. 455 (1921). The report also is printed as an appendix, 63 Interst. Com. Com'n R. 465. For an article, "Three Years of the Transportation Act," by E. G. Buckland, see 32 Yale Law J. 658.

[57] Cases on only a few phases of labor relations, wherein public service companies are involved, are printed here.

[58] Only so much of the opinion as relates to the Fifth Amendment is printed. Parts of the statute quoted in the opinion are omitted.

an employee of the carrier because of his *not* being a member of such an organization.

The present indictment was in the District Court of the United States for the Eastern District of Kentucky against the defendant, Adair. * * *

The accused, Adair, demurred to the indictment as insufficient in law, but the demurrer was overruled. After reviewing the authorities, in an elaborate opinion, the court held the tenth section of the act of Congress to be constitutional. 152 F. 737. The defendant pleaded not guilty, and after trial a verdict was returned of guilty on the first count and a judgment rendered that he pay to the United States a fine of $100. * * *

It thus appears that the criminal offense charged in the count of the indictment upon which the defendant was convicted was, in substance and effect, that, being an agent of a railroad company engaged in interstate commerce, and subject to the provisions of the above act of June 1st, 1898, he discharged one Coppage from its service *because of his membership in a labor organization*—no other ground for such discharge being alleged.

May Congress make it a criminal offense against the United States—as, by the tenth section of the act of 1898, it does—for an agent or officer of an interstate carrier, having full authority in the premises from the carrier, to discharge an employee from service simply because of his membership in a labor organization?

This question is admittedly one of importance, and has been examined with care and deliberation. And the court has reached a conclusion which, in its judgment, is consistent with both the words and spirit of the Constitution, and is sustained as well by sound reason.

The first inquiry is whether the part of the tenth section of the act of 1898 upon which the first count of the indictment was based is repugnant to the Fifth Amendment of the Constitution, declaring that no person shall be deprived of liberty or property without due process of law. In our opinion that section, in the particular mentioned, is an invasion of the personal liberty, as well as of the right of property, guaranteed by that Amendment. Such liberty and right embrace the right to make contracts for the purchase of the labor of others, and equally the right to make contracts for the sale of one's own labor; each right, however, being subject to the fundamental condition that no contract, whatever its subject-matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests, or as hurtful to the public order, or as detrimental to the common good. This court has said that "in every well-ordered society, charged with the duty of conserving the safety of its members, the rights of the individual in respect of his liberty may, at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." Jacobson v. Massachusetts, 197 U. S. 11, 29, 49 L.

Ed. 643, 651, 25 S. Ct. 358, 362, and authorities there cited. Without stopping to consider what would have been the rights of the railroad company under the Fifth Amendment, had it been indicted under the act of Congress, it is sufficient in this case to say that, as agent of the railroad company, and, as such, responsible for the conduct of the business of one of its departments, it was the defendant Adair's right —and that right inhered in his personal liberty, and was also a right of property—to serve his employer as best he could, so long as he did nothing that was reasonably forbidden by law as injurious to the public interests. It was the right of the defendant to prescribe the terms upon which the services of Coppage would be accepted, and it was the right of Coppage to become or not, as he chose, an employee of the railroad company upon the terms offered to him. Mr. Cooley, in his treatise on Torts, p. 278, well says: "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have business relations with anyone with whom he can make contracts, and, if he is wrongfully deprived of this right by others, he is entitled to redress." * * *

While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least, in the absence of contract between the parties—to compel any person, in the course of his business and against his will, to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. It was the legal right of the defendant, Adair, however unwise such a course might have been, to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so, however unwise such a course on his part might have been, to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.

These views find support in adjudged cases, some of which are cited in the margin.[59] Of course, if the parties by contract fixed the period of service, and prescribed the conditions upon which the contract may be terminated, such contract would control the rights of the parties as between themselves, and for any violation of those provisions the party wronged would have his appropriate civil action. And it may be—but upon that point we express no opinion—that, in the case of a labor contract between an employer engaged in interstate commerce and his employee, Congress could make it a crime for either party, without sufficient or just excuse or notice, to disregard the terms of such contract or to refuse to perform it. In the absence, however, of a valid contract between the parties controlling their conduct towards each other and fixing a period of service, it cannot be, we repeat, that an employer is under any legal obligation, against his will, to retain an employee in his personal service any more than an employee can be compelled, against his will, to remain in the personal service of another. So far as this record discloses the facts the defendant, who seemed to have authority in the premises, did not agree to keep Coppage in service for any particular time, nor did Coppage agree to remain in such service a moment longer than he chose. The latter was at liberty to quit the service without assigning any reason for his leaving. And the defendant was at liberty, in his discretion, to discharge Coppage from service without giving any reason for so doing.

As the relations and the conduct of the parties towards each other was not controlled by any contract other than a general employment on one side to accept the services of the employee and the general agreement on the other side to render services to the employer, no term being fixed for the continuance of the employment, Congress could not, consistently with the Fifth Amendment, make it a crime against the United States to discharge the employee because of his being a member of a labor organization.[60] * * *

The judgment must be reversed, with directions to set aside the verdict and judgment of conviction, sustain the demurrer to the indictment, and dismiss the case.

It is so ordered.[61]

Mr. Justice MOODY did not participate in the decision of this case.[62]

59 The citations are omitted.

60 After disposing of the contention under the Fifth Amendment the court went into the question whether the statute properly could be sustained as a regulation of interstate commerce. As to this phase of the opinion see Goodnow, Social Reform and the Constitution, p. 87.

61 On the authority of the principal case the same result has been reached in respect of business not public in character. Coppage v. Kansas, 236 U. S. 1, 35 S. Ct. 240, 59 L. Ed. 441, L. R. A. 1915C, 960 (1915). See 28 Harv. Law Rev. 497. See "Collective Bargaining before the Supreme Court," by Thomas Reed Powell, 33 Pol. Sci. Quart. 396.

62 Mr. Justice McKenna and Mr. Justice Holmes each delivered a dissenting opinion, both of which are omitted.

WILSON, U. S. Atty., v. NEW et al.

(Supreme Court of the United States, 1917. 243 U. S. 332, 37 S. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024.)

Appeal from the District Court of the United States for the Western District of Missouri to review a decree which enjoined the enforcement of a statute fixing an eight-hour workday for, and temporarily regulating the wages of, railway employees engaged in the operation of trains upon interstate railway carriers.

Mr. Chief Justice WHITE delivered the opinion of the court.[66]

Was there power in Congress, under the circumstances existing, to deal with the hours of work and wages of railroad employees engaged in interstate commerce, is the principal question here to be considered. Its solution, as well as that of other questions which also arise, will be clarified by a brief statement of the conditions out of which the controversy arose.

Two systems controlled in March, 1916, concerning wages of railroad employees; one, an eight-hour standard of work and wages with additional pay for overtime, governing on about 15 per cent. of the railroads; the other, a stated mileage task of 100 miles to be performed during ten hours, with extra pay for any excess, in force on about 85 per cent. of the roads. The organizations representing the employees of the railroads in that month made a formal demand on the employers that, as to all engaged in the movement of trains except passenger trains, the 100-mile task be fixed for eight hours, provided that it was not so done as to lower wages, and provided that an extra allowance for overtime, calculated by the minute at one and one-half times the rate of the regular hours' service, be established. * * *

The employers refused the demand, and the employees, through their organizations, by concert of action, took the steps to call a general strike of all railroad employees throughout the whole country.

The President of the United States invited a conference between the parties. He proposed arbitration. The employers agreed to it and the employees rejected it. The President then suggested the eight-hour standard of work and wages. The employers rejected this and the employees accepted it. Before the disagreement was resolved the representatives of the employees abruptly called a general strike throughout the whole country, fixed for an early day. The President, stating his efforts to relieve the situation, and pointing out that no resources at law were at his disposal for compulsory arbitration, to save the commercial disaster, the property injury and the personal suffering of all, not to say starvation, which would be brought to many among the vast body of the people if the strike was not prevented, asked Congress, first, that the eight-hour standard of work and wages be fixed by law and

[66] Parts of the opinion are omitted.

second, that an official body be created to observe during a reasonable time the operation of the legislation, and that an explicit assurance be given that if the result of such observation established such an increased cost to the employers as justified an increased rate, the power would be given to the Interstate Commerce Commission to authorize it. Congress responded by enacting the statute whose validity, as we have said, we are called upon to consider. Act of September 3, 5, 1916, 39 Stat. at L. 721, c. 436. * * *

All the propositions relied upon and arguments advanced ultimately come to two questions: first, the entire want of constitutional power to deal with the subjects embraced by the statute, and second, such abuse of the power, if possessed, as rendered its exercise unconstitutional. We will consider these subjects under distinct propositions separately.

1. The entire want of constitutional power to deal with the subjects embraced by the statute.

To dispose of the contentions under this heading calls at once for a consideration of the statute, and we reproduce its title and text so far as is material:

"An Act to Establish an Eight-hour Day for Employees of Carriers Engaged in Interstate and Foreign Commerce, and for Other Purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that beginning January first, nineteen hundred and seventeen, eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees who are now or may hereafter be employed by any common carrier by railroad, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, which is subject to the provisions of the act of February fourth, eighteen hundred and eighty-seven, entitled "An Act to Regulate Commerce," as amended, and who are now or may hereafter be actually engaged in any capacity in the operation of trains used for the transportation of persons or property on railroads, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads. * * *

"Sec. 2. That the President shall appoint a commission of three, which shall observe the operation and effects of the institution of the eight-hour standard workday as above defined and the facts and conditions affecting the relations between such common carriers and employees during a period of not less than six months nor more than nine months, in the discretion of the commission, and within thirty days thereafter such commission shall report its findings to the President and Congress. * * *

"Sec. 3. That pending the report of the commission herein provided for and for a period of thirty days thereafter the compensation of railway employees subject to this act for a standard eight-hour workday shall not be reduced below the present standard day's wage, and for all necessary time in excess of eight hours such employees shall be paid at a rate not less than the pro rata rate for such standard eight-hour workday.

"Sec. 4. That any person violating any provision of this act shall be guilty of a misdemeanor and upon conviction shall be fined not less than $100 and not more than $1,000, or imprisoned not to exceed one year, or both.

There must be knowledge of the power exerted before determining whether, as exercised, it was constitutional, and we must hence settle a dispute on that question before going further. Only an eight-hour standard for work and wages was provided, is the contention on the one side, and, in substance, only a scale of wages was provided, is the argument on the other. We are of the opinion that both are right and in a sense both wrong in so far as it is assumed that the one excludes the other. The provision of section 1 that "eight hours shall * * * be deemed a day's work and the measure or standard of a day's work" leaves no doubt about the first proposition. As to the second, this is equally true because of the provision of section 3, forbidding any lowering of wages as a result of applying the eight-hour standard established by section 1 during the limited period prescribed in section 2. Both provisions are equally mandatory. If it be said that the second, the depriving of all power to change the wages during the fixed period, is but ancillary to the first command, the standard of eight hours, that would not make the prohibition as to any change of wages any the less a fixing of wages. It certainly would not change the question of power unless it could be assumed that the legislative power to fix one thing, the standard of hours, could be enforced by exerting the power to do another, fix the wages, although there was no legislative authority to exert the latter power. The doing of one thing which is authorized cannot be made the source of an authority to do another thing which there is no power to do. If to deprive employer and employee of the right to contract for wages and to provide that a particular rate of wages shall be paid for a specified time is not a fixing of wages, it is difficult to see what would be.

However, there is this very broad difference between the two powers exerted. The first, the eight-hour standard, is permanently fixed. The second, the fixing of the wage standard resulting from the prohibition against paying lower wages, is expressly limited to the time specified in section 2. It is, therefore, not permanent but temporary, leaving the employers and employees free as to the subject of wages to govern their relations by their own agreements after the specified time. Concretely stated, therefore, the question is this: Did Congress have

power, under the circumstances stated, that is, in dealing with the dispute between the employers and employees as to wages, to provide a permanent eight-hour standard and to create by legislative action a standard of wages to be operative upon the employers and employees for such reasonable time as it deemed necessary to afford an opportunity for the meeting of the minds of employers and employees on the subject of wages? Or, in other words, did it have the power, in order to prevent the interruption of interstate commerce, to exert its will to supply the absence of a wage scale resulting from the disagreement as to wages between the employers and employees, and to make its will on that subject controlling for the limited period provided for?

Coming to the general considerations by which both subjects must be controlled, to simplify the analysis for the purpose of considering the question of inherent power, we put the question as to the eight-hour standard entirely out of view, on the ground that the authority to permanently establish it is so clearly sustained as to render the subject not disputable.[67] * * *

What was the extent of the power, therefore, of Congress to regulate, considering the scope of regulation which government had the right to exert with reference to interstate commerce carriers, when it came to exercise its legislative authority to regulate commerce, is the matter to be decided. That the business of common carriers by rail is in a sense a public business because of the interest of society in the continued operation and rightful conduct of such business, and that the public interest begets a public right of regulation to the full extent necessary to secure and protect it, is settled by so many decisions, state and Federal, and is illustrated by such a continuous exertion of state and Federal legislative power, as to leave no room for question on the subject. It is also equally true that as the right to fix by agreement between the carrier and its employees a standard of wages to control their relations is primarily private, the establishment and giving effect to such agreed-on standard is not subject to be controlled or prevented by public authority. But, taking all these propositions as undoubted, if the situation which we have described and with which the act of Congress dealt be taken into view—that is, the dispute between the employers and employees as to a standard of wages, their failure to agree, the resulting absence of such standard, the entire interruption of interstate commerce which was threatened, and the infinite injury to the public interest which was imminent—it would seem inevitably to result that the power to regulate necessarily obtained and was subject to be applied to the extent necessary to provide a remedy for the situation, which included the power to deal with the dispute, to provide by appropriate action for a standard of wages to fill the want

67 The court cited, in a marginal note: Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 55 L. Ed. 878, 31 S. Ct. 621 (1910); Missouri, K. & T. R. Co. v. United States, 231 U. S. 112, 58 L. Ed. 144, 34 S. Ct. 26 (1913).

of one caused by the failure to exert the private right on the subject, and to give effect by appropriate legislation to the regulations thus adopted. This must be unless it can be said that the right to so regulate as to save and protect the public interest did not apply to a case where the destruction of the public right was imminent as the result of a dispute between the parties and their consequent failure to establish by private agreement the standard of wages which was essential; in other words, that the existence of the public right and the public power to preserve it was wholly under the control of the private right to establish a standard by agreement. Nor is it an answer to this view to suggest that the situation was one of emergency, and that emergency cannot be made the source of power. Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281. The proposition begs the question, since although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed. If acts which, if done, would interrupt, if not destroy, interstate commerce, may be by anticipation legislatively prevented, by the same token the power to regulate may be exercised to guard against the cessation of interstate commerce, threatened by a failure of employers and employees to agree as to the standard of wages, such standard being an essential prerequisite to the uninterrupted flow of interstate commerce.

But, passing this, let us come to briefly recapitulate some of the more important of the regulations which have been enacted in the past in order to show how necessarily the exertion of the power to enact them manifests the existence of the legislative authority to ordain the regulation now before us, and how completely the whole system of regulations adopted in the past would be frustrated or rendered unavailing if the power to regulate under the conditions stated, which was exerted by the act before us, was not possessed. That regulation gives the authority to fix for interstate carriage a reasonable rate, subject to the limitation that rights of private property may not be destroyed by establishing them on a confiscatory basis, is settled by long practice and decisions.[68] That the power to regulate also extends to many phases of the business of carriage, and embraces the right to control the contract power of the carrier in so far as the public interest requires such limitation, has also been manifested by repeated acts of legislation as to bills of lading, tariffs, and many other things too numerous to mention.[69] Equally certain is it that the pow-

[68] The court cited, in a marginal note: Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 161, 24 L. Ed. 94, 95 (1876); Stone v. Farmers' Loan & T. Co., 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334, 388, 1191 (1886); Interstate Commerce Commission v. Chicago, R. I. & P. R. Co., 218 U. S. 88, 54 L. Ed. 946, 30 S. Ct. 651 (1910); Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, 33 S. Ct. 729, Ann. Cas. 1916A, 18 (1913).

[69] The court cited, in a marginal note: New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. Ed. 515, 26 S. Ct. 272

er has been exercised so as to deal not only with the carrier, but with its servants, and to regulate the relation of such servants not only with their employers, but between themselves.[70] Illustrations of the latter are afforded by the Hours of Service Act, the Safety Appliance Act and the Employers' Liability Act. Clear also is it that an obligation rests upon a carrier to carry on its business, and that conditions of cost or other obstacles afford no excuse and exempt from no responsibility which arises from a failure to do so, and also that government possesses the full regulatory power to compel performance of such duty.[71]

In the presence of this vast body of acknowledged powers there would seem to be no ground for disputing the power which was exercised in the act which is before us so as to prescribe by law for the absence of a standard of wages, caused by the failure to exercise the private right as a result of the dispute between the parties—that is, to exert the legislative will for the purpose of settling the dispute, and bind both parties to the duty of acceptance and compliance, to the end that no individual dispute or difference might bring ruin to the vast interests concerned in the movement of interstate commerce, for the express purpose of protecting and preserving which the plenary legislative authority granted to Congress was reposed. This result is further demonstrated, as we have suggested, by considering how completely the purpose intended to be accomplished by the regulations which have been adopted in the past would be rendered unavailing or their enactment inexplicable if the power was not possessed to meet a situation like the one with which the statute dealt. * * *

We are of opinion that the reasons stated conclusively establish that, from the point of view of inherent power, the act which is before us was clearly within the legislative power of Congress to adopt, and that, in substance and effect, it amounted to an exertion of its authority under the circumstances disclosed to compulsorily arbitrate

(1905); Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7, 31 S. Ct. 164 (1910); Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Ann. Cas. 1075 (1906); Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, 33 S. Ct. 148 (1912); Boston & M. R. Co. v. Hooker, 233 U. S. 97, 34 S. Ct. 526, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593 (1913).

[70] The court cited, in a marginal note: Johnson v. Southern P. Co., 196 U. S. 1, 49 L. Ed. 363, 25 S. Ct. 158, 17 Am. Neg. Rep. 412 (1904); Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141 (1907); Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 55 L. Ed. 878, 31 S. Ct. 621 (1910); Southern R. Co. v. United States, 222 U. S. 20, 56 L. Ed. 72, 32 S. Ct. 2, 3 N. C. C. A. 822 (1911); Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, 32 S. Ct. 169, 1 N. C. C. A. 875 (1911).

[71] The court cited, in a marginal note: Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 26, 51 L. Ed. 933, 945, 27 S. Ct. 585, 11 Ann. Cas. 398 (1906); Missouri P. R. Co. v. Kansas, 216 U. S. 262, 278, 54 L. Ed. 472, 479, 30 S. Ct. 330 (1909).

the dispute between the parties by establishing as to the subject matter of that dispute a legislative standard of wages operative and binding as a matter of law upon the parties—a power none the less efficaciously exerted because exercised by direct legislative act instead of by the enactment of other and appropriate means providing for the bringing about of such result. If it be conceded that the power to enact the statute was in effect the exercise of the right to fix wages where, by reason of the dispute, there had been a failure to fix by agreement, it would simply serve to show the nature and character of the regulation essential to protect the public right and safeguard the movement of interstate commerce, not involving any denial of the authority to adopt it.

And this leaves only to be generally considered whether the right to exercise such a power under the conditions which existed was limited or restrained by the private rights of the carriers or their employees.

(a) As to the carrier.—As engaging in the business of interstate commerce carriage subjects the carrier to the lawful power of Congress to regulate irrespective of the source whence the carrier draws its existence, and as also, by engaging in a business charged with a public interest, all the vast property and every right of the carrier become subject to the authority to regulate possessed by Congress to the extent that regulation may be exerted, considering the subject regulated and what is appropriate and relevant thereto, it follows that the very absence of the scale of wages by agreement, and the impediment and destruction of interstate commerce which was threatened, called for the appropriate and relevant remedy—the creation of a standard by operation of law, binding upon the carrier.

(b) As to the employee.—Here again it is obvious that what we have previously said is applicable and decisive, since whatever would be the right of an employee engaged in a private business to demand such wages as he desires, to leave the employment if he does not get them, and, by concert of action, to agree with others to leave upon the same condition, such rights are necessarily subject to limitation when employment is accepted in a business charged with a public interest and as to which the power to regulate commerce possessed by Congress applied, and the resulting right to fix, in case of disagreement and dispute, a standard of wages, as we have seen, necessarily obtained.

In other words, considering comprehensively the situation of the employer and the employee in the light of the obligations arising from the public interest and of the work in which they are engaged, and the degree of regulation which may be lawfully exerted by Congress as to that business, it must follow that the exercise of the lawful governmental right is controlling. This results from the considerations which we have previously pointed out and which we repeat, since,

conceding that, from the point of view of the private right and private interest, as contradistinguished from the public interest, the power exists between the parties, the employers and employees, to agree as to a standard of wages free from legislative interference, that right in no way affects the lawmaking power to protect the public right and create a standard of wages resulting from a dispute as to wages and a failure therefore to establish by consent a standard. The capacity to exercise the private right free from legislative interference affords no ground for saying that legislative power does not exist to protect the public interest from the injury resulting from a failure to exercise the private right. In saying this, of course, it is always to be borne in mind that, as to both carrier and employee, the beneficent and ever-present safeguards of the Constitution are applicable, and therefore both are protected against confiscation and against every act of arbitrary power which, if given effect to, would amount to a denial of due process, or would be repugnant to any other constitutional right. And this emphasizes that there is no question here of purely private right, since the law is concerned only with those who are engaged in a business charged with a public interest, where the subject dealt with as to all the parties is one involved in that business, and which we have seen comes under the control of the right to regulate to the extent that the power to do so is appropriate or relevant to the business regulated. * * *

Being of the opinion that Congress had the power to adopt the act in question, whether it be viewed as a direct fixing of wages to meet the absence of a standard on that subject, resulting from the dispute between the parties, or as the exertion by Congress of the power which it undoubtedly possessed to provide by appropriate legislation for compulsory arbitration—a power which inevitably resulted from its authority to protect interstate commerce in dealing with a situation like that which was before it—we conclude that the court below erred in holding the statute was not within the power of Congress to enact, and in restraining its enforcement, and its decree, therefore, must be and it is reversed and the cause remanded, with directions to dismiss the bill.

And it is so ordered.[72]

[72] Mr. Justice McKenna concurred in a separate opinion. Mr. Justice Day, Mr. Justice Pitney, and Mr. Justice McReynolds delivered dissenting opinions. Mr. Justice Van Devanter concurred in the dissent of Mr. Justice Pitney and in a portion of that of Mr. Justice Day. These opinions are omitted.

See "The Supreme Court and the Adamson Law," by Thomas Reed Powell, 65 Univ. of Pa. Law Rev. 607.

TOLEDO, A. A. & N. M. RY. CO. v. PENNSYLVANIA CO. et al.

(Circuit Court of the United States, N. D. Ohio, W. D., 1893. 54 F. 746, 19 L. R. A. 395.)

In Equity. Bill by the Toledo, Ann Arbor & North Michigan Railway Company against Albert G. Blair, Jacob S. Morris, the Pennsylvania Company, the Lake Shore & Michigan Southern Railway Company, and others, to enjoin respondents from refusing to extend to complainant the same equal facilities as to others for the exchange of interstate traffic. The injunction was issued, served upon the Lake Shore & Michigan Southern Railway Company, and brought to the notice of its employees by publication. Heard on application by said company for an order attaching Clark, Case, Rutger, and Lennon, its employés, for contempt in violating the injunction.

RICKS, District Judge.[73] * * * Before proceeding to pass upon the evidence as to whether the men now before the court under charges for contempt are guilty or not, it may be profitable to consider the general principles of law applicable to the duties with which the accused were charged by the orders issued to them and to their employers. They were in the employ of the defendant the Lake Shore & Michigan Southern Railroad at the time the orders in this case were made, compelling it to receive from the Ann Arbor road all interstate freight it might tender. The testimony shows that the terms of this order were made known to the employés generally, and that they were thoroughly advised of its scope and mandatory provisions. That their employer was obligated, both under the general provisions of the interstate commerce law and under this order of the court, to receive and haul all interstate freight, must have been known to them. They must also be held to have known that the penalties of the law were severe in case their employer violated either the law or the order of the court. Holding to that employer, so engaged in this great public undertaking, the relation they did, they owed to him and to the public a higher duty than though their service had been due to a private person. They entered its service with full knowledge of the exacting duties it owed to the public. They knew that if it failed to comply with the laws in any respect severe penalties and losses would follow for such neglect. An implied obligation was therefore assumed by the employés upon accepting service from it under such conditions that they would perform their duties in such manner as to enable it not only to discharge its obligations faithfully, but also to protect it against irreparable losses and injuries and excessive damages by any acts of omission on their part. One of these implied conditions on their behalf was that they would not leave its service or refuse to perform their duties under cir-

[73] Part of the statement of facts and parts of the opinion are omitted.

cumstances when such neglect on their part would imperil lives committed to its care, or the destruction of property involving irreparable loss and injury, or visit upon it severe penalties. In ordinary conditions as between employer and employé, the privilege of the latter to quit the former's service at his option cannot be prevented by restraint or force. The remedy for breach of contract may follow to the employer, but the employé has it in his power to arbitrarily terminate the relations, and abide the consequences. But these relative rights and powers may become quite different in the case of the employés of a great public corporation, charged by the law with certain great trusts and duties to the public. An engineer and fireman, who start from Toledo with a train of cars filled with passengers destined for Cleveland, begin that journey under contract to drive their engine and draw the cars to the destination agreed upon. Will it be claimed that this engineer and fireman could quit their employment when the train is part way on its route, and abandon it at some point where the lives of the passengers would be imperiled, and the safety of the property jeopardized?[74] The simple statement of the proposition carries its own condemnation with it. The very nature of their service, involving as it does the custody of human life, and the safety of millions of property, imposes upon them obligations and duties commensurate with the character of the trusts committed to them. They represent a class of skilled laborers, limited in number, whose places cannot always be supplied. The engineers on the Lake Shore & Michigan Southern Railroad operate steam engines moving over its different divisions 2,500 cars of freight per day. These cars carry supplies and material, upon the delivery of which the labor of tens of thousands of mechanics is dependent. They transport the products of factories whose output must be speedily carried away to keep their employés in labor. The suspension of work on the line of such a vast railroad, by the arbitrary action of the body of its engineers and firemen, would paralyze the business of the entire country, entailing losses, and bringing disaster to thousands of unoffending citizens. Contracts would be broken, perishable property destroyed, the traveling public embarrassed, injuries sustained, too many and too vast to be enumerated. All these evil results would follow to the public because of the arbitrary action of a few hundred men, who, without any grievance of their own, without any dispute with their own employer as to wages or hours of service, as appears from the evidence in this case, quit their employment to aid men, it may be, on some road of minor importance, who have a difference with their employer which they fail to settle by ordinary methods. If such

[74] See Freund, Police Power, § 452; and an article, "Constitutional Limitations on Compulsory Industrial Arbitration," by Sidney P. Simpson, 38 Harv. Law Rev. 753 (783–785). Compare remarks of Harlan, Circuit Justice, in Arthur v. Oakes, 63 F. 310, 11 C. C. A. 209, 25 L. R. A. 414 (1894), with remarks by Cooke, J., in Kemp v. Division No. 241, 255 Ill. 213, 99 N. E. 389, Ann. Cas. 1913D, 347 (1912), quoted in Sayre, Cases on Labor Law, 785, 786.

ruin to the business of employers, and such disasters to thousands of the business public, who are helpless and innocent, is the result of conspiracy,[75] combination, intimidation, or unlawful acts of organizations of employés, the courts have the power to grant partial relief, at least by restraining employés from committing acts of violence or intimidation, or from enforcing rules and regulations of organizations which result in irremediable injuries to their employers and to the public. It is not necessary, for the purposes of this case, to undertake to define with greater certainty the exact relief which such cases may properly invoke; but that the necessities growing out of the vast and rapidly multiplying interests following our extending railway business make new and correspondingly efficient measures for relief essential is evident, and the courts, in the exercise of their equity jurisdiction, must meet the emergencies, as far as possible, within the limits of existing laws, until needed additional legislation can be secured.

[After considering the facts as to the conduct of other trainmen who quit the service rather than take a train, with "boycotted cars," out of the yards, and holding such conduct not in violation of the injunction, the court proceeded:]

But the conduct of Engineer Lennon presents quite a different case. He was on his run from Detroit to Air Line Junction with a train of 45 cars. He reached Alexis station at 10:07 a. m., and was there ordered to take an empty car from the Ann Arbor "Y" for Air Line Junction. This was one of the boycotted cars. He refused to switch the car into the train, and held it there, against positive orders, from 10:07 a. m. to 3:15 p. m., and then proceeded on his run, after receiving a dispatch from the chairman of the grievance committee which read as follows: "You can come along, and handle Ann Arbor cars." That message meant that the boycott had been raised. Though Lennon had been twice ordered by telegraph by the officers of the road to come on with his train, he refused to do it, but promptly moved it when he got permission to do so from one who had no official relation to the company, and no right to interfere with the movement of its trains. When he received the order at Alexis to take the Ann Arbor car, he refused, and said, "I quit." He afterwards agreed with the superintendent of the Detroit division to take his train to its destination, if the order to take the boycotted car was countermanded. He remained with his engine, and brought his train to Air Line Junction. When he arrived at that point, as the termination of his run, he says in his testimony that "the caller told me when I registered, 'You get 134.' I said, 'All right, I'll be up.' It was his duty to give me such notice." Though he claims to have quit at Alexis about 10 o'clock in the morning, he brought his train to its destination, and, when told what his next run would be, gave no notice of having quit, or of intending to quit. This is satisfactory evidence that he did not quit in good faith

[75] See Clements v. United States (C. C. A.) 297 F. 206 (1924).

in the morning, but intended to continue in the company's service, and that his conduct was a trick and device to avoid obeying the order of the court. He admitted having seen the court's order, when confronted with it at Alexis. It was shown to him in printed form, easily to be read and understood. * * * From his own admissions he had sufficient knowledge of its nature to at least put him upon inquiry as to its exact scope and effect. He knew it related to his duties as engineer under the very conditions then confronting him, and if he had been anxious to do his duty and respect the orders of the court, he had an exceptionally good opportunity to read and fully consider it during the five hours he was holding that train at Alexis against the positive orders of his superior officers. But he failed to so further inform himself, and persisted in his defiance both of the rules of his employer and of the injunction of the court during all the hours mentioned. I cannot conceive of any principle of law under which such conduct can be justified. An engineer cannot be permitted to pretend to quit the service of his company in the manner stated, with his train on the main track, 10 miles from his destination, and for the evident purpose of evading an order of court which was equally in force against employer and employé. * * * Upon the facts of the case made against Engineer James Lennon, I find that he did not quit the service of the company in fact, and did not intend to do so, and that his pretense to do so was a trick to evade the order of the court. Being in the service of the company when he refused to switch the Ann Arbor car into the train at Alexis, and having then full knowledge of the terms and meaning of the order of the court, that order was then in full force, and commanded him to do the very thing he refused to do. He therefore deliberately and knowingly violated the mandate of the court, and was guilty of contempt. * * *[76]

PENNSYLVANIA R. CO. v. UNITED STATES RAILROAD LABOR BOARD et al.

(Supreme Court of the United States, 1923. 261 U. S. 72, 43 S. Ct. 278, 67 L. Ed. 536.)

Suit by the Pennsylvania Railroad Company against the United States Railroad Labor Board and the members thereof. A decree for complainant was reversed by the Circuit Court of Appeals, with directions to dismiss the appeal (282 F. 701), and complainant appeals.

This case involves the construction of title 3 of the Transportation Act of 1920. Chapter 91, 41 Stat. 456, 469. The title provides for the settlement of disputes between railroad companies engaged in in-

[76] Affirmed: In re Lennon, 166 U. S. 548, 17 S. Ct. 658, 41 L. Ed. 1110 (1897). But see the opinion for the ground of affirmance.

terstate commerce and their employees, and as a means of securing this, it creates a Railroad Labor Board and defines its functions and powers. * * *

In May, 1921, the officers of the Federal Shop Crafts of the Pennsylvania System, a labor union of employees of that system engaged in shop work, and affiliated with the American Federation of Labor, met the representatives of the Pennsylvania Railroad Company. They said they represented a majority of the employees of the Pennsylvania System in those crafts and were prepared to confer and agree upon rules and working conditions. The Pennsylvania representatives refused to confer with the Federation for lack of proof that it did represent such a majority, and said they would send out a form of ballot to their employees asking them to designate thereon their representatives. The Federation officers objected to this ballot because it was not in accordance with principles 5 and 15 of the Board,[77] in that it made no provision for representation of employees by an organization, but specified that those selected must be natural persons, and such only as were employees of the Pennsylvania Company, and also because it required that the representatives of the employees should be selected regionally rather than from the whole system. The result was that the company and the Federation each sent out ballots. The Federation then filed a complaint, under section 307 of the Transportation Act, against the Pennsylvania Company, complaining on behalf of its members directly interested of the company's course in respect of the ballots. The company appeared, a hearing was had and the Board decided (decision No. 218) that neither of the ballots sent out by the parties was proper, that representatives so chosen were not proper representatives, and that rules and working conditions agreed upon by them would be void. It further appeared that the votes cast on the company's ballots were something more than 3,000 out of more than 33,000 employees entitled to vote. The Federation had advised its members not to vote on the company's ballots. What the result was in the vote of the Federation ballots did not appear. The persons chosen by the 3,000 votes on the company's ballots conferred with the Pennsylvania Company's representatives and agreed upon rules and working conditions. The Board in its decision ordered a new election, for which rules were prescribed and a form of ballot was specified, on which labor organizations as well

[77] The matter referred to is:

"5. The right of such lawful organization to act toward lawful objects through representatives of its own choice, whether employees of a particular carrier or otherwise, shall be agreed to by management."

"15. The majority of any craft or class of employees shall have the right to determine what organization shall represent members of such craft or class. Such organization shall have the right to make an agreement which shall apply to all employees in such craft or class. No such agreement shall infringe, however, upon the right of employees not members of the organization representing the majority to present grievances either in person or by representatives of their own choice."

as individuals could be voted for as representatives at the option of the employee.

The company, on September 16, 1921, applied to the Board to vacate this decision on the ground that there was no dispute before the Board of which by title 3 of the Transportation Act the Board was given jurisdiction. After a hearing the Board declined to vacate its order. * * *

Title 3 of the Transportation Act of 1920 bears the heading "Disputes between Carriers and Their Employees and Subordinate Officials."

Section 301 makes it the duty of carriers, their officers, employees, and subordinate officials, to exert every reasonable effort to avoid interruption to the operation of an interstate commerce carrier due to a dispute between the carrier and its employees, and further provides that such disputes shall be considered and if possible decided "in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute."

The section concludes:

"If any dispute is not decided in such conference, it shall be referred by the parties thereto to the board which under the provisions of this title is authorized to hear and decide such dispute."

Section 302 provides for the establishment of railroad boards of adjustment by agreement between any carrier, group of carriers or the carriers as a whole, and any employees or subordinate officials of carriers, or organization or groups of organizations thereof. No such boards of adjustment were established when this controversy arose.

Section 303 provides for hearing and decision by such boards of adjustment upon petition of any dispute involving only grievances, rules or working conditions not decided as provided in section 301.

Sections 304, 305, and 306 provide for the appointment and organization of the "Railroad Labor Board" composed of nine members, three from the Labor Group, three from the Carrier Group, and three from the Public Group.

Section 307 (a) provides that, when a labor adjustment board under section 303 has not reached a decision of a dispute involving grievances, rules or working conditions in a reasonable time, or when the appropriate adjustment board has not been organized under section 302, the Railroad Labor Board "(1) upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, (2) upon a written petition signed by not less than 100 unorganized employees or subordinate officials directly interested in the dispute, or (3) upon the Labor Board's own motion if it is of the opinion that the dispute is likely substantially to interrupt commerce, shall receive for hearing, and as soon as practicable and with due diligence decide, any dispute involving grievances, rules, or working conditions which is not decided as provided in section 301."

Paragraph (b) of the same section provides for a hearing and decision of disputes over wages.

Paragraph (c) makes necessary to a decision of the Board the concurrence of five members of whom, in the case of wage disputes, a member of the Public Group must be one. The paragraph further provides that:

"All decisions of the Labor Board shall be entered upon the records of the Board and copies thereof, together with such statement of facts bearing thereon as the Board may deem proper, shall be immediately communicated to the parties to the dispute, the President, each Adjustment Board, and the [Interstate Commerce] Commission, and shall be given further publicity in such manner as the Labor Board may determine."

Paragraph (d) requires that decisions of the Board shall establish standards of working conditions which in the opinion of the Board are just and reasonable.

Section 308 prescribes other duties and powers of the Labor Board, among which is that of making "regulations necessary for the efficient execution of the functions vested in it by this title."

Section 309 prescribes that:

"Any party to any dispute to be considered by an Adjustment Board or by the Labor Board shall be entitled to a hearing either in person or by counsel."

Section 313 is as follows:

"The Labor Board, in case it has reason to believe that any decision of the Labor Board or of an Adjustment Board is violated by any carrier, or employee or subordinate official, or organization thereof, may upon its own motion after due notice and hearing to all persons directly interested in such violation, determine whether in its opinion such violation has occurred and make public its decision in such manner as it may determine."

Mr. Chief Justice TAFT, after stating the case as above, delivered the opinion of the Court.[78]

It is evident from a review of title 3 of the Transportation Act of 1920 that Congress deems it of the highest public interest to prevent the interruption of interstate commerce by labor disputes and strikes, and that its plan is to encourage settlement without strikes, first by conference between the parties, failing that, by reference to adjustment boards of the parties' own choosing and, if this is ineffective, by a full hearing before a national board appointed by the President, upon which are an equal number of representatives of the Carrier Group, the Labor Group, and the Public. The decisions of the Labor Board are not to be enforced by process. The only sanction of its decision is to be the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official

[78] Parts of the statement of facts and a part of the opinion are omitted.

prestige of the Board, and the full publication of the violation of such decision by any party to the proceeding. The evident thought of Congress in these provisions is that the economic interest of every member of the public in the undisturbed flow of interstate commerce and the acute inconvenience to which all must be subjected by an interruption caused by a serious and widespread labor dispute, fastens public attention closely on all the circumstances of the controversy and arouses public criticism of the side thought to be at fault. The function of the Labor Board is to direct that public criticism against the party who, it thinks, justly deserves it.

The main and controlling question in this case is whether the members of the Board exceeded their powers on the facts as disclosed in the bill and answer.

It is contended by the carrier that the Labor Board cannot obtain jurisdiction to hear and decide a dispute until it is referred by the parties to the Board after they have conferred and failed to agree under section 301. Undoubtedly the act requires a serious effort by the carrier and his employees to adjust their differences as the first step in settling a dispute, but the subsequent sections dispel the idea that the jurisdiction of the Board to function in respect to the dispute is dependent on a joint submission of the dispute to it. If adjustment boards are not agreed upon, then under section 307, either side is given an opportunity to bring its complaint before the Labor Board, which then is to summon every one having an interest, and after a full hearing is to render a decision. A dispute existed between all the carriers and the officers of the national labor unions as to rules and working conditions in the operation of the railroads. By order of the Labor Board, this dispute which had arisen before the passage of the Transportation Act, and before the government had turned back the railroads to their owners, was continued for settlement before the Labor Board. That Board had been obliged to postpone the decision of the controversy until it could give it full hearing and meantime had ordered that the existing rules and conditions should be maintained as a modus vivendi.

Counsel of the railroad company insist that the Board had no jurisdiction to make an order or to take up the controversies between the Government Railroad Administration and the national labor unions; that when the railroads were turned back to their owners each company had the right to make its own rules and conditions and to deal with its own employees under section 301, and that the jurisdiction of the Board did not attach until a dispute as to such rules and conditions between the company and its employees had thereafter arisen.

We are not called upon to pass upon the propriety or legality of what the Labor Board did in continuing the existing rules and labor conditions which had come over from the Railroad Administration, or in hearing an argument as to their amendment by its decision. It suffices for our decision that the Labor Board at the instance of the carriers finally referred the whole question of rules and labor conditions to each

company and its employees to be settled by conference under section 301; that such conferences were attempted in this case, and that thereafter the matter was brought before the Board by Federation No. 90 of Shop Crafts of the Pennsylvania System under section 307. It is the alleged invalidity of this proceeding, thus initiated, which is really the basis of the bill of complaint of the company herein, and it is this only which we need consider.

First, Did Federation No. 90 have the right under section 307 to institute the hearing of the dispute? Section 307 says that this may be invoked on the application of the chief executive of any organization of employees whose members are directly interested in the dispute. Its name indicates, and the record shows, that the Federation is an association of employees of the Pennsylvania Company directly interested in the dispute. The only question between the company and the Federation is whether the membership of the latter includes a majority of the company's employees who are interested. But it is said that the Federation is a labor union affiliated with the American Federation of Labor and that the phrase "organization of employees" used in the act was not intended by Congress to include labor unions. We find nothing in the act to impose any such limitation if the organization in other respects fulfills the description of the act. Congress has frequently recognized the legality of labor unions, United Mine Workers v. Coronado Coal Co., 259 U. S. 344, 42 S. Ct. 570, 66 L. Ed. 975, decided June 5, 1922, and no reason suggests itself why such an association, if its membership is properly inclusive, may not be regarded as among the organizations of employees referred to in this legislation.

The next objection made by the company to the jurisdiction of the Board to entertain the proceeding initiated by the Federation is that it did not involve the kind of dispute of which the Board could take cognizance under the act. The result of the conferences between the Pennsylvania Railroad Company and its employees under section 301 appears in the statement of the case. By a vote of 3,000 out of more than 30,000 employees, a representative committee was appointed with which the officers of the company made an agreement as to rules and working conditions. Federation No. 90 for its members objected to the settlement on the ground that it had not been made by properly chosen representatives of the employees and brought this dispute before the Labor Board. The Pennsylvania Company was summoned and appeared before the Board and the issue was heard.

It is urged that the question who may represent the employees as to grievances, rules and working conditions under section 301 is not within the jurisdiction of the Labor Board to decide; that these representatives must be determined before the conferences are held under that section; that the jurisdiction of the Labor Board does not begin until after these conferences are held, and that the representatives who can make application under section 307 to the Board are representatives engaged in

the conference under section 301. Such a construction would give either side an easy opportunity to defeat the operation of the act and to prevent the Labor Board from considering any dispute. It would tend to make the act unworkable. If the Board has jurisdiction to hear representatives of the employees, it must of necessity have the power to determine who are proper representatives of the employees. That is a condition precedent to its effective exercise of jurisdiction at all. One of its specific powers conferred by section 308 is to "make regulations necessary for the efficient execution of the functions vested in it by this title." This must include the authority to determine who are proper representatives of the employees and to make reasonable rules for ascertaining the will of the employees in the matter.

Again, we think that this question of who may be representatives of employees, not only before the Board, but in the conferences and elsewhere, is and always has been one of the most important of the rules and working conditions in the operation of a railroad. The purpose of Congress to promote harmonious relations between the managers of railways and their employees is seen in every section of this Act, and the importance attached by Congress to conferences between them for this purpose is equally obvious. Congress must have intended, therefore, to include the procedure for determining representatives of employees as a proper subject-matter of dispute to be considered by the Board under section 307. The act is to be liberally construed to effect the manifest effort of Congress to compose differences between railroad companies and their employees, and it would not help this effort, to exclude from the lawful consideration of the Labor Board a question which has so often seriously affected the relations between the companies and their employees in the past and is often encountered on the very threshold of controversies between them.

The second objection is that the Labor Board in decision 119 and principles 5 and 15, and in decision 218, compels the railroad company to recognize labor unions as factors in the conduct of its business. The counsel for the company insist that the right to deal with individual representatives of its employees as to rules and working conditions is an inherent right which cannot be constitutionally taken from it. The employees, or at least those who are members of the labor unions, contend that they have a lawful right to select their own representatives, and that it is not within the right of the company to restrict them in their selection to employees of the company or to forbid selection of officers of their labor unions qualified to deal with, and protect their interests. This statute certainly does not deprive either side of the rights claimed.

But title 3 was not enacted to provide a tribunal to determine what were the legal rights and obligations of railway employers and employees or to enforce or protect them. Courts can do that. The Labor Board was created to decide how the parties ought to exercise their le-

gal rights so as to enable them to cooperate in running the railroad. It was to reach a fair compromise between the parties without regard to the legal rights upon which each side might insist in a court of law. The Board is to act as a board of arbitration. It is to give expression to its view of the moral obligation of each side as members of society to agree upon a basis for cooperation in the work of running the railroad in the public interest. The only limitation upon the Board's decisions is that they should establish a standard of conditions, which, in its opinion, is just and reasonable. The jurisdiction of the Board to direct the parties to do what it deems they should do is not to be limited by their constitutional or legal right to refuse to do it. Under the act there is no constraint upon them to do what the Board decides they should do except the moral constraint, already mentioned, of publication of its decision.[79]

It is not for this or any other court to pass upon the correctness of the conclusion of the Labor Board if it keeps within the jurisdiction thus assigned to it by the statute. The statute does not require the railway company to recognize or to deal with or confer with labor unions. It does not require employees to deal with their employers through their fellow employees. But we think it does vest the Labor Board with power to decide how such representatives ought to be chosen with a view to securing a satisfactory cooperation and leaves it to the two sides to accept or reject the decision. The statute provides the machinery for conferences, the hearings, the decisions and the moral sanction. The Labor Board must comply with the requirements of the statute; but having thus complied, it is not in its reasonings and conclusions limited as a court is limited to a consideration of the legal rights of the parties. * * *

For this reason, we think that the District Court was wrong in enjoining the Labor Board from proceeding to entertain further jurisdiction and from publishing its opinions, and that the Court of Appeals was right in reversing the District Court and in directing a dismissal of the bill. We do not find it necessary, therefore, to consider the questions raised at the bar as to whether the Railroad Labor Board is a corporation under the act and capable of suing or being sued, without the consent of the United States, and whether the Board's publication of its opinions in matters beyond its jurisdiction could be properly enjoined by a court of equity.

Decree affirmed.

[79] See Rhodes v. New Orleans Great Northern R. R., 129 Miss. 78, 91 So. 281 (1922), and comments thereon in 22 Col. Law Rev. 682.

PEOPLE, by KEYES, Atty. Gen., v. UNITED MINE WORKERS OF AMERICA, DIST. 15, et al.

(Supreme Court of Colorado, 1921. 70 Colo. 269, 201 P. 54.)

Bill by the People of the State of Colorado, by Victor E. Keyes, Attorney General, against the United Mine Workers of America, District 15, and others. Judgment for defendants, and plaintiff brings error.

DENISON, J.[80] Bill by the people to enjoin coal miners from striking before or during the consideration of their grievances by the Industrial Commission. The bill was dismissed, and the people obtained a writ of error from this court, and filed their brief July 9, 1920. The defendants in error have favored us with no brief.

The bill was based more particularly upon section 30, c. 180, of the Acts of 1915:

"Sec. 30. It shall be unlawful for any employer to declare or cause a lockout, or for any employé to go on strike, on account of any dispute prior to or during an investigation, hearing, or arbitration of such dispute by the commission, or the board, under the provisions of this act. Provided, that nothing in this act shall prohibit the suspension or discontinuance * * * of any industry or of the working of any persons therein which industry is not affected with a public interest."

The questions argued below were: First, whether the act was passed in a constitutional manner, and, second, if it was, whether it violated any of the provisions of the Constitutions of the state of Colorado or of the United States; but the court decided that the occupation of coal mining was not an industry "affected with a public interest," and therefore not within the terms of the act, and accordingly dismissed the bill.

The learned judge who tried the case based his decision upon In re Morgan, 26 Colo. 415, 429, 58 P. 1071, 1076 (47 L. R. A. 52, 77 Am. St. Rep. 269), where the court, speaking through Chief Justice Campbell, said:

"The business of operating smelters and working underground mines is purely a private business. It is not affected with a public interest, or devoted to a public use. * * * Hence, smelting does not come within the operation of the principle of those decisions in which have been upheld reasonable regulations of a business affected by a public interest."

The real question before the court in that case was whether the industry of smelting ore was affected with a public interest. The question whether underground mining was so affected arose only incidentally because underground mining, in the act there in question, the so-called 8-hour labor act, was classed with work in smelters. The remarks of the Chief Justice were doubtless directed to the mining of ores, in respect to which they were appropriate; but although his statement was broad

[80] Part of the opinion is omitted.

enough, as the court below justly remarked, to cover the industry of coal mining, yet we cannot think that he had that industry in mind, the question before him being in regard to smelters, which naturally connoted mining of ores. The case does not hold, and we hardly believe he would have said that the mining of coal was not affected with a public interest.

Then, too, a business by circumstance and in its nature may rise from a private to a public concern. German, etc., Co. v. Kansas, 233 U. S. 411, 34 S. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189, and since the decision of the Morgan Case (1899) the rapid development of the relations of the coal miners, the coal operators, and the public have produced a situation very different from that which then existed. Because of these considerations we do not think that the Morgan Case controls this one. However, if the statute in question is not constitutional, the dismissal of the bill was right, and must be affirmed.

Unless coal mining may be said to be affected with a public interest, its regulation by statute to the extent attempted by said chapter is unconstitutional. See the cases cited below. The words "affected with a public interest" were no doubt used by the General Assembly to keep the statute within constitutional limits. It becomes necessary, then, not only in order to construe the statute, but to decide whether it is constitutional, to determine whether coal mining is so affected, and it seems self-evident that it is. We must take judicial notice of what has taken place in this and other states, and that the coal industry is vitally related not only to all other industries, but to the health and even the life of the people. Food, shelter, and heat, before all others, are the great necessities of life, and, in modern life, heat means coal.

In 1902 the great anthracite coal strike threatened the social stability of several of the great states, and recently, in the neighboring state of Kansas, under the maxim "Salus populi lex suprema est," the Governor seized the coal mines, when a strike had stopped the production of coal, and operated them with volunteers until the emergency had passed. Other instances might be cited. Can it be said that a business with such possible consequences is not affected with a public interest? The answer must be: No.

The authorities are decidedly in favor of this conclusion. The leading case is Munn v. Illinois, 94 U. S. 132, 24 L. Ed. 77, which involved contracts by grain elevators. In State v. Barrett, 172 Ind. 169, 179, 87 N. E. 7, coal mining was held to be affected with a public interest. The regulation of interest on loans of money is so familiar we do not even notice it. The following are some of the cases on the subject: Budd v. New York, 143 U. S. 517, 12 S. Ct. 468, 36 L. Ed. 247; The Sinking Fund Cases, 99 U. S. 700, 747, 25 L. Ed. 504; German, etc., Co. v. Kansas, 233 U. S. 389, 411, 34 S. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189; Brechbill v. Randall, 102 Ind. 528, 1 N. E. 362, 52 Am. Rep. 695; Hockett v. State, 105 Ind. 250, 258, 5 N. E. 178, 55

Am. Rep. 201; Webster Telephone Case, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404; Mobile v. Yuille, 3 Ala. 137, 140, 36 Am. Dec. 441; Stock Exchange v. Board of Trade, 127 Ill. 153, 19 N. E. 855, 2 L. R. A. 411, 11 Am. St. Rep. 107; Cutsinger v. Atlanta, 142 Ga. 555, 564, 83 S. E. 263, L. R. A. 1915B, 1097, Ann. Cas. 1916C, 280; Davis v. State, 68 Ala. 58, 44 Am. Rep. 128; Baker v. State, 54 Wis. 368, 12 N. W. 12; Girard Co. v. Southwark Co., 105 Pa. 248, 252; Inter-Ocean Co. v. Asso. Press, 184 Ill. 438, 56 N. E. 822, 48 L. R. A. 568, 75 Am. St. Rep. 184.

One reason for holding a business to be affected with a public interest is that it is a practical monopoly. German, etc., Co. v. Kansas, 233 U. S. 389, 416, 34 S. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189; Budd v. New York, 143 U. S. 517, 537, 12 S. Ct. 468, 36 L. Ed. 247; Nash v. Page, 80 Ky. 539, 545, 44 Am. Rep. 490.

There can be no question that the production of coal is, at the present time, affected with a public interest to a certainty, and an extent not less than any other industry; consequently coal mining is within the terms of chapter 180, S. L. 1915, and it follows that that statute does not violate any constitutional provision as to due process or liberty of contract, as appears from the cases cited above.

There is no involuntary servitude under this act. Any individual workman may quit at will, for any reason or no reason. There is not even prohibition of strike. The only thing forbidden is a strike before or during the commission's action. * * *

The judgment should be reversed.[81]

CHAS. WOLFF PACKING CO. v. COURT OF INDUSTRIAL RELATIONS OF KANSAS.

(Supreme Court of the United States, 1923. 262 U. S. 522, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A. L. R. 1280.)

See, ante, p. 130, for a report of this case.

CHAS. WOLFF PACKING CO. v. COURT OF INDUSTRIAL RELATIONS OF KANSAS.

(Supreme Court of the United States, 1925. 267 U. S. 552, 45 S. Ct. 441, 69 L. Ed. 785.)

Original proceeding in mandamus in the Supreme Court of Kansas by the Court of Industrial Relations of the State of Kansas against the Chas. Wolff Packing Company. On receipt of the mandate of the

[81] See 6 Minn. Law Rev. 251.

United States Supreme Court (262 U. S. 522, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A. L. R. 1280), the state Supreme Court modified its judgment and awarded peremptory mandamus (114 Kan. 304, 219 P. 259), which decree it modified on rehearing (114 Kan. 487, 227 P. 249). To review the original judgment awarding mandamus, and the judgment on rehearing, the respondent brings separate writs of error.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This was an original proceeding in mandamus in the Supreme Court of Kansas to compel the Wolff Packing Company to put into effect an order of a state agency, called the Court of Industrial Relations,[82] determining a dispute respecting wages, hours of labor and working conditions in a slaughtering and packing plant owned and operated by the company. The order was made in a compulsory proceeding under a Kansas statute, called the Industrial Relations Act, Laws Special Session 1920, c. 29, and consisted of 19 distinct paragraphs—some fixing wages, some fixing hours of labor and pay for overtime, and others prescribing working conditions. After a hearing, the Supreme Court eliminated the paragraphs relating to working conditions, because made without the required notice, and awarded a peremptory writ of mandamus commanding obedience to the other paragraphs. Court of Industrial Relations v. Charles Wolff Packing Co., 109 Kan. 629, 201 P. 418; Id., 111 Kan. 501, 207 P. 806. That judgment was brought to this court for review and was reversed, with a direction that the case be remanded for further proceedings not inconsistent with the opinion rendered at the time. 262 U. S. 522, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A. L. R. 1280. After receiving the mandate, the state court vacated its original judgment, eliminated the paragraphs relating to working conditions and those fixing wages, also eliminated from the paragraphs fixing hours of labor the clauses relating to pay for overtime, and awarded a peremptory writ of mandamus commanding obedience to what remained of the last paragraphs. Court of Industrial Relations v. Charles Wolff Packing Co., 114 Kan. 304, 219 P. 259. On a rehearing, the court modified that judgment by awarding a peremptory writ of mandamus to compel obedience to the paragraphs fixing hours of labor, including the clauses relating to pay for overtime. 114 Kan. 487, 227 P. 249. The paragraphs to which obedience was thus finally commanded are as follows:

"(3) A basic working day of 8 hours shall be observed in this industry; but a 9-hour day may be observed not to exceed 2 days in any 1 week without penalty: Provided, however, that if the working hours of the week shall exceed 48 in number, all over 48 shall be paid for at the rate of time and one-half; furthermore, in case a day in excess of the 8-hour day shall be observed more than 2 days in any 1 week, all over 8

[82] The Court of Industrial Relations was abolished, and its jurisdiction, authority, powers, and duties were conferred upon a newly created Public Service Commission, by chapter 258, Laws of Kansas 1925, p. 335.

hours, except for said 2 days in said week, shall be paid for at the rate of time and one-half, even though the working hours of the week may be 48 hours or fewer."

"(14) Workers paid by the week or day, if employed within the plant and not within the office or sales department, shall be subject to hours of work and overtime as other employees under the terms of finding No. 3 hereof."

"(19) In departments operating 24 hours a day and 7 days a week, each employee therein shall be entitled to 1 day off each week. In other departments work performed on Sunday and legal holidays shall be paid for at the rate of time and one-half."

The order, according to its terms, was to remain in force until changed by the Court of Industrial Relations or by agreement of the parties with the approval of that agency.

The company has brought the case here again—this time on two writs of error. One covers the judgment first entered after receipt of the mandate of this court, and the other covers the judgment entered on the rehearing. The first of these writs can serve no purpose and must be dismissed. The rehearing was seasonably requested and the judgment entered thereon became the final judgment, the other being superseded by it.

Throughout the mandamus proceedings the company insisted that the Industrial Relations Act, on which the order was based, was in conflict with the provision of the Fourteenth Amendment that no state shall deprive any person of liberty or property without due process of law. This insistence was wholly rejected when the original judgment, heretofore reversed, was rendered, and was largely rejected when the judgment on the rehearing was given.

When the case was first before this court the discussion at the bar and in the briefs chiefly related to the validity of the parts of the act permitting the fixing of wages, and the opinion then delivered particularly dealt with that question, the ultimate conclusion, as expressed therein, being:

"We think the Industrial Court Act, in so far as it permits the fixing of wages in plaintiff in error's packing house, is in conflict with the Fourteenth Amendment, and deprives it of its property and liberty of contract without due process of law."

That conclusion, without more, required a reversal of the judgment of the state court. The parts of the act permitting the fixing of hours of labor were not specially dealt with and were not affected by the decision, save as the reasons on which it proceeded might be applicable to them. The reversal was with a direction that the case be remanded for further proceedings not inconsistent with this court's decision, and therefore the mandate operated particularly to require that the parts of the act permitting the fixing of wages be regarded as invalid.

In the proceedings which followed the receipt of the mandate, the state court held that the other parts of the act were separable from those permitting the fixing of wages, and also pronounced them constitutional. As the question of separability was a state question, the decision of that court thereon is conclusive here. Dorchy v. Kansas, 264 U. S. 286, 44 S. Ct. 323, 68 L. Ed. 686; Hallanan v. Eureka Pipe Line Co., 261 U. S. 393, 397, 43 S. Ct. 414, 67 L. Ed. 715. The decision on the constitutional question is all that we can review.

Both parties rely on our decision when the case was first here. One insists that by reversing the original judgment of the state court, and not merely a part of it, we adjudged the invalidity of the entire act, and the other that by particularly declaring the provisions permitting the fixing of wages invalid and saying nothing about the provisions permitting the fixing of hours of labor we impliedly held the latter valid. Both contentions are wrong.

"A judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided." Mutual Life Insurance Co. v. Hill, 193 U. S. 551, 553, 24 S. Ct. 538, 539 (48 L. Ed. 788).

The company next contends that the decision, even though not in terms determining the question of the validity of the provisions permitting the fixing of hours of labor, recognized and gave effect to principles which are applicable to that question and if applied will solve it. A survey of the act and of the decision will show that this contention is well taken.

The declared and adjudged purpose of the act is to insure continuity of operation and production in certain businesses which it calls "essential industries." To that end it provides for the compulsory settlement by a state agency of all labor controversies in such businesses which endanger the intended continuity. It proceeds on the assumption that the public has a paramount interest in the subject which justifies the compulsion. The businesses named include, among others, that of manufacturing or preparing food products for sale and human consumption. The controversies to be settled include, among others, those arising between employer and employees over either wages or hours of labor. The state agency charged with the duty of making the settlement is the Court of Industrial Relations. Although called a court, it is an administrative board. It is to summon the disputants before it, to give them a hearing, to settle the matter in controversy—as by fixing wages or hours of labor, where they are what is in dispute—to embody its findings and determination in an order, and, if need be, to institute mandamus proceedings in the Supreme Court of the state to compel compliance with its order. The order is to continue in effect for such reasonable time as the agency may fix, or until changed by agreement of the parties with its approval. The employer may discontinue the business (a) where it can be conducted conformably to the order only at a

loss; or (b) where for good cause shown the agency approves; and individual employees may quit the service in the exercise of a personal privilege, but may not induce others to quit or combine with them to do so. With these qualifications, both employer and employees are required to continue the business on the terms fixed in the order; violations and evasions being penalized. The authority given to the agency to fix wages or hours of labor is not general, nor is it to be exerted independently of the system of compulsory settlement. On the contrary, it is but a feature of that system, and correspondingly limited in purpose and field of application. No distinction is made between wages and hours of labor; both are put on the same plane. In the fixing of wages regard is to be had for what is fair between employer and employees, and in the fixing of hours of labor regard is to be had for what are healthful periods; but neither is to be fixed save in the compulsory adjustment of an endangering controversy to the end that the business shall go on.

The following excerpt from the opinion of the Supreme Court of the state in State ex rel. v. Howat, 109 Kan. 376, 417, 198 P. 686, 705 (25 A. L. R. 1210) explains the pervading theory of the act:

"Heretofore the industrial relationship has been tacitly regarded as existing between two members—industrial manager, and industrial worker. They have joined whole-heartedly in excluding others. The Legislature proceeded on the theory there is a third member of those industrial relationships which have to do with production, preparation and distribution of the necessaries of life—the public. The Legislature also proceeded on the theory the public is not a silent partner. Whenever the dissensions of the other two become flagrant, the third member may see to it the business does not stop."

On three occasions when the act was before us we referred to it as undertaking to establish a system of "compulsory arbitration." Howat v. Kansas, 258 U. S. 181, 184, 42 S. Ct. 277, 66 L. Ed. 550; Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 542, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A. L. R. 1280; Dorchy v. Kansas, 264 U. S. 286, 288, 44 S. Ct. 323, 68 L. Ed. 686. The Supreme Court of the state in a recent opinion criticizes this use of the term "arbitration." State v. Howat, 116 Kan. 412, 415, 227 P. 752. We recognize that in its usual acceptation the term indicates a proceeding based entirely on the consent of the parties. And we recognize also that this act dispenses with their consent. Under it they have no voice in selecting the determining agency, or in defining what that agency is to investigate and determine. And yet the determination is to bind them, even to the point of preventing them from agreeing on any change in the terms fixed therein, unless the agency approves. To speak of a proceeding with such attributes merely as an arbitration might be subject to criticism, but we think its nature is fairly reflected when it is spoken of as a compulsory arbitration. Of course, our present concern is with the essence of the system rather than its name. In this connection it is well to ob-

serve that in the opinion last mentioned the state court recognizes that the system, while intended to be just between employer and employees, proceeds on the theory that the public interest is paramount, as was explained in State ex rel. v. Howat, supra.

The survey just made of the act, as construed and applied in the decisions of the Supreme Court of the state, shows very plainly that its purpose is not to regulate wages or hours of labor either generally or in particular classes of business, but to authorize the state agency to fix them where, and in so far as, they are the subjects of a controversy the settlement of which is directed in the interest of the public. In short, the authority to fix them is intended to be merely a part of the system of compulsory arbitration and to be exerted in attaining its object, which is continuity of operation and production.

When the case was first here the question chiefly agitated, and therefore discussed and decided, was whether the authority to fix wages as an incident of the compulsory arbitration could be applied to a business like that of the Wolff Company consistently with the protection which the due process of law clause of the Fourteenth Amendment affords to the liberty of contract and rights of property. The question was answered in the negative and the act was held invalid in so far as it gives that authority. The subject was much considered and the principles which were recognized and applied were distinctly stated.

At the outset the court pointed out that the act assumes as a "necessary postulate" that the state, in the interest of the public, "may compel those engaged in the manufacture of food, and clothing, and the production of fuel, whether owners or workers, to continue in their business and employment on terms fixed by an agency of the state if they cannot agree." Then, after referring to the limited privilege of withdrawing from the business or employment which the act accords to owners and employees who may be dissatisfied with the determination, the court said:

"These qualifications do not change the essence of the act. It curtails the right of the employer on the one hand, and of the employee on the other, to contract about his affairs. This is part of the liberty of the individual protected by the guaranty of the due process clause of the Fourteenth Amendment. Meyer v. Nebraska, ante, 390. While there is no such thing as absolute freedom of contract and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances. Adkins v. Children's Hospital, 261 U. S. 525 [43 S. Ct. 394, 67 L. Ed. 785, 24 A. L. R. 1238]."

Various matters which were relied on as justifying the attempted restraint or abridgment were considered and pronounced inadequate. Among them was the assumption in the act that a business like that in question—preparing food for sale and human consumption—is so far

affected with a public interest that the state may compel its continuance, and, if the owner and employees cannot agree, may fix the terms through a public agency to the end that there shall be continuity of operation and production. This assumption was held to be without any sound basis and its indulgence by the state Legislature was declared not controlling. The court recognized that, in a sense, all business is of some concern to the public, and subject to some measure of regulation, but made it plain that the extent to which regulation reasonably may go varies greatly with different classes of business and is not a matter of legislative discretion solely, but is a judicial question to be determined with due regard to the rights of the owner and employees. Care was taken to point out that operating a railroad, keeping an inn, conducting an elevator, and following a common calling are not all in the same class, and particularly to point out the distinctions between a quasi public business conducted under a public grant imposing a correlative duty to operate, a business originally private which comes to be affected with a public interest through a change in pais, and a business which not only was private in the beginning but has remained such. The conclusion was that power to compel the continuance of a business because affected with a public interest is altogether exceptional. On this subject the court said:

"An ordinary producer, manufacturer or shopkeeper may sell or not sell as he likes (United States v. Trans-Missouri Freight Association, 166 U. S. 290, 320 [17 S. Ct. 540, 41 L. Ed. 1007]; Terminal Taxicab Co. v. District of Columbia, 241 U. S. 252, 256 [36 S. Ct. 583, 60 L. Ed. 984, Ann. Cas. 1916D, 765]), and while this feature does not necessarily exclude businesses from the class clothed with a public interest (German Alliance Insurance Co. v. Lewis, 233 U. S. 389 [34 S. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189]), it usually distinguishes private from quasi-public occupations. * * *

"It involves a more drastic exercise of control to impose limitations of continuity growing out of the public character of the business upon the employee than upon the employer; and without saying that such limitations upon both may not be sometimes justified, it must be where the obligation to the public of continuous service is direct, clear and mandatory and arises as a contractual condition express or implied of entering the business either as owner or worker. It can only arise when investment by the owner and entering the employment by the worker create a conventional relation to the public somewhat equivalent to the appointment of officers and the enlistment of soldiers and sailors in military service. * * *

"The penalties of the act are directed against effort of either side to interfere with the settlement by arbitration. Without this joint compulsion, the whole theory and purpose of the act would fail. The state cannot be heard to say, therefore, that upon complaint of the employer,

the effect upon the employee should not be a factor in our judgment. * * *

"The power of a Legislature to compel continuity in a business can only arise where the obligation of continued service by the owner and its employees is direct and is assumed when the business is entered upon. A common carrier which accepts a railroad franchise is not free to withdraw the use of that which it has granted to the public. It is true that if operation is impossible without continuous loss (Brooks-Scanlon Co. v. Railroad Commission, 251 U. S. 396 [40 S. Ct. 183, 64 L. Ed. 323]; Bullock v. Railroad Commission, 254 U. S. 513 [41 S. Ct. 193, 65 L. Ed. 380]), it may give up its franchise and enterprise, but short of this, it must continue. Not so the owner [in another field] when by mere changed conditions his business becomes clothed with a public interest. He may stop at will whether the business be losing or profitable."

Applying these principles, the court was of opinion that the business in question is one which the state is without power to compel the owner and employees to continue.

On further reflection we regard the principles so stated and applied as entirely sound. They are as applicable now as they were then. The business is the same and the parties are the same. So we reach the same conclusion now that we reached then.

The system of compulsory arbitration which the act establishes is intended to compel, and if sustained will compel, the owner and employees to continue the business on terms which are not of their making. It will constrain them, not merely to respect the terms if they continue the business, but will constrain them to continue the business on those terms. True, the terms have some qualifications, but as shown in the prior decision the qualifications are rather illusory and do not subtract much from the duty imposed. Such a system infringes the liberty of contract and rights of property guaranteed by the due process of law clause of the Fourteenth Amendment.

"The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." Meyer v. Nebraska, 262 U. S. 390, 399, 43 S. Ct. 625, 627 (67 L. Ed. 1042, 29 A. L. R. 1446).

The authority which the act gives respecting the fixing of hours of labor is merely a feature of the system of compulsory arbitration and has no separate purpose. It was exerted by the state agency as a part of that system and the state court sustained its exertion as such. As a part of the system it shares the invalidity of the whole. Whether it would be valid had it been conferred independently of the system and made either general or applicable to all businesses of a particular class we need not consider, for that was not done.

It follows that the state court should have declined to give effect to any part of the order of the state agency. * * *[83]

[83] See "Constitutional Aspects of Compulsory Arbitration of Industrial Disputes on Public Utilities," by Thomas I. Parkinson, Proceedings of Academy of Political Science in the City of New York, Vol. VII, No. 1 (1917); "Constitutional Limitations on Compulsory Industrial Arbitration," by Sidney P. Simpson, 38 Harv. Law Rev. 753 (1925); and "The Kansas Court of Industrial Relations with its Background," by W. R. Vance, 30 Yale Law J. 456 (1921).

CHAPTER 3

SERVICE

SECTION 1.—DUTY TO SERVE, AND MATTER IN EXCUSE

LITTLE ROCK & FT. S. RY. CO. v. CONATSER.

(Supreme Court of Arkansas, 1896. 61 Ark. 560, 33 S. W. 1057.)

Action by M. B. Conatser against the Little Rock & Ft. Smith Railway Company. Judgment for plaintiff, and defendant appeals.

WOOD, J.[1] The appellee alleges in his complaint that he had bought 192 bales of cotton in the town of Ozark, for which he paid the current market price, and that this cotton was bought for the express purpose of selling same to cotton buyers in said town, who were, in the months of November and December, buying cotton in said town, and paying the current market price. He alleges that he failed to sell to these cotton buyers because the appellant negligently refused and failed to receive said cotton, and to provide transportation for same, notwithstanding appellee had at divers times requested appellant so to do, and had offered and tendered said cotton, and had been ready and willing to pay to appellant any sum it might legally demand for receiving and transporting same; and that, by reason of said failure and refusal of the appellant to furnish transportation for said cotton, appellee had been unable to sell the same, to his damage, as he alleged, in the sum of $375.89, for which he asks judgment. The appellant answered, denying all the material allegations, and set up matters in defense, which it becomes unnecessary to set out in the view we take of the case.

The appellee must fail for two reasons:

First. It is nowhere shown in the proof that the relation of carrier and shipper ever existed, or was intended or attempted to be created, between the appellant and appellee as to this 192 bales of cotton. Neither the appellee for himself, nor any witness on his behalf, states that this cotton was offered to the carrier for shipment, and that he refused to receive and ship same. The most definite proof on that point is from the plaintiff himself, who says: "I would not undertake to say that we went down there, and tendered this 192 bales, and asked them to ship it; but I undertake to say we tried to ship cotton all along, and could not, and this 192 bales was on hand then." Again, the plaintiff says, with reference to this particular lot of cotton: "I don't remember whether I tried to ship this or not, but I remember I tried to

[1] Part of the opinion is omitted.

ship some other. I don't remember whether this was in it or not, but we did finally ship that." True, there was proof that the railway had failed to furnish transportation for cotton, and that same had accumulated on the yards on that account; but, to hold the carrier liable for damages growing out of the failure to ship a specific lot of cotton, it should have been made to appear that the contractual relation of shipper and carrier existed, or was sought to be established, with reference to that specific cotton. On this proposition the proof is too vague and uncertain to be the basis of a judgment. The liability of common carriers of freight for a failure to furnish sufficient accommodation for the transportation of such property as they may be legally called upon to carry (Sand. & H. Dig. §§ 6193, 6194; Fordyce v. Nix, 58 Ark. 140, 23 S. W. 967) attaches only in favor of those who come, or offer to come, into contractual relation with the carrier as shippers. This the appellee failed to do with reference to this particular cotton. The company therefore owed him no duty, and was subject to no liability. * * *

Reversed and dismissed.[2]

CRESCENT COAL CO. v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky, 1911. 143 Ky. 73, 135 S. W. 768, 33 L. R. A. [N. S.] 442.)

Action by the Crescent Coal Company against the Louisville & Nashville Railroad Company. Decree dismissing the petition, and plaintiff appeals.

CARROLL, J.[3] The appellant, Crescent Coal Company, is the business name assumed by Joe Higdon, who in 1908 was engaged in buying and selling coal in the city of Henderson. The appellee, Louisville & Nashville Railroad Company, was at the time, and is, a corporation organized under the laws of Kentucky and engaged in the business of a common carrier of passengers and freight. Its main line of road runs into and through the city, and in addition to its main line it operates and controls what is called a "belt line," running from its

[2] See Wilder v. St. Johnsbury & L. C. R. Co., 66 Vt. 636, 30 A. 41 (1891), and comment thereon in 8 Harv. Law Rev. 230. The demand for service must be bona fide, Nicholson v. New York City R. Co., 118 App. Div. 858, 103 N. Y. S. 695 (1907), action to recover statutory penalty for refusal to issue transfer; but see W. U. Tel. Co. v. Ferguson, 57 Ind. 495 (1877); Bull v. New York City R. Co., 121 App. Div. 582, 106 N. Y. S. 378 (1907), and comment thereon in 8 Col. Law Rev. 146; Fleming v. Montgomery Light Co., 100 Ala. 657, 13 So. 618 (1892). On the question who is entitled to make demand for service, see Public Service Corp. v. American Lighting Co., 67 N. J. Eq. 122, 57 A. 482 (1904); American Lighting Co. v. Public Service Corp. (C. C.) 132 F. 794 (1904); In re Vance (Okl.) 241 P. 164 (1925); and an article on "The Inherent Limitation of Public Service Duty to Particular Classes" by Bruce Wyman, 23 Harv. Law Rev. 339.

[3] Only so much of the opinion is printed as relates to the question whether the defendant was under a duty to render the service demanded.

main line in two directions through the city. Leading from its main and belt line, there were a number of spur tracks that ran into various industrial plants in the city of Henderson, situated near its main and belt lines of road. These spur tracks were used for the purpose of transporting freight to and from these industrial plants, and were operated by the company as a part of its line of road. The Keystone Mining & Manufacturing Company was engaged in the operation of a coal mine in the city of Henderson, and was connected with the main or belt line by a spur controlled and operated by the appellee company.

In April, 1908, Higdon, in the name of the Crescent Coal Company, conceived the plan of supplying the industrial plants in the city of Henderson that had spur connections with the main or belt line of the appellee company with coal mined from the Keystone mine. His purpose was to have cars furnished by the appellee company loaded with coal at the time, and then transferred by the appellee company to the industrial plants in Henderson that had spur connections. With this object in view, he entered into a contract with the Keystone company, by the terms of which he was to be furnished by it during the year beginning July 1, 1908, 20,000 tons of coal, which it was stipulated in the contract should be delivered to him on the spur track at its mine. Another contract made in May, 1908, gave him the right with certain conditions to sell the output of the mine in excess of 20,000 tons. After making these contracts with the Keystone company, he contracted with various industrial plants having spur connections with the line of the appellee company to deliver to them at their plants in car load lots, at a stipulated price, a large quantity of coal. On July 1, 1908, he applied to the appellee company to furnish him cars at the Keystone Company's mine to be loaded with coal and hauled by it to the industrial plants, and proposed to pay for the services $4 per car, which would be about 10 cents per ton. The appellee company refused to furnish any cars for this service until July 13, 1908, when it notified Higdon that it would furnish cars but would charge for the service 50 cents per ton. This offer, which was kept open until August 13, 1908, Higdon refused to accept, and on August 13th the appellee company informed him that it would not furnish cars for this service at any price. Thereupon Higdon brought this suit against the appellee company, setting up his contracts, and the action of the appellee in preventing him from fulfilling them, and sought to recover damages to compensate him for the loss he had sustained. The action was brought on the ordinary, or common-law, side of the docket, but on motion of the appellee company was transferred over the objection of the appellant to equity, and, upon hearing, the petition was dismissed.

A number of legal questions are presented by the record, and we will endeavor to dispose of such of them as seem essential to a solution of the matters in controversy. The first, and perhaps the most important, question is: Was the appellee company under a duty as a common carrier of passengers and freight to render this service?

The evidence for appellee conduces to show that the coal mine and the industrial plants located in Henderson to which Higdon desired to deliver coal were all located within what are called the "switching limits" of the appellee company. It is therefore said that it should not be treated as a common carrier or charged with the duty of transporting freight as a common carrier from one point within these limits to another point within them. A common carrier, such as the appellee company was, may undoubtedly have what may be called yard facilities, including switches, spurs, and side tracks for its convenience in the handling, storing, and distribution of its cars and freight, and it would not be obliged as a common carrier to transport from one point to another in these yards, or on these spurs or switches, freight for the convenience of shippers who might desire to have freight hauled from one point on a switch or spur in the yard to another point in the yard. In the use of tracks laid in its yards for its own convenience in handling, storing, and distributing cars and freight, a common carrier cannot fairly be said to be engaged in the business of a common carrier in the sense that it must receive and deliver as at other points on its line of road freight or passengers. A rule like this would impose an unreasonable duty upon a common carrier and unnecessarily hinder and interfere with the conduct of its business. It is essential in the operation of railroads that they should have at terminals, and other places where the business requires it, yards and facilities that they may use in the conduct of their business, in such a way as not to be inconvenienced by the necessity of receiving and unloading goods for shippers. But we are not inclined to treat what the appellee company terms its "switching limits" in the city of Henderson as coming within the meaning of yards and terminals, such as we have described. The spur tracks to the coal mine and the industrial plants were not constructed, nor were they operated for the convenience of the appellee company in handling, storing, and distributing its cars, engines, and other property. As we will presently show, they were constructed and were being used as a part of its railroad system, in carrying freight for compensation to and from the plants connected with its main line of road by these spur tracks. It is true these spur tracks were within what it called its "switching limits" and extended to factories and mills situated close to its line of road; but we regard as wholly immaterial, in the consideration of the question before us, the length of the spur track, or the kind of business establishments it connects the line of road with. Nor do we consider it a matter of any consequence how close together spur tracks, such as these, are located, or whether they are upon one part of its line or another. Whether they run to factories or mines in cities or towns, or to industrial plants in country districts, whether they are long or short, or close together or widely separated, they are to be considered a part and parcel of the system constructed and operated in its business as a common carrier, and the public have an interest in their conduct and operation that the carrier must respect. A railroad company owes to

establishments connected with its line of road by these spur tracks the same duty that it does to establishments situated immediately upon its main line of road. It is under the same obligation to furnish facilities for transportation to one as it is to the other. It must serve all alike. Nor can a railroad company arbitrarily and without any relation to the use to which it is put designate a part of its track or system as "yards or switching limits" and then say that it owes no duty as a common carrier in this district except such as it may choose to assume, or say that it will or not, as suits its pleasure or convenience, perform service as a common carrier in this territory. A railroad company engaged in the general business of a common carrier cannot without regard to the convenience of the public classify or divide its trackage into divisions or parts and say that on one part it is a carrier and on another it is not. In the discharge of its duties to the public as a common carrier, a railroad company may establish reasonable depots or places at which it will receive and deliver freight, and cannot be required to receive or handle it at other places; but it must use for the public convenience all the tracks set apart by it for the transportation of freight, and treat without favor or discrimination all persons offering to it freight for carriage. The spur tracks to these various plants in Henderson were no more a part of its "yards or switching limits" than would be a spur track that connected its main line in a country district with a mill or factory.

It is shown by the evidence that the appellee company in 1908, and for a number years prior thereto, had been in the habit of transporting car loads of freight from industrial plants in Henderson with spur connections to other industrial plants in Henderson with spur connections, but that it had never performed this service for the Keystone Company. For example, it would haul a car load of corn from an elevator, connected with its belt or main line by a spur track, to a mill connected with its main or belt line by a spur track; but it would not haul a car load of coal from the mine to either the elevator or the mill. In explanation of this practice, and for the purpose of showing that it involved a different character of service from that sought by Higdon, it attempted to show, and did so do by its traffic agents, that the service it performed in hauling products from one industrial plant to another, such as from the corn elevator to the mill, was merely auxiliary or incidental to a transportation service that preceded or followed this local movement. Or, in other words, when it hauled for a nominal charge a car load of corn from the elevator to the mill to be converted into foodstuff of some kind, this foodstuff would necessarily be sold to parties outside of Henderson, and therefore it would get what it calls a transportation charge for hauling the food product from the mill at Henderson to the place it was shipped. And so it would be compensated in the transportation haul for the service it rendered in switching the cars from the elevator to the mill at a nominal price. It is said, however, that, if coal was hauled from the Keystone mine to a factory

to be there consumed, the carrier could not get another haul out of this coal or the substance to which it was reduced, and therefore it had the right to decline to render in the transportation of coal the character of service that it rendered in the transportation of corn. Looking at this question from the standpoint of the traffic manager of the appellee company, it doubtless presented to his mind sufficient reasons why the discrimination should be made. But, when considered in relation to the duties a common carrier owes to the public, it was wholly unjustifiable. A common carrier may under certain conditions hold itself out to the public as being a common carrier of certain articles of freight, and, if it was only engaged in the carriage of specified articles it would not be under any obligation to carry other things. If it carried for every person, who offered it, the articles and things that it held itself out to the public as a carrier of, it could not well be said to be guilty of discrimination. Hutchinson on Carriers, vol. 1, §§ 59, 90, 144. But, as the appellee company was engaged in the business of carrying coal, as well as all other articles of merchandise and freight offered to it, it had no right to make any discrimination between shippers, and was obliged to carry for all persons all classes and character of freight offered to it. Bassett & Stone v. Aberdeen Coal & Mining Co., 120 Ky. 728, 88 S. W. 318, 27 Ky. Law Rep. 1122. The argument is further made that it had persistently and uniformly declined to haul coal from this mine to places in Henderson, and this was well known to Higdon when he made the contracts referred to; but this custom did not confer upon it the right to continue the discrimination. That it had never engaged in the business of carrying coal in the manner desired by Higdon did not under the circumstances of this case authorize it to refuse to render the service when demanded. No length of time, or manner of treatment, or habit of dealing, will discharge a common carrier from the obligation to furnish to the public the service it is engaged in performing. The appellee company could not transfer between mills and factories corn, wheat, and other articles, and refuse to transfer under the same conditions coal.

It follows from these conclusions that the appellee company was not justified in refusing to render the service requested by Higdon.[4] * * *

[4] The case was again before the court, Louisville & N. R. Co. v. Higdon, 149 Ky. 321, 148 S. W. 26, and judgment for plaintiff affirmed in 234 U. S. 592, 34 S. Ct. 948, 58 L. Ed. 1484. See 33 L. R. A. (N. S.) 443; also, Wiggins Ferry Co. v. East St. Louis Union Ry. Co., 107 Ill. 450 (1883).

SOUTHERN PACIFIC CO. v. STATE.

(Supreme Court of Arizona, 1917. 19 Ariz. 20, 165 P. 303.)

Ross, J.[5] This is an action to recover a fine, assessed against appellant by the Corporation Commission for contempt in refusing to obey an order of the Corporation Commission directing it to transport Campbell's United Shows from Tucson to Phœnix, Arizona. * * *

It developed that appellant and other railroads of this section of the country had been accustomed to enter into contracts of transportation with circuses and carnival shows at rates very much less than the regular tariffs, and containing terms of exemption from the liability of common carriers; that Campbell's United Shows had such a contract in 1913 with appellant and other roads in this and contiguous states. * * *

It is next contended that the Corporation Commission was without jurisdiction to make its order requiring appellant to transport Campbell's United Shows from Tucson to Phœnix, because no intrastate tariffs had been filed with the commission showing the rates for movement of privately owned equipment in circus trains or otherwise, or obliging appellant to transport privately owned equipment in circus trains. That the appellant was under no common-law obligation to accept the privately owned equipment of Campbell's United Shows, we think is well settled. It could entirely refuse to accept such transportation, or if it should accept it the law permitted the common carrier to dictate the terms upon which the privately owned equipment of such a concern was transported. Clough v. Grand Trunk Western Ry. Co., 155 F. 81, 85 C. C. A. 1, 11 L. R. A. (N. S.) 446, and cases there cited.[6]

The rule of the common law prevails in this jurisdiction, unless it has been changed and modified by statute. Looking to our statutes and to our Constitution, we are satisfied that the common-law rule has been abrogated in this state so as to make it obligatory upon common carriers to accept and transport the privately owned equipment of circuses and other show outfits under the rules, regulations, and rates, when reasonable and just, prescribed by the Corporation Commission. * * *

We think it was the intention of the law, both constitutional and statutory, that the Corporation Commission should have plenary power over every public service corporation transacting business in this state of a local nature. That this power of supervision extends to contracts for the transportation of both persons and property, whether effected in the capacity of private carrier or common or public carrier.

[5] Only parts of the opinion are printed. The dissenting opinion of Cunningham, J., is also omitted.

[6] For other cases dealing with the liability of carriers undertaking such service, see post, p. 935.

Nor do we think that appellant can complain because it had neglected to file with the commission tariffs showing the rates for the movement of privately owned equipment of circuses and like organizations. These omissions may be excused, as stated by the Interstate Commerce Commission in its rules concerning circuses and other show outfits, owing to "the peculiar nature of this traffic and the difficulties of establishing rates thereon in advance of shipper's request describing the character and volume of the traffic offered," but it cannot justify a refusal upon application to fix just and reasonable rates or to enter into just and reasonable contracts.[7] * * *

APLINGTON v. PULLMAN CO.

(Supreme Court of New York, Appellate Division, First Department, 1905. 110 App. Div. 250, 97 N. Y. S. 329.)

Appeal by the plaintiff, Henry Aplington, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office denying the plaintiff's motion for a new trial made upon the minutes.

LAUGHLIN, J.[8] This is an action to recover damages for the wrongful ejectment of the plaintiff from one of the defendant's sleeping cars in which he had purchased a berth. On the 14th day of March, 1901, the plaintiff at San Antonio, Tex., purchased of the agent of the Galveston, Harrisburg & San Antonio Railroad Company a through ticket for a continuous passage to New York and at the same time purchased a ticket from the defendant company for a double lower berth in a sleeping car from San Antonio, Tex., to Jersey City. The Pullman Company's ticket was in two parts, one for the lower berth to New Orleans and the other for the remainder of the journey. The agent who sold the Pullman ticket to the plaintiff designated in writing thereon that he was to have a lower berth from New Orleans but did not designate the number of the berth. * * *

The plaintiff testifies that he stated to defendant's agent that he desired a lower berth through to Jersey City and asked if he could have it and was informed that he could and received and accepted the ticket on the understanding that it was for a lower berth through. He had, therefore, obtained the right from the railroad company to through transportation and from the Pullman Company to the use of a double lower berth in one of its cars throughout the journey authorized by the

[7] As to the duty of common carriers to accept and transport private cars or other privately owned equipment, see 30 L. R. A. 161, and 48 L. R. A. (N. S.) 990.

[8] A part of the opinion is omitted.

railroad ticket. He started on the journey on the evening of the 14th of March. That part of the ticket calling for a lower berth from San Antonio to New Orleans was taken up by the conductor, and plaintiff was assigned to and occupied a lower berth until he reached New Orleans the following evening. At the outskirts of the city, evidently at a junction, the plaintiff with other passengers was directed to vacate the sleeping car and take another train there for New York. The plaintiff did as he was directed and entered the sleeping car of the defendant attached to the New York train and bound for Jersey City at about 7:45 p. m. He presented to the Pullman car conductor the unused portion of the Pullman ticket and asked for a lower berth for which it called. The conductor informed him that upper 8 had been assigned to him; that there was only one unoccupied lower berth which was reserved from Montgomery, Ala., where the train would arrive about 6:10 the following morning, and that in the meantime he might occupy the berth but would be obliged to vacate the same at that hour. The plaintiff demanded a lower berth through to Jersey City in accordance with his ticket. In the meantime the conductor sold the lower berth to Montgomery. All of the lower berths having been sold, and the conductor having refused to give him a lower berth, the plaintiff left the car and entered an ordinary day coach on the same train on which he rode all night. He offered to prove that he was obliged to change cars at Montgomery at 6:10 the following morning, at Atlanta at noon, and at Washington at 7 o'clock the following morning, and that he was obliged to ride in a day coach all the way for two nights and a day and a half; that he was afraid to take an upper berth owing to the fact that from infancy he had been accustomed to walk in his sleep and believed that it would endanger his life to occupy an upper berth; that there were no conveniences for washing or sleeping in the cars in which he was obliged to ride and that he sustained inconveniences and annoyances and pain and suffering incident to traveling in that manner and owing to the associates that he encountered in the day coaches. Counsel for the defendant objected to this evidence, and it was excluded, and plaintiff duly excepted. The trial court ruled that defendant violated its contract with the plaintiff but that his damages were limited to the cost of the sleeping car ticket from New Orleans to Jersey City, which was eight dollars, and directed a verdict for that amount. The plaintiff asked to go to the jury on all the questions in the case and particularly on the question of his ejectment from the car and as to damages and excepted to the refusal of the court to grant his request and to the verdict as directed. We are of opinion that the learned court was right in ruling that the defendant was guilty of a breach of its contract; but we think that the evidence offered on the question of damages should have been received and submitted to the jury. Where one purchases a ticket for a continuous long journey and, perhaps, pays an additional fare to travel by special train and has business or social engagements, or is in a condition of health that requires him to make the journey at that particular time and by that

particular train and engages a berth, section or stateroom in a sleeping car for his health, comfort or convenience, he should not, when the sleeping car company refuses him the conveniences and facilities which he purchased, be confined to a recovery of the cost of the sleeping car ticket. That would not be adequate compensation. Public policy also requires that a liberal rule of damages should be accorded to plaintiff in such a case. If the damages are in such case to be limited to the cost of the ticket not only will the traveling public be seriously inconvenienced and annoyed, but it would lead to the resale of tickets for gratuities tendered by subsequent applicants and result in the utmost confusion. The sleeping car company had notice of every element of damages that a traveler is liable to encounter in such circumstances. For the indignity inflicted upon the passenger in the presence of other passengers by being refused the berth which he had purchased and by being obliged to leave the sleeping car and for the inconvenience and annoyance which he suffered by being obliged to travel in a daycoach without sleeping or washing facilities and being obliged to change cars at early and late hours, he should be compensated. Although the decisions on this point are not fully in accord, the trend of judicial authority is that these are elements of damage for which a recovery may be had. Buck v. Webb, 58 Hun, 185, 11 N. Y. S. 617; Braun v. Webb, 32 Misc. Rep. 243, 65 N. Y. S. 668; Nevin v. Pullman Palace-Car Co., 106 Ill. 222, 46 Am. Rep. 688; Hughes v. Pullman's Palace-Car Co. (C. C.) 74 F. 499; Pullman's Palace-Car Co. v. King, 99 F. 380, 39 C. C. A. 573; cited approvingly in Gillespie v. Brooklyn Heights R. Co., 178 N. Y. 361, 70 N. E. 857, 66 L. R. A. 618, 102 Am. St. Rep. 503; Mann Boudoir Car Co. v. Dupre, supra, 54 F. 646, 4 C. C. A. 540, 21 L. R. A. 289; Pullman Palace-Car Co. v. Booth (Tex. Civ. App.) 28 S. W. 719. See, also, Gillespie v. Brooklyn Heights R. R. Co., 178 N. Y. 347, 70 N. E. 857, 66 L. R. A. 618, 102 Am. St. Rep. 503.

The action, strictly speaking, is not ex contractu. It would not be assignable and the statute of limitations relating to torts, as distinguished from contracts, would be applicable. Webber v. Herkimer, etc., R. R. Co., 109 N. Y. 311, 16 N. E. 358. The action is, however, ex contractu in the sense that the wrongful act in refusing the plaintiff the berth and excluding him from the sleeping car, which is the gravamen of the case, is dependent upon the contract. A recovery may be had both for the breach of contract—the value of the ticket—and for the tort. It is not essential, however, to analyze the nature of the action. The facts are pleaded. The plaintiff has not alleged merely a breach of contract, but he has alleged his wrongful ejectment. This distinguishes the case from Miller v. Baltimore & Ohio R. R. Co., 89 App. Div. 457, 85 N. Y. S. 883, which was an action on contract where there was no ejectment. The learned counsel for the respondent contends that there was no ejectment here and that the plaintiff voluntarily left the car. We are of opinion that this cannot be said as matter of

law. The jury could well have found that there was nothing left for the plaintiff to do but to leave the car, and that it constituted none the less an ejectment that he did so on being repeatedly informed that he could not have the berth which he had purchased or any lower berth without waiting to be further humiliated by being commanded to leave or for the application of force. Townsend v. N. Y. C. & H. R. R. Co., 56 N. Y. 301, 15 Am. Rep. 419; Buck v. Webb, supra. The plaintiff was on the train, and, for aught that appears, it had started at the time of his interview with the conductor. The plaintiff was technically right at least in insisting on a lower berth, for the contract was for a lower berth, and he was entitled to what he engaged, even though another might answer. Pullman Palace Car Co. v. Taylor, 65 Ind. 153, 32 Am. Rep. 57.[9] If the jury believed that he was accustomed to walk in his sleep, they would readily find that he was justified in refusing to take an upper berth. Whether his conduct was reasonable in refusing to accept the lower berth for the first night, which he would have been obliged to vacate early in the morning, or in refusing to accept an upper berth, was a question of fact for the jury, and any unreasonable conduct on his part would go in mitigation of damages. Pullman's Palace-Car Co. v. King, 99 F. 380, 39 C. C. A. 573. The evidence, excluded, however, should have been received, and for this error a new trial must be awarded.

It follows, therefore, that the judgment should be reversed and a new trial granted, with costs to appellant to abide the event.[10]

PATTERSON and CLARKE, JJ., concurred. O'BRIEN, P. J., and INGRAHAM, J., dissented.

Judgment reversed, new trial granted, costs to appellant to abide event.

PANTEBAKOS v. ROCKINGHAM COUNTY LIGHT & POWER CO.

(Supreme Court of New Hampshire, 1925. 81 N. H. 441, 128 A. 534, 38 A. L. R. 1063.)

Case for negligence. Trial by the Court. Verdict for the Plaintiff. When the plaintiff applied to the defendant to connect his hotel with its wires, he told the man he met in the office that he intended to use electricity for both lighting and heating, and was told that if he was going to use much electricity for heating he would save money if he installed two meters. The plaintiff, however, installed but one meter

[9] Accord: Mann Boudoir Car Co. v. Dupre, 54 F. 646, 4 C. C. A. 540, 21 L. R. A. 289 (1893).

[10] Does a guest at an inn have any rights in the selection of a room or other accommodations? See Fell v. Knight, 8 M. & W. 269, 151 Eng. Rep. 1039 (1841), and Hervey v. Hart, 149 Ala. 604, 42 So. 1013, 9 L. R. A. (N. S.) 213, 123 Am. St. Rep. 67, 13 Ann. Cas. 1049 (1906).

and paid for the electricity he used at lighting rates. If he had installed a second meter the electricity he used for heating would have cost only about one-fourth of what he paid for it. After operating in this way for some 13 months, the plaintiff brought this suit in which he seeks to recover the difference between what he paid for electricity used for heating and what he would have had to pay if he had installed a second meter.

Transferred on the defendant's exception to the ruling that it was the defendant's duty to use reasonable means to give the plaintiff adequate information at the time he became a customer, and to the finding that it had failed to perform that duty.

YOUNG, J. As the ruling excepted to is understood, the court held that it is the duty of a public service corporation at the time a customer applies to it for service to use reasonable means to enable him to understand what he must do to use electricity economically. Is that the law?

The duty and the only duty, in so far as the question we are considering is concerned, which the law imposes on a public service corporation, in addition to those it imposes on an individual engaged in selling goods or services, is that prescribed by Laws 1911, c. 164, § 7, in respect to making and publishing its rates and charges, and the court has found that the defendant had complied with the provisions of that section at the time the plaintiff became one of its customers.

The test, therefore, to determine the validity of the defendant's exception is to inquire whether the common law makes it the duty of an individual to use reasonable means to inform his customers in respect to the economical way to use the goods they purchase, for the plaintiff's sole complaint is that the defendant failed to use such means to give him adequate information in respect to using electricity economically.

In other words the plaintiff does not contend that the defendant lied to him or even that it attempted to deceive him. His sole complaint, as the case is understood, is that the defendant failed to use reasonable means to make him comprehend how great a saving he would make if he installed a second meter.

As we have seen, there is no statute or specific rule of the common law which imposes that duty on either an individual or a public service corporation. On the contrary, it is common knowledge that those engaged in the business of selling standard goods are not accustomed to advise their customers as to the best way to use them.

In short, the court erred when it ruled that it is the duty of a public service corporation to use reasonable means to give its customers adequate information in respect to the economical way of using the electricity they purchase, for, although it may be true that there has been a great change in the meaning of the maxim caveat emptor since Chandelor v. Lopus, 3 Croke, 4, was decided, still caveat venditor is not the law if by it is intended anything more than that it is the seller's duty to do what the ordinary man would do in a similar situation.

If, however, it were assumed that it was the defendant's duty to use ordinary care to inform the plaintiff as to how he could purchase electricity most economically, the result would be the same, for all fair-minded men must agree that that is what the defendant did when it told him that if he used much electricity for heating he would save money by installing two meters, one for lighting and one for heating, even though it cost him $40 to install the second meter.

From all that appears, there was nothing in the plaintiff's general appearance, except the fact that he was a Greek and spoke broken English, to differentiate him from the defendant's other customers; and there was no evidence tending to prove that Greeks are less intelligent or less capable of looking out for themselves than other nationalities, and it is not common knowledge that that is the fact. There is no evidence, therefore, in any view of the law, tending to the conclusion that the defendant was in fault.[11]

Defendant's exception sustained.

Judgment for the defendant.

ALLEN, J., did not sit.

The others concurred.

BULLARD v. AMERICAN EXP. CO.

(Supreme Court of Michigan, 1895. 107 Mich. 695, 65 N. W. 551, 33 L. R. A. 66, 61 Am. St. Rep. 358.)

Action by Chandler E. Bullard, Survivor of himself and Zenas H. Bullard, late copartners, against the American Express Company for damages for defendant's refusal to call for and deliver packages at plaintiff's place of business. Judgment for defendant, and plaintiff brings error.

MONTGOMERY, J. This is an action in case, commenced in justice court. The declaration, in substance, alleges that plaintiff is a large shipper of celery by express from Kalamazoo to places throughout the United States, upon lines of the defendant, a common carrier; that the defendant, to collect celery and other articles for shipment in the city of Kalamazoo, and to deliver packages received by it, maintains and employs a large number of men, horses, and wagons; that since December 1, 1893, plaintiff's place of business has been at No. 506 Douglas avenue, in said city; that during the celery season plaintiff makes large daily shipments over defendant's lines, and has consigned to him packages of money in payment of celery shipped C. O. D., and other articles, of all of which defendant had notice; that plaintiff repeatedly requested defendant to call at his place of business for his

[11] See Ladd v. City of Boston, 170 Mass. 332, 49 N. E. 627, 40 L. R. A. 171 (1898), for an unusual situation developed by a change in method of charging for water, with resultant high prices to complainant.

shipments, and to deliver packages to him, which defendant refused to do; that defendant collects for shipment and delivers to a large number of shippers of celery and other articles, under substantially the same circumstances, condition, and situation as the plaintiff, and for shippers at a greater distance from its place of business than plaintiff's place, and for shippers in the same locality as the plaintiff, and has unlawfully discriminated against the plaintiff by such refusal; that plaintiff has been damaged by being compelled to convey his celery to defendant's office for shipment, and procure his packages from its office. The plaintiff had judgment in the justice court. In the circuit court the court directed a verdict for the defendant.

The evidence on the trial showed that the defendant's agents, acting in unison with the agents of other express companies, had established limits in the city, beyond which they did not go to receive goods for shipment or to deliver packages. In some instances these limits extended a greater distance from the defendant's office than plaintiff's place of business. It was also in evidence that plaintiff knew of these limits before moving into his present place of business, and before transacting the business with defendant in which the inconvenience arose which, it is alleged, caused damage to plaintiff. At the common law, a carrier of goods was not bound to accept delivery at any place other than his place of business, or the line of travel, in the absence of the custom of receiving goods at other places. Hutch. Carr. §§ 82, 87; Blanchard v. Isaacs, 3 Barb. (N. Y.) 388. But it is insisted that the defendant in this case, having practiced the custom of receiving goods for shipment at other points in the city than its office, was bound to furnish equal facilities to all shippers who occupy a similar position. We are not impressed with the force of this reasoning, as applied to the facts in this case. We are cited to no case in which it has been held that a carrier is bound to go beyond its line to receive goods, and, while it would not be competent for a common carrier to discriminate against shippers within its fixed limits, it is not perceived why, if the company is entitled to limit its receipt of goods to its own office or place of business, it may not enlarge these limits at its discretion, without being bound to go beyond them. The duty to deliver to the consignee is somewhat broader. Carriers on land, receiving packages, were, at the common law, generally bound to deliver to the consignee, at his residence or place of business. This rule has not been applied to carriers by water, or railroad companies, which must, of necessity, be confined to a fixed route. It has been said, however, that express companies owe their origin to this very fact, and that the nature of their business is to furnish a means of transportation and delivery to the consignee. Hood's Brown, Carr. § 230; Hutch. Carr. 379. The question of how far this duty may be escaped by usage is not well settled. It has been held, however, that, when the business of an office is so small that the company cannot or does not keep a messenger to make personal delivery, it is not

unreasonable to require the consignee to call at the office. Hutch. Carr. § 380. If this may be done, it would seem to follow that the company may, so long as the public have notice of the custom, fix limits beyond which its agents are not required to go for delivery. If it cannot do this, it is difficult to say where would be the limit. It is clear that a reasonable limit is not in all cases the city limit. Conditions are often varied. If not the city limit, can it be said that a certain number of miles from the office, in either direction, would be a reasonable limit? We think, where the company, in apparent good faith, has assumed to fix limits, having regard to the public requirements, that, with regard to persons who have dealt with them, having knowledge of this fact, they are not bound to deliver beyond these limits. We do not determine what the right of one not having knowledge of these limits would be. This is not such a case, but in this case we think the court committed no error in directing a verdict for the defendant.

Judgment will be affirmed.[12]

McGRATH, C. J., did not sit. The other Justices concurred.

STATE ex rel. HOOTON v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Indiana, 1909. 172 Ind. 20, 87 N. E. 641.)

Mandamus proceeding by the State of Indiana, on the relation of Elliott R. Hooton, Prosecuting Attorney, against the Western Union Telegraph Company. From a judgment for defendant, relator appeals.

MONTGOMERY, J. The prosecuting attorney of Marion county procured the issuance of an alternative writ of mandamus requiring appellee to make delivery, by messenger, of telegraphic dispatches to all parts of the city of Indianapolis upon equal terms and without any charge except the proper charge for transmitting such messages to said city, or show cause why the same should not be done. Appellee made its answer or return to said writ, in which the following facts, with others, were alleged: That appellee is a corporation organized under the laws of the state of New York, and is engaged in doing a general telegraphic business in Indiana and elsewhere. That its lines of telegraph throughout the United States aggregate more than 1,000,000 miles of wire, and it transmits for the general public more than 80,000,000 of messages each year, exclusive of governmental messages, office messages, railroad messages, and messages over leased wires. That for the purpose of establishing rates it must calculate the cost

[12] See 33 L. R. A. 66; also, State v. Adams Exp. Co., 171 Ind. 152, 85 N. E. 337, 966, 19 L. R. A. (N. S.) 93 (1908), for a discussion of the common-law and statutory duty of free delivery by express companies; 19 L. R. A. (N. S.) 93.

of service, and to that end is authorized by law to make reasonable rules and regulations for the conduct of its business. That for more than 50 years it has had and enforced, throughout the United States, the following, among other, rules: "Messages will be delivered free within a radius of one-half mile from the office in any city or town of less than 5,000 inhabitants, and within a radius of one mile from the office in any city or town of 5,000 or more inhabitants. Beyond these limits only the actual cost of the delivery service will be collected. The manager will, however, see that such cost is as reasonable as possible." And during all such time it has caused to be printed on the back of all its message blanks the following condition: "Messages will be delivered free within the established free delivery limits of the terminal office; for delivery at a greater distance a special charge will be made to cover the cost of such delivery." That said rules and conditions are and have been for years well known to the general public, and are reasonable and necessary to regulate and prescribe rates for telegraphic service. That messengers delivering messages beyond one mile from the receiving station in said city of Indianapolis are required to take a street car, or, in the event such conveyance is not available, to consume additional time at an average extra expense of at least 10 cents for each message, and that appellee's charge of 10 cents a message for such deliveries is reasonable and just. That appellee makes delivery of all dispatches received for delivery at its station in said city, to all persons or their agents residing within said city on payment of the charges for transmission due on such dispatches, and within the conditions and limitations of said rules serves the public alike and without discrimination among its patrons, throughout the United States.

Appellee denies that any law of the state requires delivery of telegraphic messages except on payment of any charges due for the same, and avers that if any law sought to compel delivery of such messages free throughout the city of Indianapolis, without regard to the distance from the receiving station, such law would be void under the Constitution and laws of the United States, as an attempt to lay burdens upon interstate commerce and to deprive appellee of its property without due process of law. Appellant's demurrer to this return was overruled, and, the relator declining to plead further, final judgment was rendered in favor of appellee.

The overruling of appellant's demurrer is assigned as error upon this appeal. Writs of mandate may be issued in this state "to compel the performance of an act which the law specially enjoins or a duty resulting from an office, trust or station." Section 1225, Burns' Ann. St. 1908. The statute which it is claimed creates the duty sought to be enforced in this action reads as follows: "Such companies shall deliver all dispatches, by messenger, to the persons to whom the same are addressed or their agents, on payment of any charges due for the same, provided such persons or agents reside within one mile of the

telegraphic station, or within the city or town in which such station is." 1 Rev. St. 1852, p. 482, § 3; section 5783, Burns' Ann. St. 1908. Appellant's contention is that this statute requires free delivery of telegraphic messages in the cities and towns where the same are received. Appellee's insistence is that the statute merely requires delivery and impliedly authorizes a reasonable charge for the service. The true construction of this act is the primary question involved, and, assuming that a writ of mandamus issued upon the motion of the prosecuting attorney is an available method of enforcing the duty created, if it be found that the statute does not require appellee to make free delivery of telegraphic messages, by messenger, to all points within the city of Indianapolis, then other questions discussed in the briefs need not be considered.

A telegraph company is bound to make delivery of all messages sufficiently addressed, within reasonable distance limitations, when this can be done by the exercise of ordinary diligence. The state, in the exercise of its police power for the protection of the public safety and convenience, may prescribe reasonable regulations for the conduct of the business of telegraph companies within its jurisdiction. Western Union Teleg. Co. v. James, 162 U. S. 650, 16 S. Ct. 934, 40 L. Ed. 1105; Western Union Teleg. Co. v. Moore, 12 Ind. App. 136, 39 N. E. 874, 54 Am. St. Rep. 515. The statute above quoted and relied upon as the foundation of this action went into effect May 6, 1853. The whole number of inhabitants in the city of Indianapolis at that time was but 12,000; and delivery limits of one mile from an office centrally located in any city or town then would have included substantially every resident of any city or town in this state. The enactment of the statute in question antedated any effort on the part of the Legislature to regulate the charges of common carriers or other public service corporations operating within this state. This statute, in our opinion, was not intended to regulate or in any manner control the charges of telegraph companies for services either in the transmission by wire or delivery of dispatches. The section quoted above, and also section 1 of the act recognized the right of the company to regulate and fix its own charges for service. It is provided by section 1 that every electric telegraph company doing business for the public in this state, during office hours shall receive dispatches "and, on payment or tender of the usual charge, according to the regulations of such company, shall transmit the same," etc. The section under immediate consideration does not purport to require free delivery within the prescribed limits, but only to make delivery within such bounds compulsory "on payment of any charges due for the same."

It appears from the allegations of the return that appellee does deliver, by messenger, all dispatches received, to the persons to whom the same are addressed or to their agents, residing within the city of Indianapolis, and this is all the state can exact under this statute. Appellant's case is primarily predicated upon an asserted right under the

law to require free delivery by messenger to all points within the city, and not upon the unreasonableness of appellee's rules and regulations fixing free delivery limits or charges for delivery beyond such boundaries. It is averred, however, that appellee discriminates as to the manner and conditions of service between its patrons in making delivery of dispatches free to those residing within one mile of its station at Meridian and Monument Place in the city of Indianapolis, and in exacting a delivery charge of 10 cents for each message addressed to persons residing more than one mile distant from said station. It is perfectly manifest that a telegraph company could not reasonably undertake to make delivery of dispatches without regard to distance from its telegraph offices, and it is equally clear that it does not constitute discrimination to exact of each person to whom a message is delivered a charge therefor approximately commensurate with the distance traveled and the expense incurred in making such delivery. We have already seen that our statute does not deal with the subject of charges for the transmission and delivery of telegraphic messages, and, in the absence of statutory regulations, it is within the power of telegraph companies to prescribe reasonable rules by which they will undertake and agree to deliver all messages within a certain radius of their offices free of charge, and require extra compensation for every delivery beyond this radius. Campbell v. Western U. Tel. Co., 74 S. C. 300, 54 S. E. 571; Western U. Tel. Co. v. Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 153; Western Union, etc., Co. v. Redinger, 22 Tex. Civ. App. 362, 54 S. W. 417.

The rule set out in the return is alleged to be of general application throughout all the states and to have been in force for more than 50 years. Its reasonableness and validity have never been denied so far as our research extends, while, on the other hand, this particular rule has been either expressly or impliedly sustained in a number of instances. Western Union, etc., Co. v. Moore, 12 Ind. App. 136, 39 N. E. 874, 54 Am. St. Rep. 515; Western Union, etc., Co. v. Trotter, 55 Ill. App. 659; Western Union, etc., Co. v. Taylor, 3 Tex. Civ. App. 310, 22 S. W. 532; Western Union, etc., Co. v. Ayers, 41 Tex. Civ. App. 627, 93 S. W. 199; Western Union, etc., Co. v. Henderson, supra; Western Union, etc., Co. v. Scott et al., 87 S. W. 289, 27 Ky. Law Rep. 975.

Our conclusion is that the rule pleaded and the delivery charge made in pursuance thereof are reasonable and proper as against the attack of the relator in this proceeding, and that the demurrer to the return was not only correctly overruled, but should have been carried back and sustained to the alternative writ of mandate.

The judgment is affirmed.[13]

[13] "When a telegraph company discovers that the person for whom the message is intended lives beyond the free delivery limits, its duty is not at an end unless the sender, with notice of the claim for additional compensation, has failed or refused on demand to pay it." Jones, J., in Lyles v. West-

PARK ABBOTT REALTY CO. v. IROQUOIS NATURAL GAS CO.

(Supreme Court of New York, Special Term, Erie County, 1918. 102 Misc. Rep. 266, 168 N. Y. S. 673.)

Application by the Park Abbott Realty Company for mandamus against the Iroquois Natural Gas Company to compel it to make connection with its gas mains.

SEARS, J. The respondent is a company engaged in the business of distributing natural gas to consumers in the city of Buffalo under a franchise from the city to a predecessor company, which contains the following clause:

"The company will furnish natural gas to all consumers on the line of the streets, avenues, alleys, lanes and public squares in which the pipes are laid as long as said pipes shall be in use for the purpose of supplying natural gas."

The relator is the owner of a lot on Eaglewood avenue in the city of Buffalo, through which street and in front of which lot the natural gas company has a pipe or main. On this lot the relator has built a dwelling house, now substantially completed and ready for occupancy. Other houses on the same street, including the houses on either side of the house in question, are being served with natural gas by means of the main in the street. In October, 1916, the relator, when about to start the construction of the house in question, applied to the respondent for connection; but the connection was not made before the date of the granting of the order of the Public Service Commission about to be referred to, and since the granting of such order and because of it the respondent has refused to make the connection with said house or furnish to the relator natural gas. The order of the Public Service Commission referred to was granted on the 13th day of December, 1917, in a proceeding before the Public Service Commission instituted by the complaint of one Ross Graves in relation to the natural gas supply in the city of Buffalo. Upon this complaint the Public Service Commission held several hearings, and finally made an order containing many provisions, the one here in question being as follows:

"The respondent, the Iroquois Natural Gas Company, shall not, after the receipt by it of a copy of this order, connect or allow its mains to be connected with any building or structure with which connection is not now had, and shall not furnish gas to any person or persons or corporation who is not at the time of the receipt of this order by said company a customer or user of gas furnished by said company.

ern Union Tel. Co., 77 S. C. 174, 57 S. E. 725, 12 L. R. A. (N. S.) 534 (1906). See Hendricks v. Western Union Tel. Co., 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658 (1900), extra charge for delivery outside free limits unknown; Western Union Tel. Co. v. Emerson, 161 Ala. 221, 49 So. 820 (1909), no delivery in small towns.

But this restriction shall not apply to any person or persons or corporation who may hereafter become the occupant of a building or other structure already connected with the mains of the company and who may desire to use the amount of gas supplied by the pipes now in the building, but such user shall be subject to the regulations hereinafter proposed as to the amount of gas to be used by any customer."

The order contained the further provision that "any person, firm, or corporation affected by the provisions of this order may apply to this commission to have this order or any part thereof modified or annulled," and the order required the Iroquois Natural Gas Company, within 10 days after the receipt by it of a copy of the order, to notify the commission whether it accepted the terms of the order and would obey the same. In the acceptance of the order, which was thereafter filed by the Iroquois Natural Gas Company, the acceptance was conditioned in part as follows:

"The acceptance of this order by the undersigned is upon the following understanding: (a) That under the franchise granted by the city of Buffalo, under which the undersigned is operating its plant in said city, it is provided that the company will furnish and supply natural gas to all consumers on the line of the streets, avenues, alleys, lanes, and public squares in which the pipes are laid as long as said pipes shall be in use for the purpose of conveying natural gas, and that the company will cause a meter to be placed on the application of any person who has complied with the requirement of the company in furnishing the necessary apparatus for the use of natural gas. The franchise referred to was granted by the common council of said city on April 12, 1886, to the Buffalo Natural Gas Fuel Company, predecessor in interest of the undersigned. The question may be raised as to whether the provision of the order prohibiting the company from making new connections supersedes the above-mentioned franchise provision. The company, however, will obey this provision of the order, unless otherwise directed by judicial determination."

It further appears that the relator planned the house in question and constructed it with the necessary appliances for the use of natural gas; that there is no manufactured gas on Eaglewood avenue, and none can be obtained for this house; that there is a shortage of coal and difficulty in procuring it; that the respondent company has increased its number of customers in the city of Buffalo during 1917, up to December 1st, by 2,473; that for several years the supply of natural gas for consumers in the city of Buffalo has been sufficient and adequate, with the exception that during a few days of extremely cold weather, not more than 15 or 20 in number, the company is unable to supply the full demand in all parts of the city; and that the periods of shortage are not due to the excessive number of connections considering the size of the main, nor are they due to the circumstance that much of the gas has to be transported long distances, nor are they due to any faulty scheme of storage or distribution, but,

on the contrary, are due to a lack of supply of gas to meet the abnormal demands made by the company's customers during extremely cold weather, and the trouble would be increased during such periods by the addition of a large percentage of new customers. During such periods of shortage the supply in the neighborhood of the building in question suffers to some extent from the shortage.

The respondent is engaged in a business of a public character, and its obligation to serve all equally within its power and to make connections, in the absence of any restraining order, rests upon a common-law duty, on the contract obligation of its franchise, and on the statutory duty imposed by section 65 of the Public Service Commissions Law. Of course, the law does not require the impossible, and, if gas cannot be obtained, a company like the respondent is excused from supplying it. The Public Service Commission has undoubted right to make regulations for the supply of gas, but a restriction or classification which is unreasonable and arbitrary is invalid, and may be attacked collaterally. Fire Department v. Gilmour, 149 N. Y. 453, 44 N. E. 177, 52 Am. St. Rep. 748; People v. Kaye, 212 N. Y. 415, 106 N. E. 122.

In view of the circumstances stated above in respect to the absence of manufactured gas and the deficient coal supply, and considering, also, the short duration of the periods of shortage and the fact that the house was built after an application was made for the connection to which the premises were entitled under the franchise, the order of the Public Service Commission, so far as it relates to this relator in respect to the house in question, is, in my opinion, unreasonable and arbitrary, and therefore void.

It is not necessary, therefore, to decide the interesting questions which were argued as to whether a company must make connections and furnish gas to all new consumers upon the lines of pipe, even in the face of a failing supply and a general shortage, although support for such contention may be found in State ex rel. Wood v. Consumers' Gas Trust Co., 157 Ind. 345, 61 N. E. 674, 55 L. R. A. 245;[14] nor whether, if such duty ordinarily exists, the Public Service Commission may absolve a distributor of natural gas from such obligation. As the city of Buffalo, or the Public Service Commission, or both, may desire to review the order in this case, an application may be made by them, or either of them, to be made parties to this proceeding.

Motion for a writ of peremptory mandamus is therefore granted. Let the writ issue.[15]

[14] See the case cited, and compare Gerber v. Nampa & Meridian Irr. District, 16 Idaho, 1, 100 P. 80 (1908), where it was held, in the case of an irrigation company furnishing water, that prior customers had prior rights, and that

[15] Is it a valid excuse for one public service company to refuse service on the ground that the applicant is securing, or can secure, adequate service from another company? See Portland Natural Gas & Oil Co. v. State ex rel. Keen, 135 Ind. 54, 34 N. E. 818, 21 L. R. A. 639 (1893).

GAGE v. ARKANSAS CENTRAL R. CO.

(Supreme Court of Arkansas, 1923. 160 Ark. 402, 254 S. W. 665.)

Treating this case as counsel for appellant has treated it, it is an action by appellant against appellee to recover damages for the common-law breach of duty of appellee, as a common carrier, in refusing to receive for shipment certain hogs of appellant.

According to the evidence adduced in favor of appellant, appellee owns and operates a line of railroad between Paris and Ft. Smith, Arkansas. Appellant made application to the station agent of appellee at Ratcliff, Arkansas, for two cars for the purpose of transporting 148 hogs to Kansas City, Missouri. Appellant requested that the cars be set at the stock pens of appellee at Ratcliff, Arkansas, on the 8th day of April, 1920. Appellee had his hogs in the stock pens at said station on said date, ready for shipment, but appellee refused to receive the same.

The station agent at Ratcliff, Arkansas, the superintendent, and the train dispatcher of appellee, Arkansas Central Railroad Company, were all witnesses for it. Each of them testified that the distance from Ratcliff, Arkansas, to Kansas City, Missouri, is 397 miles, and that, in the ordinary movement of trains, the carload of stock would make the trip in about 48 hours. The railroad company received information on April 8, 1920, that there was an embargo placed by the railroads running into Kansas City on all kinds of freight consigned to that place. The embargo on freight for Kansas City was due to a switchmen's strike, and the agents on the Arkansas Central Railroad Company were notified that no freight would be received consigned to Kansas City, Missouri, until the embargo was lifted. The embargo was raised on the 30th day of April, 1920, and freight cars, as requested, were placed for appellant on May 1, 1920. The hogs were then shipped by appellant to Kansas City, Missouri.

The court directed a verdict for the appellee, and the case is here on appeal.

HART, J. (after stating the facts).[16] The circuit court was right in directing a verdict for appellee. It is true that railroad companies are bound to have all reasonable and necessary facilities and appliances for conducting and carrying on their business in a prompt, skillful, and careful manner, but they are not bound to be prepared for unusual contingencies which no ordinary prudence or foresight could reasonably foresee or anticipate. So that it has been held in this state, where an unusual contingency has arisen which unexpectedly increases

unless there was a surplus of water subsequent customers were not entitled to be served. For a consideration of the question left open in the principal case and a discussion of the irrigation cases as well as of the principal case, see a note on "Discrimination by a Natural Gas Company," 31 Harv. Law Rev. 1025.

16 A part of the opinion is omitted.

the business of a railroad company, it will be excused for delaying shipping, or even in receiving goods for shipment, until such goods can, in the regular and usual course of business, be removed. St. L. S. W. Ry. Co. v. Clay County Gin Co., 77 Ark. 357, 92 S. W. 531, and Hines v. Mason, 144 Ark. 11, 221 S. W. 861.

In the application of the rule, if the railroad, as in this case, is prevented in the handling of freight in a prompt and expeditious manner by unforeseen conditions, such as a strike, over which it had no control, and over which, in the nature of things, it could have no control, it will likewise be excused from receiving freight for shipment. 10 C. J. 67; Murphy Hdwe. Co. v. Southern Ry. Co., 150 N. C. 703, 64 S. E. 873, 22 L. R. A. (N. S.) 1200, 17 Ann. Cas. 481; Pittsburgh, Cinn. & St. L. Ry. Co. v. Hollowell, 65 Ind. 188, 32 Am. Rep. 63.

It appears from the record that a switchmen's strike in the city of Kansas City, Missouri, caused all railroads which entered that city to refuse to receive freight from connecting carriers. The line of the defendant's railroad only extended from Ratcliff to Ft. Smith, Arkansas. On account of the embargo on freight consigned to Kansas City, Missouri, it did not receive the shipment of hogs in question. The strike was not in any manner induced or caused by appellee. It had nothing whatever to do with it, and the embargo placed on freight consigned to Kansas City prevented it from receiving the hogs for shipment.

The testimony on this branch of the case was undisputed, and it follows that, under the principles of law above announced, the court was right in directing a verdict for appellee. * * *

Therefore the judgment will be affirmed.[17]

[17] In Murphy Hardware Co. v. Southern Railway Co., 150 N. C. 703, 64 S. E. 873, 22 L. R. A. (N. S.) 1200, 17 Ann. Cas. 481 (1909), it was held that a statute imposing a penalty for refusing to accept a consignment for shipment was "in aid of the common law and to compel a discharge of those duties only which the common law itself imposes," and that it was a good defense that the carrier was disabled by reason of a strike of the machinists on its own lines. For a discussion of the right of the public to secure mandamus to compel the carrier to render service notwithstanding a strike of its own employees and suggesting a distinction between legal and illegal strikes, see People v. New York Central & H. R. R. Co., 28 Hun (N. Y.) 543 (1883), and also 35 Harv. Law Rev. 623. Buschow Lumber Co. v. Union Pacific Railway Co. (Mo. App.) 276 S. W. 409 (1925), discussed in 39 Harv. Law Rev. 648, reaches a result contra to the principal case. Concerning the liability of carriers for delay in transmitting goods due to strikes, see Bacon v. Cleveland, post, p. 681, and footnotes. Compare, with the reasoning of the principal case, the opinion in Jonesboro L. C. & E. R. Co. v. Maddy, 157 Ark. 484, 248 S. W. 911, 28 A. L. R. 498 (1923). As to the legality of giving preference to perishable over nonperishable goods, when there is a shortage of equipment, see Marshall v. New York Cent. R. Co., 45 Barb. (N. Y.) 502 (1866), a portion of which is printed as a footnote, post, p. 473.

CROW v. SAN JOAQUIN & KINGS RIVER CANAL & IRRIGATION CO.

(Supreme Court of California, 1900. 130 Cal. 309, 62 P. 562.)

VAN DYKE, J.[18] The appeal is from a judgment in favor of the plaintiff and from an order denying defendant's motion for a new trial. The action was to recover damages for the refusal on the part of the defendant to furnish water to the plaintiff for the irrigation season of 1896 on tender by him of the regular rates therefor.

1. Defendant does not deny the refusal as alleged, but seeks to justify its action on the ground that the plaintiff was indebted to it for water furnished to him in the years 1893 and 1894; that by the regulations of the company, to which the plaintiff had subscribed, it was made a condition precedent to the right to receive water that all dues and claims for previous supplies should first be paid.

To meet this alleged justification on the part of the defendant, the plaintiff offered in evidence a certificate of discharge in insolvency, dated September 5, 1896, five days subsequent to the date of the demand by him for water and refusal on the part of the defendant to supply the same. It is contended on the part of the appellant that the certificate of discharge was invalid for the reason that it was not under seal, and also that it was subseqent to the commission of the wrong, if any, on the part of the defendant in refusing to supply the water demanded. Under the view we take of the case, however, it is unnecessary to consider this so-called discharge in insolvency. The alleged contract between the parties relied upon by appellant consisted simply of the application for water, made by the plaintiff in 1893 and 1894, to which were attached the regulations of the company, including, among other things, the provision that "no land will be supplied with water unless all dues and claims for previous supply on that land shall have been paid." If this could be considered as a contract binding upon the user of water for all future time, it would be without consideration; for it was the duty of the defendant company to furnish the plaintiff with water whether he agreed to the regulations or not.

The use of water, in this state, appropriated "for sale, rental, or distribution" is a public use (Const. art. 14, § 1), and by the Act of March 12, 1885 (Stat. 1885, p. 95), enacted to carry out this provision of the Constitution, it is made the duty of the company administering such use, "upon demand therefor and tender in money of the established water rates * * * to sell, rent, or distribute such water" to the inhabitants of the county "at the established rates regulated and fixed therefor, as in this act provided, whether so fixed by the board of supervisors or otherwise," etc. And it is further provided in said

[18] Only a part of the opinion is printed. A rehearing was denied, Nov. 23, 1900 (62 P. 1058), Beatty, C. J., and McFarland, J., dissenting, in an opinion by Beatty, C. J., which is omitted.

act that for failure to do so an action may be maintained for "damages to the extent of the actual injury sustained." By section 552 of the Civil Code the same duties are also imposed upon such corporations in favor of those to whom water had been previously sold by such company. Price v. Riverside Land, etc., Co., 56 Cal. 431; McCrary v. Beaudry, 67 Cal. 120, 7 P. 264; Merrill v. South Side Irr. Co., 112 Cal. 435, 436, 44 P. 720. It was therefore the duty of the defendant, under the law as established in this state, to furnish the plaintiff water upon a tender of the established rates; and this rule precludes the idea that any other duties can be prescribed or imposed, except the tender of the rate, as a condition for supplying water, as required by law. * * *[19]

PEOPLE ex rel. KENNEDY v. MANHATTAN GAS LIGHT CO.

(Supreme Court of New York, 1865. 45 Barb. 136.)

Appeal from an order made at a Special Term, denying an application for a mandamus commanding the defendant to supply the plaintiff with gas, at his house, No. 121 West Sixteenth street, New York.

By the Court, INGRAHAM, P. J. I think there can be no doubt about the authority of this court to direct the respondents to furnish gas to persons who, under the provisions of their charter, have a right to receive it and who offer to comply with the general conditions on which the company supply others.

They possess, by virtue of their charter, powers and privileges which others cannot exercise, and the statutory duty is imposed upon them to furnish gas on payment of all moneys due by such applicants.

We are left then to inquire whether the relator was in a condition to demand from the company this supply. It appears by the papers used on the motion that the relator commenced taking gas in 1858, at No. 61 in Seventh avenue, and was supplied with gas by the company, until 28th of December, 1861, that he paid for the gas so received up to 19th of August, 1861, and that for gas furnished after that date he has not paid. It also appears that in January, 1865, the respondent sued the relator and obtained a judgment against him for the amount due therefor, which still remains unpaid. In May, 1864, the relator applied to the company for gas at 121 West Sixteenth street, which was furnished to him by the company, without objection on account of the former indebtedness, until 9th of February, 1865, when the company shut off the supply of gas and refused to furnish any more. It also appears that the relator in answer to a claim for payment of this indebtedness, represents himself as insolvent and unable to pay the judgment.

[19] Accord: Danaher v. Southwestern Telegraph & Telephone Co., 94 Ark. 533, 127 S. W. 963, 30 L. R. A. (N. S.) 1027 (1910).

There is nothing in the charter of the company which requires them to make the objection that the applicant was indebted to them at the time of the first application. It would be unreasonable to suppose that in every instance they could ascertain such indebtedness. If at any time the party is so indebted, the company may refuse to furnish, and more especially should this be so when the relator avows his insolvency and his inability to pay for gas furnished previously.

The attempted denial of liability for this bill, by the relator will not aid him. The company have obtained a judgment against him. This is not disputed, and no attempt is made by him to set it aside. So long as that remains in force it is conclusive against him.

The order appealed from should be affirmed, with $10 costs.[20]

ELMORE v. SANDS.

(Commission of Appeals of New York, 1874. 54 N. Y. 512, 13 Am. Rep. 617.)

This action was brought against the defendant, a conductor upon the Long Island Railroad, to recover damages for forcibly ejecting plaintiff from the cars of that road. The facts appear sufficiently in the opinion.[21] * * *

EARL, C. On the 16th of November, 1865, the plaintiff purchased, at Jamaica, a ticket for Hunter's Point upon the Long Island railroad. Upon the face of the ticket was printed, "Good this date only," and upon the back was stamped the date when it was issued. When the plaintiff purchased the ticket he intended to make the trip on that day, but his journey becoming unnecessary, he kept the ticket until the twenty-third of the same month, when he entered the cars at Jamaica to go to Hunter's Point. When called upon by the defendant as con-

[20] As to past indebtedness being an excuse for further service, accord with principal case: Irvin v. Rushville Co-operative Telephone Co., 161 Ind. 524, 69 N. E. 258 (1903); Tacoma Hotel Co. v. Tacoma Light & Water Co., 3 Wash. 316, 28 P. 516, 14 L. R. A. 669, 28 Am. St. Rep. 35 (1891); Brass v. Rathbone, 153 N. Y. 435, 47 N. E. 905 (1897), statutory power. As to indebtedness in respect of other premises being an excuse, contra to principal case: Mackin v. Portland Gas Co., 38 Or. 120, 61 P. 134, 62 P. 20, 49 L. R. A. 596 (1900). Nor is indebtedness for collateral service an excuse. Crumley v. Watauga Water Co., 99 Tenn. 420, 41 S. W. 1058 (1897). The indebtedness of a prior tenant of the same premises cannot be used as an excuse, Turner v. Revere Water Co., 171 Mass. 329, 50 N. E. 634, 40 L. R. A. 657, 68 Am. St. Rep. 432 (1898); unless required by statute, City of Atlanta v. Burton, 90 Ga. 486, 16 S. E. 214 (1892). An injunction pendente lite will issue to prevent discontinuance or refusal of service where there is a bona fide dispute between the customer and the public service company. See McEntee v. Kingston Water Co., 165 N. Y. 27, 58 N. E. 785 (1900). If the company's claim is manifestly illegal, the injunction will be made permanent. Gordon & Ferguson v. Doran, 100 Minn. 343, 111 N. W. 272, 8 L. R. A. (N. S.) 1049 (1907); Borough of Washington v. Washington Water Co., 70 N. J. Eq. 254, 62 A. 390 (1905).

[21] A part of the statement of facts is omitted.

ductor for his fare, he produced the ticket; the defendant declined to receive the same on the ground that it had been issued some days before, and demanded of the plaintiff the payment of his fare, and, the plaintiff refusing to pay, the defendant, using no unnecessary force, and in obedience to the regulations of the company, put him off from the train.

Upon these facts the judge at the circuit directed a verdict for the defendant, and the question for our consideration is, whether he erred in this direction. Railroad companies carrying passengers have the right to make reasonable rules and regulations for conducting their business, and they and their agents incur no liability in enforcing them in a proper manner. It does not appear that the plaintiff was obliged to purchase the ticket before he could enter the cars. He had his option either to pay upon the train or to purchase the ticket and exhibit that as evidence of his right to ride. The railroad company was not bound to issue the ticket in advance of the day on which it was to be used, and had the right to insist and provide that it should be used on the day when it was issued. It had the right to make a rule that every passenger, when he entered the train, should pay his fare or produce a ticket showing his right to ride upon that train. Such a regulation is neither unreasonable nor illegal. It is not an uncommon one, and it is not important that we should perceive all the purposes which it subserves. It is sufficient that it is apparently useful for some purpose. If the ticket be required to be used on the day it is issued, the passenger cannot well use it for more than one trip, and the railroad company will have some information of the number of passengers to provide for on any day. Without such a limitation a conductor might, for aught I can see, permit a passenger to ride for several days, and then take up and return the ticket.

In enforcing this regulation, therefore, the defendant incurred no liability, and this conclusion is reached whether we regard the ticket as evidencing a contract or as a token merely.[22] If the former be the case, then, by the terms of the contract, it was good only for a passage on the day of its date; if the latter, then the plaintiff was bound to pay his fare, as he had no token showing that he was entitled to ride in that train. I am, however, of the opinion that the ticket was, as claimed by the learned counsel for the appellant, a mere token or voucher, showing that the plaintiff had paid his fare and was entitled to a passage as thereon indicated. Quimby v. Vanderbilt, 17 N. Y. 306, 72 Am. Dec. 469; Van Buskirk v. Roberts, 31 N. Y. 661; Rawson v. Penn. R. R. Co., 48 N. Y. 212, 8 Am. Rep. 543. These views are not in conflict with the decisions made in Blossom v. Dodd, 43 N. Y. 264, 3 Am. Rep. 701, and Rawson v. Penn. R. R. Co., 48 N. Y. 212, 8 Am. Rep. 543. In those cases the plaintiffs were sought to be held to

[22] See an article, "Tickets," by Joseph H. Beale, Jr., 1 Harv. Law Rev. 17 (1887); and a note, "The Nature of Railroad Tickets," 9 Harv. Law Rev. 353.

contracts of which they knew nothing, and to which they had not expressly or impliedly assented. Here the words "good this date only" were plainly printed on the face of the ticket; the plaintiff had had the ticket in his possession for several days, and there is no proof that he did not know its terms. He must be presumed to have known them. But, whether he did or did not, he knew that he was bound to pay his fare or present a suitable voucher. A passenger should see to it, if he prefers not to pay in the cars, that he has a proper voucher.[23] If he does not, he cannot complain if the conductor, in obeying the regulations of his company, puts him off the train.

The conclusion I have thus reached is sustained by the following authorities: Boston and Lowell R. R. Co. v. Proctor, 1 Allen (Mass.) 267, 79 Am. Dec. 729; Barker v. Coflin, 31 Barb. 556; Boice v. Hudson River Railroad Co., 61 Barb. 611; Shedd v. Troy & Boston Railroad Co., 40 Vt. 88; Dietrich v. Pennsylvania Railroad Co., 71 Pa. 432, 10 Am. Rep. 711, and many other analogous cases.

The judgment must be affirmed, with costs.

All concur; LOTT, C. C., not sitting.

Judgment affirmed.[24]

[23] See 43 L. R. A. (N. S.) 584, on duty of passenger to examine ticket to avoid errors of carrier's agents. As to standard of care required in sale of tickets, see 27 Harv. Law Rev. 178.

[24] See Kenney v. New York Railways Co., 90 Misc. Rep. 672 (1915), for discussion of rights of a passenger tendering a transfer after time for its use had expired. See 16 L. R. A. 471, for note on "How Far Ticket may be Used for Passage after Expiration of Time Limit."

For cases on the right of a carrier to refuse to accept nonticket holders as passengers, see 29 L. R. A. (N. S.) 299; also, 23 Col. Law Rev. 302; rights of passenger who is unable to get ticket before train starts, 24 L. R. A. (N. S.) 758; duty of passenger to pay fare wrongfully demanded, L. R. A. 1918D, 1032; right of passenger who has lost ticket, L. R. A. 1918E, 983. See note, "Ejection of Passenger Who Presents Wrong Transfer Check," 20 Harv. Law Rev. 137; also 27 Harv. Law Rev. 755. And see 28 Harv. Law Rev. 206, ejection for refusal to pay unlawful fare.

In Barker v. Central Park, N. & E. R. R. Co., 151 N. Y. 237, 45 N. E. 550, 35 L. R. A. 489, 56 Am. St. Rep. 626 (1896), a passenger tendered a $5 bill in payment of a 5 cent fare. The conductor refused to change it, and ejected the passenger, who sues. See 35 L. R. A. 489, for note on "What is a Reasonable Sum out of Which a Common Carrier may be Required to Take a Passenger's Fare and Return the Change?" And see Knoxville Traction Co. v. Wilkerson, 117 Tenn. 482, 99 S. W. 992, 9 L. R. A. (N. S.) 579, 10 Ann. Cas. 641 (1907), and note; Funderburg v. Augusta & A. R. Co., 81 S. C. 141, 61 S. E. 1075, 21 L. R. A. (N. S.) 868 (1908). Dale v. Western Union Tel. Co., 100 Misc. Rep. 718, 166 N. Y. S. 740 (1917), commented on in 17 Col. Law Rev. 736, applies the doctrine to telegraph companies. In Martin v. Rhode Island Co., 32 R. I. 162, 78 A. 548, 32 L. R. A. (N. S.) 695, Ann. Cas. 1912C, 1283 (1911), a passenger was ejected for refusal to accept (in exchange for five pennies tendered by him) a nickel and put it in the automatic fare registering device. In Cincinnati Northern Traction Co. v. Rosnagle, 84 Ohio St. 310, 95 N. E. 884, 35 L. R. A. (N. S.) 1030, Ann. Cas. 1912C, 639 (1911), it was held that a battered coin must be accepted by a carrier. But see contrary holding in North Hudson County R. Co. v. Anderson, 61 N. J. Law, 248, 39 A. 905, 40 L. R. A. 410, 68 Am. St. Rep. 703 (1897), discussed in 12 Harv. Law Rev. 142, where a mutilated bill was tendered. For other cases, see note in 35 L. R. A. (N. S.) 1030.

PARISH v. ULSTER & D. R. CO.

(Court of Appeals of New York, 1908. 192 N. Y. 353, 85 N. E. 153.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department, entered May 10, 1906, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at Trial Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

CULLEN, C. J. The action is brought to recover damages for the unlawful expulsion of the plaintiff on two separate occasions from the defendant's trains on which she was a passenger. At the time of these occurrences the defendant issued mileage books good for five hundred miles. By the contract printed in the book the ticket was good only for the person in whose name it was issued, but this provision was modified by the further one: "It will be good for use of family of the person named hereon from September 1st to June 1st only. During months of June, July, and August section 1 (that first quoted) will apply." The plaintiff was aware that according to the limitations prescribed in the ticket she could not use her husband's ticket during the three summer months and, therefore, had her husband obtain from the local passenger agent a mileage book for her individually. He stated the plaintiff's name and asked that the ticket be made out to H. M. Parish. It was issued accordingly. On the ticket was a blank for the name of the person to whom the ticket was issued and for the residence of such person. Before the name there was a capital "M" apparently to be followed in script by the letter "r" or the letters "rs" or "iss," depending on the sex and condition of the holder. In this case "r" alone was written after the capital "M," "s" being omitted, and that omission has caused the whole controversy between these parties. The plaintiff testified that on the 6th of August, 1902, she boarded the defendant's train at Hobart and presented her ticket to the conductor, who refused to accept it; that she explained to the conductor that it was her ticket and that the prefix of "Mr." instead of "Mrs." was a mistake on the part of the defendant's agent. Nevertheless, the conductor, on the plaintiff refusing to pay her fare, ejected her from the train. The next day the plaintiff wrote to the general passenger agent of the defendant at Oneonta a letter complaining of her removal from the train and also of the discourteous conduct on the part of the conductor and stated fully the circumstances attending the issue of the ticket. To this letter the agent replied that if the ticket bore the name Mr. H. M. Parish the conductor had no right to honor it, adding: "Therefore so far as that part of the case is concerned you are entirely at fault, and in order to avoid further trouble you should have the ticket sent to this office for correction." The plaintiff refused to comply with the demand that the ticket be sent to the defendant's office,

which was at some distance from the place where she lived, giving as a reason that she had heard of a ticket being sent there and not returned. On August 23d she again sought passage on the train, and on tendering the ticket it was again refused by the same conductor. The plaintiff said to him that by this time he must know that it was her ticket, to which he replied that she ought to have sent the ticket back, that the agent of the company wrote her about it, and that it was "sheer contrariness" on her part. Thereupon the plaintiff was again put off the train. At the close of the plaintiff's evidence the complaint was dismissed and the judgment entered on the decision at the Trial Term has been affirmed by the Appellate Division.

The plaintiff recovered on the first trial of this action, but the judgment was reversed by the Appellate Division (99 App. Div. 10, 90 N. Y. S. 1000). On the second trial the case was disposed of in accordance with the opinion rendered on the first appeal. The decision of the Appellate Division was founded on the case of Monnier v. N. Y. C. & H. R. R. R. Co., 175 N. Y. 281, 67 N. E. 569, 62 L. R. A. 357, 96 Am. St. Rep. 619. In the Monnier case a passenger entered a train without having procured a ticket. The conductor demanded from him the extra five cents allowed by statute where a ticket is not procured at the station. As a condition for exacting this additional fare the statute required that the ticket office should be open for a period at least an hour prior to the departure of the train. Laws of 1857, c. 228. The passenger stated that the ticket office had not been open for the required period and refused to pay the sum demanded. Thereupon he was ejected. It was held that the conductor could have no knowledge on the subject, that he was not bound to accept the passenger's statement, and that as prima facie he was entitled to exact the additional five cents, the passenger should have complied with the conductor's demand, obtaining as his redress the penalty prescribed by statute for exacting an excessive fare. While some expressions may be found in one of the opinions rendered for the majority of the court that a passenger must comply with the demands of the conductor, seeking redress subsequently by appropriate action, only three judges concurred in that opinion. The three judges who dissented held that the passenger was justified in his refusal, and that his expulsion was unlawful. The remaining judge of the court expressed his concurrence in the general doctrine stated by the minority, but denied its application to the case then before the court solely on the ground that the conductor was necessarily ignorant of the facts and was justified in acting on appearances. The Appellate Division has said: "It seems too clear for discussion that upon its face the book did not authorize her to ride upon it." I am not inclined to concur in that view, at least, unqualifiedly. The designation "Mr." or "Mrs." was a mere matter of courtesy and no part of the name of the person to whom the ticket was issued. Conceding, however, that without any other knowledge on the subject the conductor would be justified in assuming that the

ticket had been issued to a man, the testimony of the plaintiff tended to show that the conductor personally knew her and by inquiring he might have found out whether H. M. Parish, whose signature was at the foot of the book, was a man or a woman. But whatever may be the case as to the first expulsion, it is plain that prior to the time of the second both the officers of the defendant and the conductor knew that the ticket presented was that of the plaintiff, and had determined to force the plaintiff to comply with their direction to return the ticket to the general office. Therefore, the very foundation of our decision in the Monnier Case, that the conductor did not know and could not know the rights of the passenger, is wanting in the present case. The blunder in the form of the ticket was that of the defendant, not of the plaintiff, and the requirement that she should send that to the general office of the defendant for correction was unreasonable, or, at least, the jury might have so found. If it was advisable to correct the ticket so as to prevent its being used by a man, the company could have instructed its local agent or the conductor to make the necessary change.

Moreover, if the defendant was at the time within the provisions of the Mileage Book Act its justification wholly fails. That statute prescribes that any corporation operating a railroad in this state, the line or lines of which exceed one hundred miles in length, shall issue mileage books for either one thousand or five hundred miles which shall entitle the holder thereof or any member of his family to travel thereon. Laws of 1895, c. 1027, as amended Laws of 1896, c. 835; Laws of 1897, c. 484; Laws of 1898, c. 577. The defendant was organized in 1901 as the result of a consolidation of the roads of several companies. These acts were unconstitutional and inoperative as to corporations formed prior to their enactment (Beardsley v. N. Y., L. E. & W. R. R. Co., 162 N. Y. 230, 56 N. E. 488), but constitutional and controlling as to corporations organized subsequent to that period. (Minor v. Erie R. R. Co., 171 N. Y. 566, 64 N. E. 454).[25] The corporation which was formed by the consolidation of several corporations was a new corporation. Minor v. N. Y. C. & H. R. R. R. Co., 123 N. Y. 242, 25 N. E. 339. The roads of none of the corporations from the consolidation of which the defendant was formed exceeded in length one hundred miles. Therefore, none of them came within the provisions of the Mileage Book Act; but the roads of the consolidated corporation, the defendant, do exceed one hundred miles, and it is, therefore, subject to the provisions of those acts unless it is exempted therefrom by the statute under which the consolidation was effected. Section 72 of the Railroad Law (Laws 1890, c. 565) provides: "Upon the consummation of such act of consolidation all the

[25] See Railroad Commission v. Louisville & N. R. Co., 140 Ga. 817, 80 S. E. 327, Ann. Cas. 1915A, 1018 (1913), and note in L. R. A. 1915E, 902, on the validity of regulations by public concerning the manner of using tickets or mileage books. Also a note in 18 Col. Law Rev. 155, on "State Regulation of Commutation Rates."

rights, privileges, exemptions and franchises of each of the corporations (so consolidated) * * * shall be taken and deemed to be transferred to and vested in such new corporation." The inapplicability of the Mileage Book Acts to the several corporations before consolidation, because none of their roads was more than one hundred miles, was in no proper sense a right, privilege, exemption or franchise of the corporation. Minor v. Erie R. R. Co., supra. It is contended, however, that though the defendant did issue mileage books, it incorporated therein certain conditions and restrictions; that while the plaintiff might have insisted upon the issue to her of a mileage book, with the privileges accorded to the holder thereof by the terms of the statute and sued for the statutory penalty in case it was refused, nevertheless, by accepting the ticket so issued, she became bound by its limitations and restrictions. We think not. The company received the full price of the mileage book as fixed by the statute, and, therefore, there was no consideration for any agreement by the plaintiff to limit its use to a greater extent than prescribed by the law. If the mileage book was available by any member of the family of the holder, of course, the plaintiff's sex was no indication that she was not entitled to use it even if it had been issued to a man.

The judgment appealed from should be reversed and a new trial ordered, costs to abide the event.

GRAY, HAIGHT, VANN, WERNER and WILLARD BARTLETT, JJ., concur; CHASE, J., not sitting.

Judgment reversed, etc.

O'BRIEN v. NEW YORK CENT. & H. R. R. CO.

(Court of Appeals, New York, 1880. 80 N. Y. 236.)

Appeal from judgment of the General Term of the Supreme Court, in the Third Judicial Department, affirming a judgment in favor of plaintiff, and affirming an order denying a motion for a new trial.

This action was brought to recover damages for an alleged unlawful ejectment from a train on defendant's road. * * *

RAPALLO, J.[26] There was evidence in the case tending to prove that before the plaintiff was put off the train at West Albany, he offered to pay to the conductor the additional four cents which he demanded, and that other passengers offered to pay the amount in his behalf. There was no error in the submission of this question to the jury, and they appear to have found the fact in favor of the plaintiff. If the stoppage at West Albany had been made for the sole purpose of putting the plaintiff off, and he had rendered it necessary by a fractious refusal to pay the extra fare, he would not have been entitled to insist on con-

[26] Part of the statement of facts is omitted.

tinuing his trip after having occasioned such an interruption. But West Albany having been one of the regular stopping places of the train, we think that if, before being ejected there, he or others in his behalf offered to pay the full fare, the conductor should have accepted it.

The admission of the testimony as to the circumstances under which the plaintiff got on the train could not have affected the result, for the court expressly charged the jury that the defendant had a right to charge the extra fare, and that was the only point upon which the evidence could have any bearing. The discrepancies and contradictions in the testimony were solely for the consideration of the jury.

The judgment should be affirmed.

All concur.

Judgment affirmed.[27]

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CONNORS v. CUNARD S. S. CO.

(Supreme Judicial Court of Massachusetts, 1910. 204 Mass. 310, 90 N. E. 601, 26 L. R. A. [N. S.] 171, 134 Am. St. Rep. 662, 17 Ann. Cas. 1051.)

Actions by Alice Connors, administratrix of Margaret Connors, against the Cunard Steamship Company. There was a directed verdict for defendant in the first action, and a verdict for plaintiff in the second, and both parties except.

The principal question presented by the defendant's exceptions in the second action is an important one, not directly decided in any case which has come to our attention.

On February 24, 1905, the defendant corporation sold a ticket entitling the plaintiff and the intestate to a second cabin passage from Boston to Queenstown (or Liverpool) on the Ivernia sailing from Boston on the 28th of the same month. * * *

The intestate came to this country in 1893 and had been employed as a servant in several families during the intervening 12 years. On February 13 or 14, 1905, upon the advice of her physician, she submitted to an exploratory operation at a hospital. This operation disclosed the fact that the intestate was suffering from a cancer of the uterus and that on account of the peculiar position of the growth and its advanced stage an operation would not be of benefit to her. The plaintiff's evidence also showed that her death was expected in five or six months. These facts and the result of the operation were known to the plaintiff but not to the intestate.

On the morning of February 28th the two sisters, with some friends, drove to the defendant's wharf in East Boston. The Ivernia was not

[27] See Mullins v. Illinois Cent. R. Co., 93 Miss. 184, 46 So. 529, 136 Am. St. Rep. 542 (1908); Phillips v. Atlantic Coast Line R. Co., 90 S. C. 187, 73 S. E. 75, 38 L. R. A. (N. S.) 1151, Ann. Cas. 1913C, 1244 (1910).

ready to receive second-class passengers when they arrived, and they waited in a room for some 15 minutes.

The evidence was somewhat conflicting as to the movements of the intestate between the time when she left the waiting room and undressed and went to bed in her room on the Ivernia. The plaintiff's evidence tended to show that she walked about and talked with her friends, while the defendant's evidence tended to show that she was supported and almost carried to her room, and that she looked very ill at the time. The evidence of both parties showed that she undressed and went to bed before the Ivernia cast off from the wharf.

The fact that the intestate had undressed and gone to bed was reported to the ship's surgeon, who was on duty at the third-class gangway. He immediately stopped embarkation at that gangway and went to her room. On arriving there he felt her pulse, looked at her tongue and asked the intestate and the plaintiff what the matter was. Whereupon the plaintiff handed to the surgeon the following letter from Dr. Hare:

"27th Feb.

"Ship Surgeon S. S. Ivernia—My Dear Doctor: May I explain to you a most sad case which will be under your care during this crossing.

"The patient herself has no idea of the nature of her trouble, so will you kindly make light of anything occurring and give us your aid in concealing facts.

"This note will be handed to you by her sister who knows all.

"She has endothelioma of uterus too advanced for more than curetting and cautery, which I did Feb. 13. Unfortunately this is her week to expect menstruation but I trust it will give you no special trouble. She will be supplied with creolin for douches and codeia suppos. (ov grs iss) for pain if needed.

"May I suggest an early vaginal pack should the loss of blood pass the normal that strength may be saved until she reaches home.

"Any kindness shown her if in need will be greatly appreciated by myself and others.

"Thanking you in advance I am

"Very sincerely, C. H. Hare."

The surgeon read this letter, left the room, and gave directions that the intestate should not be allowed to proceed on the voyage. * * *

Nothing was said to the defendant corporation when the ticket for the intestate and the plaintiff was bought of it, as to the intestate's condition.

The defendant asked for 30 rulings on liability and 6 on the damages recoverable. Among other rulings asked for by it was a ruling directing the jury as matter of law to find a verdict in its favor.

The plaintiff was required to elect between her action in tort and her action in contract and she elected to go to the jury on her action in tort. The action in tort is the second of the two actions now before us.

The presiding judge instructed the jury that on the liability of the defendant there was only one question for them to decide, to wit: Did the intestate leave the Ivernia voluntarily?

The plaintiff had a verdict and the case is here on exceptions.

LORING, J.[28] (after stating the facts as above). The general rule that a common carrier is bound to accept anybody and everybody who presents himself for transportation and pays the regular fare, has its limitations. A common carrier is bound to care for all who have become its passengers. For that reason not only is it not bound to accept, but it is under obligation to refuse to accept as a passenger an insane person without a proper attendant or attendants (Owens v. Macon & Birmingham Ry., 119 Ga. 230, 46 S. E. 87, 63 L. R. A. 946; Meyer v. St. Louis, Iron Mountain & Southern Ry., 54 F. 116, 4 C. C. A. 221); or one who has smallpox (Paddock v. Atchison, Topeka & Santa Fe Railroad, 37 F. 841, 4 L. R. A. 231); and the same is true of one who because of intoxication or for any other reason would be offensive to other passengers (Vinton v. Middlesex R. R., 11 Allen, 304, 87 Am. Dec. 714; Murphy v. Union Ry., 118 Mass. 228; Hudson v. Lynn & Boston R. R., 178 Mass. 64, 59 N. E. 647; Lemont v. Railroad Co., 1 Mackey, 180, 47 Am. Rep. 238.)

The jury was instructed in Thurston v. Union Pacific R. R., 4 Dill. 321, Fed. Cas. No. 14,019 that a common carrier was not bound to accept as a passenger one who sought transportation for a criminal purpose and on that ground that the defendant was justified in refusing to sell a ticket to a three card monte man.

It was held in all these cases that the justification was made out if the carrier had reasonable cause to suppose and did suppose that the safety or convenience of other passengers would be endangered by the person in question and that it was not necessary to wait to see if the person believed and with reason to be afflicted with an infectious disease or so insane, drunk, or sick as to be likely to interfere with the safety or convenience of other passengers, was or was not in fact in the condition he appeared to be in.

The doctrine established by these cases is admitted by the learned counsel for the plaintiff. His contention is that the right of the carrier to exclude a person who wishes to become a passenger is confined to those cases where the safety or convenience of other passengers is endangered or thought to be endangered and that "the mere fact that a person is afflicted with an internal disease will not justify" a carrier in refusing to accept him as a passenger if he offers to pay the regular fare. He relies on statements in Sheridan v. Brooklyn & Newton Railroad, 36 N. Y. 39, 93 Am. Dec. 490, Pullman Car Co. v. Barker, 4 Colo. 344, 34 Am. Rep. 89, and New Orleans, Jackson & Great Northern R. R. v. Statham, 42 Miss. 607, 97 Am. Dec. 478, and the decision in Zachery v. Mobile & Ohio R. R., 74 Miss. 520, 21 So. 246, 36 L. R. A. 546, 60 Am. St. Rep. 529, in support of that contention.

[28] Parts of the statement of facts and parts of the opinion are omitted.

The decision in Zachery v. Mobile & Ohio R. R. does not help the plaintiff. What was there decided was that the complaint in that case stated a good cause of action. It was a complaint for refusing to sell the plaintiff a ticket because he was blind. But the report states that "it is alleged in the complaint, and admitted by the demurrer, that appellant was not infirm, but robust, able to take care of himself, and to comply with the rules applying to passengers generally; that he had been traveling on appellee's road for several years, and given no cause of complaint to appellee's servants, and none was ever made. All this being admitted by the demurrer, the doctrines laid down in Sevier v. Vicksburg & Meridian R. R., 61 Miss. 10, 48 Am. Rep. 74, relied on by appellee, do not apply to this case. There is nothing to show that appellant was informed that the absence of an attendant was the cause of his rejection, and nothing to show that he needed one."

There is a general statement in the opinion in Sheridan v. Brooklyn & Newton R. R., 36 N. Y. 39, 42, 93 Am. Dec. 490, that a sick person is entitled to ride in the cars, and there is a similar statement in Pullman Palace Car Co. v. Barker, 4 Colo. 344, 348, 34 Am. Rep. 89. But taken in connection with the point under discussion in the case in question neither statement is of importance. The question to be decided in Sheridan v. Brooklyn & Newton R. R. was whether the judge was wrong in refusing to instruct the jury that the fact that the deceased (for whose death the action was brought) was a child (he was nine years old) makes no difference in rule of law as to the question of negligence; if not of years of discretion he should have a protector. The court held that the ruling asked for was wrong, and in discussing that question said that "a sick or aged person, a delicate woman, a lame man, or a child," is entitled to more attention in getting on or off the cars or in crossing a street than one in good health and under no disability. The court then added the statement here relied on: "All these classes are entitled to use the streets and to ride in the cars." The similar statement made in Pullman Palace Car Co. v. Barker is of no more significance. In that case a car of the Pullman Company got on fire through the negligence of its servants, and the plaintiff had to leave her berth and go to another car on an "extremely" cold night, in her night clothes. "She caught a severe cold which caused the cessation of her menses and resulted in a long period of illness." It was held that the negligence of the defendant was not the immediate cause of that illness. In deciding that point the court said: "Persons who are ill have a right to enter the cars of a railroad company and travel therein; as a common carrier of passengers the company has no right to prevent them; but the increased risk arising from conditions affecting their fitness to journey, certainly where they are unknown to the carrier, must rest upon their own shoulders." There is a somewhat similar statement of no more consequence in New Orleans, Jackson & Great Northern Railroad v. Statham, 42 Miss. 607, 613, 97 Am. Dec. 478.

On the other hand it is plain that the right to exclude is not confined

to cases where the safety or convenience of other passengers is endangered or thought to be endangered. * * *

It was held in Louisville, Nashville & Great Southern Railroad v. Fleming, 14 Lea (Tenn.) 128, that an old colored man 83 years of age, whose hands were partially paralyzed and numb, had no cause of action for being put off the train for not producing his ticket or paying his fare. There was evidence that he had a ticket in his pocket and that the conductor, although he tried, failed to find it.

In Sevier v. Vicksburg & Meridian R. R., 61 Miss. 8, 48 Am. Rep. 74, it was held that a man had no cause of action who while sick with fever got on a train and told the conductor when he gave him his ticket that he was sick with fever, that he wanted to sleep and to be waked up at Jackson; the conductor did not wake him up and he had to walk back four miles from the station next beyond Jackson.

In Croom v. Chicago, Milwaukee & St. Paul Ry., 52 Minn. 296, 53 N. W. 1128, 18 L. R. A. 602, 38 Am. St. Rep. 557, "the defendant accepted the plaintiff as a passenger on its train for transportation from Savannah, Ill., by way of Austin, Minn., to Wells, in this state. He was aged 80 years, feeble, and infirm in mind and body, and hence required special care and assistance during his journey, of which fact the defendant was informed when it accepted him as a passenger by a letter from its station agent at Savannah, which accompanied his ticket, and was exhibited to each successive conductor on the train." It was held that, having voluntarily accepted as a passenger one who required extra care, it was bound to furnish it. In coming to that conclusion it was said, at page 298 of 52 Minn., at page 1129 of 53 N. W. (18 L. R. A. 602, 38 Am. St. Rep. 557): "Of course a railroad company is not bound to turn its cars into nurseries or hospitals, or its employes into nurses. If a passenger, because of extreme youth or old age, or any mental or physical infirmities, is unable to cake care of himself, he ought to be provided with an attendant to take care of him. But if the company voluntarily accepts a person as a passenger, without an attendant, whose inability to care for himself is apparent or made known to its servants, and renders special care and assistance necessary, the company is negligent if such assistance is not afforded. In such case it must exercise the degree of care commensurate with the responsibility which it has thus voluntarily assumed, and that care must be such as is reasonably necessary to insure the safety of the passenger, in view of his mental and physical condition."

If the most favorable view is taken of the plaintiff's evidence in the case at bar, her intestate presented herself on February 28th as a person who would require medical attention during the voyage in question and expected the defendant corporation to furnish it. There is nothing in the evidence which would warrant a finding that the intestate's sister assumed to have any medical knowledge or skill.

The question of accepting as a passenger a person in need of medical attention is a more serious one in case of a carrier by water than in

case the proposed transportation is on land. Hospitals abound on shore, and even where there are no hospitals physicians and surgeons can be found at different stopping places to whose care the traveler in need of medical attendance can be confided. But in case a person in need of medical attendance is taken as a passenger on a sea voyage she must be cared for until the voyage is at an end, and if she is not accompanied by her own physician it might well be held that the responsibility of caring for her had been assumed by the carrier.

We are of opinion that a common carrier is bound to take as passengers all who offer themselves, ill or well, provided the carrier can furnish the necessary accommodations and the passenger is willing to pay for what he demands.

But where a person who is ill presents herself to a common carrier for transportation by water it is her duty to state the fact that she is ill and make special arrangements for her transportation as a person in need of medical attention. Speaking in another connection this court said in Spade v. Lynn & Boston R. R., 168 Mass. 285, 289, 47 N. E. 88, 89, 38 L. R. A. 512, 60 Am. St. Rep. 393: "If, for example, a traveler is sick or infirm, delicate in health, specially nervous or emotional, liable to be upset by slight causes, and therefore requiring precautions which are not usual or practicable for travelers in general, notice should be given, so that, if practicable, arrangements may be made accordingly, and extra care be observed."

The case of a person requiring medical attendance does not come within the same class as the cases (put in some of the opinions) where a very old or a very young person is alighting from a car and for that or any other reason requires more time than a person in good health and not under a disability. Those persons and persons laboring under other difficulties are included in persons fit to travel. What we have to consider in the case at bar is the case of one not fit to travel without medical attention. Had notice been given to the defendant corporation of the condition of the plaintiff's intestate when her ticket was bought for her the question of what care her physical condition was likely to demand and how and by whom it was to be provided could have been taken up with deliberation and some special arrangement made for the necessary extra care and the amount to be paid to the defendant corporation if it was arranged that the extra care was to be furnished by it.

But nothing of that kind was done in the case at bar. The ticket for the plaintiff's intestate was bought and paid for and she presented herself for embarkation as an ordinary passenger. We are of opinion that the presentation of Dr. Hare's letter was a representation by her that she needed medical attention during the voyage and looked to the defendant corporation to supply it.

If after the visit which the ship's surgeon paid to the intestate while she was lying in bed in her room the intestate had not been put ashore there would have been a serious question whether the defendant corporation had not assumed the responsibility of giving her proper med-

ical care during the voyage on the principle acted upon by the court in deciding for the plaintiff in Croom v. Chicago, Milwaukee & St. Paul Ry., 52 Minn. 296, 53 N. W. 1128, 18 L. R. A. 602, 38 Am. St. Rep. 557. * * *

In the case at bar the facts which made out the defendant's justification in refusing to accept the plaintiff's intestate as a passenger were a part of the plaintiff's case put in by her. Under these circumstances a verdict for the defendant should have been directed as matter of law in spite of the fact that the burden of proving a justification in the action of tort was on the defendant. Mountford v. Cunard Steamship Co., 202 Mass. 345, 88 N. E. 782. * * *

We are of opinion that the entry in the second action should be judgment for the defendant. See St. 1909, p. 174, c. 236. * * *

The result is that the entry in the first action must be exceptions sustained and in the second action judgment for the defendant.

So ordered.[29]

BROWN v. MEMPHIS & C. R. CO.

(Circuit Court of the United States, W. D. Tennessee, 1880. 5 F. 499.)

This was a common-law action for the wrongful exclusion of the plaintiff, a colored woman, from the ladies' car of the defendant's train, upon her refusal to take a seat in the smoking car. At the time of her exclusion the plaintiff held a first-class ticket over the defendant's road from Corinth, Mississippi, to Memphis, Tennessee, and her behavior while in the car was ladylike and inoffensive.

The defendant pleaded that the plaintiff was a woman of color, and that the company had a regulation excluding persons of color from the ladies' car, but providing equal accommodations in another car, which she refused to accept.[30] This plea, however, was subsequently with-

[29] See comment on principal case in 26 L. R. A. (N. S.) 171; Hogan v. Nashville Interurban R. Co., 131 Tenn. 244, 174 S. W. 1118, Ann. Cas. 1916C, 1162 (1915), annotated in L. R. A. 1915E, 788, on "Duty of Carrier to Accept as a Passenger One Physically or Mentally Disabled." May a person, so sick that he can be transported only on a cot, compel a railroad to take him in the baggage car? See Central of Ga. Ry. Co. v. Fleming, 13 Ga. App. 464, 79 S. E. 369 (1913), and comment thereon in 27 Harv. Law Rev. 278. For an unusual case concerning a passenger suddenly becoming ill en route, see Middleton v. Whitridge, 192 App. Div. 172, 182 N. Y. S. 598 (1920), and comment thereon in 34 Harv. Law Rev. 211. See note, "Duty of Carriers of Passengers to Accept All Applicants for Transportation," 10 Col. Law Rev. 353.

[30] See Chiles v. Chesapeake & O. R. Co., 125 Ky. 299, 101 S. W. 386, 11 L. R. A. (N. S.) 268 (1907), affirmed 218 U. S. 71, 30 S. Ct. 667, 54 L. Ed. 936, 20 Ann. Cas. 980 (1910), and note, "Right of Carrier Independent of Statute, to Separate Passengers on Account of Race," 11 L. R. A. (N. S.) 268. In respect of statutes requiring separation of passengers, see Plessy v. Ferguson, 163 U. S. 540, 16 S. Ct. 1138, 41 L. Ed. 256 (1896). In Shelton v. Chicago, R. I. & P. R. Co., 139 Tenn. 378, 201 S. W. 521, L. R. A. 1918D, 707 (1918), the question was raised concerning separate accommodations in dining cars. See a note, "Statutory Discriminations against Negroes with Reference to Pullman Cars," 28 Harv. Law Rev. 417.

drawn, because the defendant as a matter of fact made no distinction as to color on its cars. After the withdrawal of this plea the court refused to entertain the question of color, and excluded it altogether from the jury, and charged that the case was to be tried precisely as if the plaintiff were a white woman excluded under similar circumstances. The defendant also pleaded that the plaintiff was a notorious and public courtesan, addicted to the use of profane language and offensive habits of conduct in public places; that the ladies' car was set apart exclusively for the use of genteel ladies of good character and modest deportment, from which the plaintiff was rightfully excluded because of her bad character.

It also appeared that an existing statute of the state of Tennessee (Act of March 24, 1875, c. 130, § 1, p. 216) contained the following provision:

"The rule of the common law giving a right of action to any person excluded from any hotel or public means of transportation, or place of amusement, is hereby abrogated; and hereafter no keeper of any hotel or public house, or carrier of passengers for hire, or conductors, drivers, or employés of such carrier or keeper, shall be bound or under any obligation to entertain, carry, or admit any person whom he shall for any reason whatever choose not to entertain, carry, or admit to his house, hotel, carriage, or means of transportation, or place of amusement; nor shall any right exist in favor of any such persons so refused admission; but the right of such keepers of hotels and public houses, carriers of passengers, and keepers of places of amusement, and their employés, to control the access and admission or exclusion of persons to or from their public houses, means of transportation, and places of amusement, shall be as perfect and complete as that of any private person over his private carriage or private theater or place of amusement for his family."

HAMMOND, D. J., charged the jury that this act of the Legislature, so far as it abrogated the common-law right of action for wrongful exclusion from railroad cars on roads running between two or more states, was unconstitutional, because it was a regulation of commerce between the states, which the Legislature had no right to make, the exclusive right to make it being by the Constitution of the United States in Congress. Hall v. De Cuir, 95 U. S. 485, 24 L. Ed. 547.

On the question of the plaintiff's character for chastity, he charged the same principles of law were to be applied to women as men in determining whether the exclusion was lawful or not; that the social penalties of exclusion of unchaste women from hotels, theaters, and other public places could not be imported into the law of common carriers; that they had a right to travel in the streets and on the public highways, and other people who travel must expect to meet them in such places; and, as long as their conduct was unobjectionable while in such places, they could not be excluded. The carrier is bound to carry good, bad, and indifferent, and has nothing to do with the morals

of his passengers, if their behavior be proper while traveling. Neither can the carrier use the character for chastity of his female passengers as a basis of classification, so that he may put all chaste women, or women who have the reputation of being chaste, into one car, and those known or reputed to be unchaste in another car. Such a regulation would be contrary to public policy, and unreasonable. It would put every woman purchasing a railroad ticket on trial for her virtue before the conductor as her judge, and, in case of mistake, would lead to breaches of the peace. It would practically exclude all sensible and sensitive women from traveling at all, no matter how virtuous, for fear they might be put into or unconsciously occupy the wrong car.

The police power of the carrier is sufficient protection to other passengers, and he can remove all persons, men or women, whose conduct at the time is annoying, or whose reputation for misbehavior and indecent demeanor in public is so notoriously bad that it furnishes a reasonable ground to believe that the person will be offensive or annoying to others traveling in the same car; and this is as far as the carrier has any right to go. He can no more classify women according to their reputation for chastity, or want of it, than he can so grade the men.

The car in which the plaintiff was required to sit was used as a smoking car, and was at the time crowded with passengers, mostly emigrants, traveling on cheap rates, with many women and children. It was claimed by the company that its accommodations were as good as the ladies' car, and the plaintiff had no right to refuse it. On this point the court charged that the plaintiff was entitled to first-class accommodations, which meant that those tendered were to be equal in all respects to the best which the company offered on that train to other female passengers traveling alone as the plaintiff was. If being chaste she would have been entitled to ride in the ladies' car, she was entitled to ride in it notwithstanding the alleged want of chastity, if her behavior was ladylike; and having already acquired a seat in it she could not be excluded, nor was she compelled to accept a seat in the other car, if, because of the smoking or bad ventilation or other causes, it was disagreeable to her, there being room for her in the ladies' car.

Verdict for plaintiff for $3,000.

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NELSON v. BOLDT et al.

(Circuit Court of the United States, E. D. Pennsylvania, 1910. 180 F. 779.)

At Law. Action by Oscar Battling Matthew Nelson against George C. Boldt and another. On plaintiff's motion for a new trial.

The court charged the jury, in part, as follows:

"Innkeepers owe a certain duty to the traveling public which they are required at all times to perform, and, if they violate the duty or refuse to perform it, they are answerable in damages to any person who suffers injury as a result therefrom."

"When a traveler presents himself at an inn, it is the duty of the innkeeper to accommodate him if he be a fit person to be admitted and receive accommodation; it being the innkeeper's duty to receive into his house all strangers and travelers who may call for entertainment, provided he has rooms, and they tender him a reasonable sum for the accommodation demanded. The innkeeper, however, can refuse to admit any one, if he pleases, rendering himself liable in an action for any injury the stranger may sustain. If he refuses to entertain a stranger or a traveler for a good reason, he is not liable for damages, as the law only requires him to entertain fit persons."

"It is also the duty of an innkeeper to protect his guests against the intrusion of boisterous, objectionable characters and persons intoxicated, and such persons may be rejected. Where objection to admitting a guest is based on the fact that the guest is committing a breach of the peace, or is intoxicated, the innkeeper's justification may be determined by the court as a matter of law, but when the question is as to the guest's character or reputation, and his standing as a reputable person, the question is for the jury; that if the jury believed that plaintiff was not a law-abiding citizen, but at the time was engaged in a business which was in violation of the laws of the various states of the United States, then the jury would be authorized in finding that he was not such a proper person as was entitled to enforce a legal right to be admitted to a hotel in the state of Pennsylvania, and defendants would be justified in refusing to give him such accommodations as he demanded at that time, it being no answer that other hotels would accommodate him."

The evidence reviewed by the court to the jury indicated that plaintiff, while claiming to be engaged in athletics and looking after real estate, had in fact represented himself in his own biography as the champion light-weight prize fighter of the world up to February 22, 1910. It also appeared that he had engaged in nearly a hundred hotly contested battles which were such as to be prohibited by the laws of the state of Pennsylvania and of other states, by which such contests are made a criminal offense. The court thereupon charged that it was for the jury to say whether a violator of the criminal laws of the various

states, such as the evidence showed plaintiff was, would be a reputable person to be admitted to a hotel in Pennsylvania under the law as previously stated, and that, if the jury conclude that he was not, he could not recover.

HOLLAND, District Judge. This was a suit instituted by the plaintiff against the defendants, owners and managers of the Bellevue-Stratford Hotel in Philadelphia, to recover damages for having been refused lodging and accommodation at the hotel. On August 2, 1909, the plaintiff secured a room at the Bellevue-Stratford through his agent, Mr. Robinson, which he occupied until the morning of August 3d. While Mr. Nelson and his agent, Mr. Robinson, were at breakfast, his satchels were removed from his room to the baggage room, and, when he applied for a room for the following night, the clerk refused to assign him one. He left the hotel and secured a room at the St. James, Thirteenth and Walnut streets, about one square away. Next day he brought suit for damages against the Bellevue-Stratford, and the case was tried in this court on the 6th of April, 1910, and a verdict rendered in favor of the defendant. Motion and reasons for a new trial were filed in due time by the plaintiff, the reasons being five in number, which, however, raise only two questions. The first question to be considered is raised by the third ground for a new trial, which is as follows:

"The learned judge erred in not confining the cross-examination of plaintiff to such matters as had been stated in the examination in chief, and to such questions as might tend to show bias and interest, and in permitting defendant to lead out new matter constituting his own case under the guise of cross-examination."

The plaintiff had been examined by his counsel in his own behalf, and had testified as follows:

"Q. What is your business? A. Athletics is my business, and I have a lot of real estate in six different states to the extent of about $250,000, and I have to look after that.

"Q. Do you do newspaper work? A. Considerable; yes, sir. I have been corresponding for a dozen different papers for the last five years, doing special work."

Upon an objection by the defendant's counsel to the amount of real estate he owned, Mr. Wilson, counsel for plaintiff, insisted that he wanted to show Mr. Nelson's business. The witness further testified, in answer to questions submitted to him by his counsel, as follows:

"Q. Have you ever been convicted or accused of any crime or misdemeanors of any kind? A. No, sir.

"Q. Or disgraceful conduct? A. No, sir.

"Q. You have never been accused of any of those things? A. No, sir; never.

"Q. What are your personal habits with respect to drink, especially what was your condition at this time?

"By Mr. Beitler, Counsel for Defendants: That is a matter of defense, if this man was in bad condition. We do not intend to allege he was in bad condition. We do not intend to allege he was not sober.

"By Mr. Wilson, Counsel for Plaintiff: I thought the burden was upon me to show that he was a proper person.

"By Mr. Beitler: I do not intend to allege that he was not sober.

"Mr. Nelson, the Witness: I always travel in the best of company, and mix with the best people in the world."

This was part of the testimony of the plaintiff, offered in chief, for the purpose of sustaining his claim for damages against the defendant; they having refused to admit him to the hotel.

Upon cross-examination the defendant's counsel endeavored to show that Mr. Nelson was not in the business of athletics and looking after his real estate. He was questioned as to whether or not his business was not that of a prize fighter, instead of one engaged merely in athletics. He was further cross-examined on the question as to whether he had ever been convicted or accused of any crime or misdemeanor of any kind, and in the examination on this point he volunteered the assertion that he had never "knowingly violated any law of any state of the Union, or had ever been arrested." He further stated, "I never violated the law in my life in any state." He was then further questioned as to whether or not it was unlawful to fight prize fights in certain states of the Union, and the law of the state was read to him, after which he was asked whether or not he knew of the existence of that law at the time he fought his prize fight, for the purpose of contradicting him and showing that he had knowingly violated the law of different states. The examination was very extensive because of the varied career of the plaintiff and because of the great number of fights in which he took part.

It seems to me that this was proper cross-examination in view of the position assumed by the plaintiff's counsel that it was his right to establish the plaintiff's fitness to be a guest at the hotel, and offered evidence as to his business and standing, and that he had been a law-abiding person. He was properly cross-examined upon his answers in chief in regard to these matters.

The only other questions raised by the assignments of error are to the charge of the court as to the right of all persons to be admitted to a hotel. We still think the view of the court taken at the trial and expressed in the charge to the jury is a correct exposition of the law.

The motion and reasons for a new trial are overruled.[31]

[31] See Raider v. Dixie Inn, 198 Ky. 152, 248 S. W. 229 (1923); Stevenson v. West Seattle Land & Imp. Co., 22 Wash. 84, 60 P. 51 (1900). For further cases, see a note, "Innkeepers: Refusal to Accept or Serve One as a Guest," 52 L. R. A. (N. S.) 740, and also a note, "Right to Reject Passenger Because of His Bad Character or Misconduct on Previous Occasion," 43 L. R. A. (N. S.) 821.

PEARSON v. DUANE.

(Supreme Court of the United States, 1866. 71 U. S. [4 Wall.] 605, 18 L. Ed. 447.)

In the month of June, 1856, the steamship Stevens, a common carrier of passengers, of which Pearson was master, on her regular voyage from Panama to San Francisco, arrived at the intermediate port of Acapulco, where Duane got on board, with the intention of proceeding to San Francisco. He had, shortly before this, been banished from that city by a revolutionary, yet powerful and organized, body of men, called "The Vigilance Committee of San Francisco," upon penalty of death in case of return. This committee had, in the fore part of June, against his will, placed him on the Golden Age, a steamer in the harbor of San Francisco, destined for Panama, with directions that he should be conveyed beyond the limits of California; and he was forcibly carried to the Mexican port of Acapulco. The presence of the Stevens afforded the first opportunity to get back, which he was anxious to embrace, being willing to encounter the risk to which his return might expose him. Duane went openly on the boat, at the public gangway, and talked freely with some of the officers and passengers. It is not certain that the master knew of his being aboard until after the ship got to sea, but no directions had been given for his exclusion, and although he was without a ticket, or money to buy one, yet a passenger, who had the means, offered to pay the purser his fare, who declined receiving it. * * *

There was no evidence that Duane would have been excluded, had the master been aware that he was on board before he left Acapulco, for it was quite clear that the circumstances of his banishment were unknown at that time.

The master, Pearson, was aware that the Vigilance Committee were in control of San Francisco, and ascertained in some way that Duane had been expelled by them from California, and, if he returned, would be in danger of losing his life. Having learned this, he resolved to put Duane aboard the first down ship he met, and send him back to Acapulco. The steamer Sonora, commanded by Captain Whiting, and one of the same line of steamers of which Pearson was master, very soon came in sight, and was stopped. Whiting informed Pearson that he had orders not to carry back any banished person, and that Duane would certainly be executed if he returned, and advised that he should be sent to the Sonora, and he would endeavor to persuade him to go on with him.

Thereupon Duane was transferred to the Sonora, and landed at Acapulco. The transfer was effected without any personal indignity to Duane, who at first resisted, but was induced to yield to superior force, by friendly counsels.

Duane did not return to California until the month of February, 1860. The Vigilance Committee no longer existed, and he then filed a libel in admiralty for damages. * * *

The answer, besides a defense from lapse of time, asserted that the libelant was not "a good or law-abiding citizen of San Francisco," and that he had "secretly and without any right or authority so to do, got on board of the Stevens and remained secreted on board as a stowaway"; and that the defendant, in sending the libelant back on the Sonora, had been influenced by humane motives.

The District Court decreed in favor of Duane, with $4,000 damages; a decree affirmed in the Circuit Court. Appeal.

Mr. Justice DAVIS delivered the opinion of the court.[32]

This case is interesting, because of certain novel views which this court is asked to sustain.

Two questions arise in it: (1) Was the conduct of Pearson justifiable? (2) If not, what should be the proper measure of damages? It is contended, as the life of Duane was in imminent peril, in case of his return to San Francisco, that Pearson was justified, in order to save it, in excluding him from his boat, notwithstanding Duane was willing to take his chances of being hanged by the Vigilance Committee.

Such a motive is certainly commendable for its humanity, and goes very far to excuse the transaction, but does not justify it. Common carriers of passengers, like the steamship Stevens, are obliged to carry all persons who apply for passage, if the accommodations are sufficient, unless there is a proper excuse for refusal.

If there are reasonable objections to a proposed passenger, the carrier is not required to take him. In this case, Duane could have been well refused a passage when he first came on board the boat, if the circumstances of his banishment would, in the opinion of the master, have tended to promote further difficulty, should he be returned to a city where lawless violence was supreme.

But this refusal should have preceded the sailing of the ship. After the ship had got to sea, it was too late to take exceptions to the character of a passenger, or to his peculiar position, provided he violated no inflexible rule of the boat in getting on board. This was not done, and the defense that Duane was a "stowaway," and therefore subject to expulsion at any time, is a mere pretense, for the evidence is clear that he made no attempt to secrete himself until advised of his intended transfer to the Sonora. Although a railroad or steamboat company can properly refuse to transport a drunken or insane man, or one whose character is bad, they cannot expel him, after having admitted him as a passenger, and received his fare, unless he misbehaves during the journey. Duane conducted himself properly on the boat until his expulsion was determined, and, when his fare was tendered to the pur-

[32] Parts of the statement of facts and parts of the opinion are omitted.

ser, he was entitled to the same rights as other passengers. The refusal to carry him was contrary to law, although the reason for it was a humane one. The apprehended danger mitigates the act, but affords no legal justification for it.

But, the sum of four thousand dollars awarded as damages, in this case, is excessive, bearing no proportion to the injury received. Duane is entitled to compensation for the injury done him by being put on board the Sonora, so far as that injury arose from the act of Pearson in putting him there. * * *

On a review of the whole case, we are of opinion that the damages should be reduced to fifty dollars.

It is ordered that this cause be remitted to the Circuit Court for the District of California, with directions to enter a decree in favor of the appellee for fifty dollars. It is further ordered that each party pay his own costs in this court.

Order accordingly.

43 L. E. 234

v. B+O 54 L. E. 936.
24 L. E. 577

WATERS v. RICHMOND & D. R. CO.

(Supreme Court of North Carolina, 1892. 110 N. C. 338, 14 S. E. 802, 16 L. R. A. 834.)

Action by L. M. Waters against the Richmond & Danville Railroad Company for breach of contract of shipment. Judgment for plaintiff. Defendant appeals.

The other facts fully appear in the following statement by DAVIS, J.:

A former appeal in this action was decided at February term, 1891 (108 N. C. 349, 12 S. E. 950), when a new trial was granted, after which plaintiff filed an amended complaint, in which it is alleged in substance that the defendant is a corporation duly created by law, owning and operating a line of railroad between the town of Taylorsville, in North Carolina, and the city of Charleston, S. C. That on or about the 10th of May, 1888, he was the owner of a lot of cattle, which he desired to ship from Taylorsville to the city of Charleston; and, in order to reach said city on the Saturday morning following, he contracted with the defendant, for and in consideration of the sum of $58.50, to furnish on the Wednesday night one safe and substantial R. & D. stock car, capable of holding and transporting the said cattle, 32 in number; and that the said car should be transported with diligence and dispatch from Taylorsville to Charleston, and reach the latter place on Saturday morning. That the defendant at the time of making the said contract was distinctly and plainly informed that the plaintiff desired to reach Charleston on Saturday, to be ready for the Monday market. That the defendant neglected and failed to perform and comply with said contract, and by reason of said neglect and failure the plaintiff sustained $350 damage, and he demands judgment for the

same and for costs, etc. The defendant answered, admitting that it was a corporation as alleged, but denying all the other allegations seriatim, and for a further defense alleged: "(1) That, as it is informed and believes, a cattle-car of a kind in constant use on its road was tendered to the plaintiff on his arrival at the town of Taylorsville, and refused by him. (2) That, as it is informed and believes, it was Sunday market in Charleston which plaintiff desired to reach, and this information is obtained partly from the sworn statement of plaintiff in his original complaint; and, as it is advised and believes, the law of South Carolina prohibits the sale or offering for sale of any property in said state on Sunday. (3) That plaintiff's cattle were shipped by defendant from Taylorsville within a reasonable time from their delivery at its depot." This answer was duly sworn to. Upon the trial the plaintiff offered in evidence the verified answer of the defendant in the original action, and afterwards the defendant put in evidence the original verified complaint of the plaintiff, which are set out in full in the record. Much other evidence was offered, to which there were many exceptions. At the close of the evidence the defendant asked in writing twenty-one special instructions, eight of which were refused, and exceptions entered by defendant; but only two (the second and twenty-first) seemed to be insisted upon by counsel in his brief for defendant. The second prayer for instructions was as follows: "If the jury believe the evidence of the plaintiff himself, he had in his mind at the time of making the contract the purpose to expose his cattle to sale on Sunday, and communicated this purpose to the defendant, and the contract, if made, was void, and the plaintiff is not entitled to recover." Instruction refused, and defendant excepted.

DAVIS, J. (after stating the facts).[33] When this case was before us on the former appeal (108 N. C. 349, 12 S. E. 950) the court said that the judge below very properly declined to give the instruction that the "contract was based upon an illegal consideration, and was void, * * * as there is not the slightest illegality either in the consideration or promise. The consideration was the sum of $58.50, and the promise was to transport the cattle so as to reach the city of Charleston on Saturday. We presume that the defendant intended to present the question as to the effect of the alleged illegal purpose of the plaintiff, but, as the point is not presented in the prayer for instruction, we do not feel at liberty to pass upon it in this appeal." The question which the court declined to pass upon because not presented by the prayer for instruction is now directly presented by the prayer, but there is no issue to which the prayer for instructions is applicable. There was no objection to the issues framed, and none was tendered as to the purpose of the plaintiff with regard to the sale of cattle on Sunday, or of the knowledge of the defendant of his purpose; but there was evidence tending to show the plaintiff's illegal purpose to sell on

[33] The part of the opinion relating to the twenty-first prayer for instructions is omitted.

Sunday, and that that purpose was communicated to the defendant. The jury were instructed at the request of the defendant that, "if the plaintiff had in his mind, at the time of making the alleged contract, the purpose to sell his cattle or expose them for sale in Charleston on Sunday, and communicated his purpose to the defendant, and the contract was made with this understanding, then it is void, and the plaintiff is not entitled to recover;" and we think this instruction was fully as liberal as the defendant was entitled to, bearing upon the illegality of the contract; and, though the question was not presented by any issue, we deem it proper to say that railroad companies are public carriers of passengers and freight, and they cannot exempt themselves from liability for damages by reason of the fact that freight is to be used for some illegal purpose at the point of destination, or that the object of the passenger is to do some illegal act at the point of destination, even if the railroad company had knowledge of the illegal purpose, unless that illegal purpose was the consideration and inducement of the contract. The railroad company has no right to say to the passenger or to the shipper, "I will not transport you or your freight, for it is your purpose to do some unlawful act;" but, if it makes some special contract, not in the regular order of transportation—as, for instance, to furnish a special train to passengers to go to a particular point to engage in a prize fight—the contract will be illegal and void, and no action could grow out of it. An illegal contract furnishes no ground, in law, of action; but the railroad is not exempt from liability for negligence, even though the purpose of the shipper or passenger be illegal, unless the illegal purpose enter into the consideration of the contract of transportation.[34] * * *

GODWIN v. CAROLINA TELEPHONE & TELEGRAPH CO.

(Supreme Court of North Carolina, 1904. 136 N. C. 258, 48 S. E. 636, 67 L. R. A. 251, 103 Am. St. Rep. 941, 1 Ann. Cas. 203.)

Mandamus by Jane Godwin against the Carolina Telephone & Telegraph Company. Judgment for defendant, and plaintiff appeals.

CLARK, C. J.[35] * * * This is an application for a mandamus to compel the defendant to put a telephone, with necessary fixtures and appliances, in the dwelling house of the plaintiff in the town of Kinston,

[34] See Baltimore & O. R. Co. v. O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 21 L. R. A. 117, 34 Am. St. Rep. 579 (1892), and Cantu v. Bennett, 39 Tex. 304 (1873). In Gray v. Western Union Tel. Co., 87 Ga. 350, 13 S. E. 562, 14 L. R. A. 95, 27 Am. St. Rep. 259 (1891), the question was presented as to whether the telegraph company had a good defense for delay in transmitting a telegram on the ground that the contents of the message related to an illegal transaction (sale of futures). And see Schnitzer v. Western U. T. Co., 84 N. J. Law, 63, 85 A. 1021 (1913); Gist v. Western Union Telegraph Co., 45 S. C. 344, 23 S. E. 143, 55 Am. St. Rep. 763 (1895); Wiggins v. Postal Tel. Co., 130 S. C. 292, 125 S. E. 568 (1924).

[35] Parts of the opinion are omitted.

and admit her to all the privileges accorded to other subscribers to the telephone exchange operated by the defendant in said town. It was admitted by the plaintiff that "she is a prostitute, and keeps a bawdy house within the corporate limits of the town of Kinston, and desires to have said telephone put in said bawdy house." The court being of opinion that the plaintiff was not entitled to a mandamus for such purpose, the plaintiff took a nonsuit and appealed.

There was no error. A mandamus lies to compel a telephone company to place telephones and furnish telephonic facilities, without discrimination, for those who will pay for the same and abide the reasonable regulations of the company. This is well settled. State v. Nebraska Telephone Co. (Neb.) 22 N. W. 237, 52 Am. Rep. 404; 27 Am. & Eng. Enc. (2d Ed.) 1022; 19 Am. & Eng. Enc. (2d Ed.) 877; Joyce on Electric Law, § 1036; and numerous cases cited by all these. In Telegraph Co. v. Telephone Co., 61 Vt. 241, 17 A. 1071, 5 L. R. A. 161, 15 Am. St. Rep. 893, it is said: "A telephonic system is simply a system for the transmission of intelligence and news. It is, perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all." That case cites many authorities, which are, indeed, uniform, that the telephone business, like all other services fixed with a public use, must be operated without discrimination, affording "equal rights to all, special privileges to none." Telephones "are public vehicles of intelligence, and they who own or control them can no more refuse to perform impartially the functions that they have assumed to discharge than a railway company, as a common carrier, can rightfully refuse to perform its duty to the public," is said in Telephone Co. v. Telegraph Co., 66 Md. 399, at page 414, 7 A. 811, 59 Am. Rep. 167, which is another very instructive and well-reasoned case upon the same subject. Telephone companies are placed by our corporation act on the same footing, as to public uses, as railroads and telegraphs, and the corporation commission is authorized to regulate their charges and assess their property for taxation. But while it is true there can be no discrimination where the business is lawful, no one can be compelled, or is justified, to aid in unlawful undertakings. A telegraph company should refuse to send libelous or obscene messages, or those which clearly indicate the furtherance of an illegal act or the perpetration of some crime. But recently in New York the telephone and telegraph instruments were taken out of "pool rooms" which were used for the purpose of selling bets on horse races.[36] "Keeping a bawdy house" was an indictable offense at common law, and is still so in this state. State v. Calley, 104 N. C. 858, 10 S. E. 455, 17 Am. St. Rep. 704; State v. Webber, 107 N. C. 962, 12 S. E. 598, 22 Am. St. Rep. 920. One who leases a house for the purpose of its being kept as a bawdy house, or with the knowledge that it will be used for that pur-

[36] See Cullen v. New York Tel. Co., 106 App. Div. 250, 94 N. Y. S. 290 (1905), and People ex rel. Restmeyer v. New York Tel. Co., 173 App. Div. 132, 159 N. Y. S. 369 (1916).

pose, is indictable. 9 A. & E. Enc. (2d Ed.) 527. A mandamus will never issue to compel a respondent to aid in acts which are unlawful. Wiedwald v. Dodson, 95 Cal. 450, 30 P. 580; Gruner v. Moore, 6 Colo. 526; Chicot County v. Kruse, 47 Ark. 80, 14 S. W. 469; People v. Hyde Park, 117 Ill. 462, 6 N. E. 33.

It is argued that a common carrier would not be authorized to refuse to convey the plaintiff because she keeps a bawdy house. Nor is the defendant refusing her a telephone on that ground, but because she wishes to place the telephone in a bawdy house. A common carrier could not be compelled to haul a car used for such purpose. If the plaintiff wished to have the phone placed in some other house used by her, or even in a house where she resided, but not kept as a bawdy house, she would not be debarred because she kept another house for such unlawful and disreputable purpose. It is not her character, but the character of the business at the house where it is sought to have the telephone placed, which required the court to refuse the mandamus. In like manner, if a common carrier knew that passage was sought by persons who are traveling for the execution of an indictable offense, or a telegraph company that a message was tendered for a like purpose, both would be justified in refusing; and certainly when the plaintiff admits that she is carrying on a criminal business in the house where she seeks to have the telephone placed the court will not, by its mandamus, require that facilities of a public nature be furnished to a house used for that business. For like reason a mandamus will not lie to compel a water company to furnish water, or a light company to supply light, to a house used for carrying on an illegal business. The courts will enjoin or abate, not aid, a public nuisance. * * *

No error.[37]

WESTERN UNION TELEGRAPH CO. v. FERGUSON.

(Supreme Court of Indiana, 1877. 57 Ind. 495.)

HOWK, J.[38] The appellee was the plaintiff, and the appellant was the defendant, in this action, in the court below.

Omitting the title of the cause, the venue and style of the court, and the signature of counsel, the appellee's complaint was as follows:

"The plaintiff complains of the defendant, and says, that on the 23d day of September, 1874, he placed in the hands of the defendant's agent, at Francesville, Indiana, in said county, the following message, to wit:

" 'Clint. Crose, Lafayette, Indiana: Send me four girls, on first train to Francesville, to tend fair.

" 'E. Ferguson.'

[37] See 5 Col. Law Rev. 64, and 3 L. R. A. (N. S.) 153.

[38] Part of the opinion is omitted.

"That said message was left at said office during the usual business hours, and was to be transmitted to said Clint. Crose, Lafayette, Indiana, without delay, the said plaintiff paying in advance for the transmission of said message the sum demanded by the agent of said company, at the time he delivered said message; that the defendant, without cause, wrongfully, wholly failed and refused to transmit said message at all, to the damage of the plaintiff one hundred dollars, which has never been paid, either in whole or in part, as shown per exhibit A, herewith filed and made a part hereof; and the plaintiff prays that he have judgment for the statutory penalty in such cases made and provided, in the sum of one hundred dollars, and other proper relief."

The exhibit, referred to in said complaint, was a simple statement of account, showing that on September 23, 1874, appellant was indebted to appellee, for damages and penalty for not transmitting a message, in the sum of one hundred dollars.

To the appellee's complaint, the appellant answered in five paragraphs, as follows:

"1. For answer herein, defendants deny each and every allegation in the complaint herein contained.

"2. They say, the dispatch was offered by the plaintiff for an illegal purpose, to wit, to obtain prostitutes to be used at a fair held, or to be held, at Francesville, Indiana, for purposes of prostitution; that the said plaintiff was a lewd man, and of bad and licentious character; that the said Clint. Crose was also a lewd man; that he is, and was at the time, an agent and keeper of prostitutes; that, in their offices, defendants have employed a large number of ladies of refinement and intelligence, and they say, they were not bound to transmit any such message, and that they refused the same, as they lawfully might, because the same was, and is, illegal and immoral, and was offered in aid of immorality and illegality, and they could not send said dispatch without becoming parties thereto.

"3. That said message was not sent in good faith, but was delivered to defendant, by plaintiff, for the purpose of obtaining the penalty of one hundred dollars, by the statute provided in case of refusal to transmit bona fide dispatches.[39]

"4. That said message was not sent, because other messages were in the office at Francesville, Indiana, in advance of this; that it contained no directions; that thereby the same was not entitled to be forwarded until after the necessary inquiries were made as to whether there was any such person at Lafayette, and until after their other usual business was disposed of; that, before such inquiry could be made, the plaintiff called upon this defendant, received back his money, and discharged said defendant from any duty or obligation she was under to transmit the said message. Wherefore defendants say that the plaintiff ought not to recover the premises.

39 See 1 Rev. St. (Ind.) 1876, p. 868, § 1.

"5. The defendant, for a fifth and further answer herein, says, that the message in question is ambiguous; that the plaintiff is, and was at the time, a man of loose morals and of bad repute at Francesville, Indiana; that the said Clint. Crose was a man of bad repute, and was, before the date of the alleged default of this defendant, in jail.

"That, acting upon these facts, and that there was to be a large number of persons assembled at the Francesville fair, the defendant had reasonable cause to believe, and did believe, that said message referred to prostitutes, and was to be sent to draw prostitutes to said fair; and defendant, on that account, refused to send the same, as an illegal and unlawful message, which refusal she was authorized to make.

"Wherefore defendants demand judgment against the plaintiff."

The appellee demurred to each of the paragraphs, except the first, of the appellant's answer, for the alleged insufficiency of the facts therein to constitute a defense to appellee's action; which demurrers were overruled as to the second and fourth paragraphs, and sustained as to the third and fifth paragraphs, of said answer, to which latter decisions the appellant excepted. And the appellee replied to the second and fourth paragraphs of appellant's answer by a general denial of the matters alleged therein.

And the action, being at issue, was tried by a jury in the court below, and a verdict was returned for the appellee, assessing his damages at the sum of one hundred dollars.

The appellant's written motion for a new trial having been overruled by the court below, and its exception saved to such ruling, judgment was rendered on the verdict.

In this court, the appellant has assigned the following alleged errors of the court below:

(1) In sustaining the appellee's demurrer to the third paragraph of the appellant's answer;

(2) In sustaining the appellee's demurrer to the fifth paragraph of the appellant's answer;

(3) In overruling appellant's motion for a new trial; and,

(4) In overruling the appellant's motion for judgment on the pleadings herein.

It seems to us, that no error was committed by the court below in sustaining the appellee's demurrers, either to the third or fifth paragraphs of the appellant's answer. We know of no provision of law which would authorize the appellant, or any of its agents, to inquire into or impugn the motives [40] of any one who might desire to transmit a message, couched in decent language, over the appellant's telegraphic lines. And certainly we are not aware of any law which makes the appellant, or any of its employees, a censor of public or private morals, or a judge of the good or bad faith of any party who may seek to send a dispatch over the appellant's lines. If the message offered for trans-

[40] See Nicholson v. New York City R. Co., 118 App. Div. 858, 103 N. Y. S. 695 (1907).

mission is expressed in decent language, "on payment or tender of the usual charge," the duty of the telegraph company is fixed by law, and it has no discretion. If, however, the message is expressed in indecent, obscene or filthy language, then, in our opinion, the telegraph company will be excused from the transmission of any such message.[41] But such was not the message described in appellee's complaint. * * * "

BOND v. STARKEY.

(Court of Appeals of Kentucky, 1918. 180 Ky. 50, 201 S. W. 461.)

Action by O. K. Bond to compel N. Starkey, owner of the Eastern Kentucky Home Telephone Company, to install a telephone. From a judgment denying the relief demanded, the plaintiff appeals.

CLARKE, J. N. Starkey owns and operates a public telephone system in Pike county, Ky., under the name of Eastern Kentucky Home Telephone Company, which is not incorporated. Appellant is a physician, and prior to January 26, 1911, had contracted for and had in his home or office a telephone instrument, furnished by defendant, and connected with his telephone system, when a dispute arose over the telephone between appellant and appellee about the service rendered, in which both parties became angry and used profane language, whereupon appellee removed appellant's telephone instrument, and, informing him that it was removed "for no other reason than the profane language you used to-day over our line to the operator," refunded to him the unearned part of the fee appellant had paid in advance for the service. In this action appellant sought, by mandatory injunction, to compel appellee to furnish him telephone service, which relief was denied him by the chancellor.

It is shown in the proof that appellee, conceded to be a public carrier, had adopted rules and regulations governing the use of telephones by subscribers, which were published in the directory furnished to the subscribers, rule 18 being: "The use of profane language is forbidden." Since the removal of his telephone, Dr. Bond has not applied in person for its reinstallation but had his attorney, Mr. Auxier, to make application therefor, to whom appellee offered to restore the service upon condition that appellant would sign the usual contract containing the following stipulation:

"Fifth. Any failure to pay rent or tolls when due, or any other violation of the provisions and stipulations of this contract, or injury to said telephone or the use of obscene and profane language through said telephone, or listening to the conversation of other parties talking on said line, or interfering with parties talking on said line, shall give the

41 Is a telegraph company bound to transmit a defamatory message? See an article, "Liability of a Telegraph Company for Transmitting a Defamatory Message," by Young B. Smith, 20 Col. Law Rev. 369 (379).

company the right at its option to terminate this contract and remove the said telephone at once without notice."

This proposition was declined, so the only question involved here is whether a public telephone company may adopt reasonable rules and regulations governing the use of its telephones by subscribers and make the service conditional upon agreement to observe such rules and regulations. That such a company may adopt and enforce reasonable rules and regulations for use of its telephones by patrons, among which is a rule prohibiting the use of profane language, is thoroughly established. McDaniel v. Faubush Telephone Co., 106 S. W. 825, 32 Ky. Law Rep. 572; Williams v. Maysville Telephone Co., 82 S. W. 995, 119 Ky. 33; 37 Cyc. 1619; Jones on Telegraphs & Telephones, vol. 1, § 250.

From which it necessarily follows that the company may make the furnishing of its service conditional upon agreement by an applicant that he will observe such reasonable rules and regulations as it may have adopted.

Judgment affirmed.[43]

SECTION 2.—ADEQUACY OF SERVICE

WADLEY SOUTHERN RY. CO. v. KENT & DOWNS.

(Supreme Court of Georgia, 1916. 145 Ga. 689, 89 S. E. 765.)

Action by Kent & Downs against the Wadley Southern Railway Company. There was a judgment for plaintiffs, and defendant brings error.

LUMPKIN, J.[44] Kent & Downs brought suit against the Wadley Southern Railway Company, to recover damages for an alleged failure of its duty as a common carrier by railroad to furnish cars for the shipment of certain lumber. They recovered a verdict. The defendant moved for a new trial. The motion was overruled, and the defendant excepted.

1, 2. This suit was not predicated on any violation of a rule of the Railroad Commission, but upon the general duty of a railroad company as a common carrier to furnish cars. It is declared by Civil Code 1910, § 2729:

"A common carrier, holding himself out to the public as such, is bound to receive all goods and passengers offered that he is able and accustomed to carry, upon compliance with such reasonable regulations as he may adopt for his own safety and the benefit of the public."

[43] See Huffman v. Marcy Mut. Telephone Co., 143 Iowa, 590, 121 N. W. 1033 (1909), and a brief note thereon in 23 L. R. A. (N. S.) 1010.

[44] A part of the opinion is omitted.

Section 2736 declares:

"The common carrier is bound not only for the safe transportation and delivery of goods, but also that the same be done without unreasonable delay."

In Ocean Steamship Co. v. Savannah Locomotive Works & Supply Co., 131 Ga. 831, 836, 63 S. E. 577, 579 (20 L. R. A. [N. S.] 867, 127 Am. St. Rep. 265, 15 Ann. Cas. 1044),[45] Presiding Justice Evans, after referring to the fact that an owner of a ship was under no obligation to provide other ships because his facilities might be inadequate to transport all goods which might be offered to him said:

"Such a carrier does not owe to the public all the duties imposed by the law on railroad companies and similar public institutions to furnish adequate transportation facilities for all goods which may be tendered. Railroad companies are public institutions, and are granted certain exclusive franchises and rights which naturally impose correlative duties. They are invested with the power of condemnation, by the exercise of which sovereign right they acquire an exclusive privilege to carry on their business over the highway constructed by them. They are endowed with special and unusual powers, with an express view to their rendering to the public adequate service. The conference of these unusual powers raises an obligation, not only to serve the public impartially, but to serve the public efficiently. Upon them the law imposes the obligation to furnish sufficient facilities for the reasonably prompt transportation of goods tendered for carriage; and they are bound to provide sufficient cars for transporting, without unreasonable delay, the usual and ordinary quantity of freight offered to them, or which might reasonably and ordinarily be expected."

In Southern Ry. Co. v. Moore, 133 Ga. 806, 813, 67 S. E. 85, 26 L. R. A. (N. S.) 851, it was stated, in substance, that it had been said that the duty of a railroad company to provide facilities for the transportation of goods was not an absolute one; that, while the company must furnish cars sufficient to transport goods offered in the usual and ordinary course of business, it was not bound to anticipate and prepare for an extraordinary and unexpected press of business; that a plaintiff who sought to recover from a railroad company for a failure to furnish cars must aver and prove that the goods were properly offered for transportation; and that, where cars were required, there must be a reasonable demand and an offer of goods for transportation.

In Southern Ry. Co. v. Atlanta Sand, etc., Co., 135 Ga. 35, 54, 68 S. E. 807, it was said that it is the duty of a railroad company as a common carrier to provide cars sufficient to transport goods offered in the usual and ordinary course of business, but that it is not bound to anticipate and prepare for an exceptional and extraordinary press of business; that, in a suit for failure to furnish cars on proper demand merely to show that a railroad company did not have enough cars to comply with

[45] See this case and comment thereon in 20 L. R. A. (N. S.) 867. Merchants' & Miners' Transp. Co. v. Dixon, 141 Ga. 762, 82 S. E. 141 (1914), accord.

the demands made upon its service, at the time when cars were ordered from it, would not suffice as a defense, as it might have been negligent in providing for the ordinary conduct of its business, and its own negligence would not excuse it; that it would be admissible to prove that, at the time of the demand, the defendant did not have cars enough to comply therewith, that the general movement of freight throughout the country traversed by the defendant's lines of railroad was unusually large and more than was normally to have been expected; and that therefore it could not comply with the demand for cars, without fault on its part. Similar defenses have been held proper by the Supreme Court of the United States, in interstate shipments. See Houston & Texas Central R. Co. v. Mayes, 201 U. S. 321, 26 S. Ct. 491, 50 L. Ed. 772.

In the present case the court charged the jury, in the language of Civil Code 1910, § 2729, as to the duty of a common carrier to receive for transportation all goods offered that it is able and accustomed to carry, upon compliance with such reasonable regulations as it may adopt for its own safety and the benefit of the public. He did not repeat the expression "that he is able and accustomed to carry" each time he referred to this duty. In this there was no error. If he fairly submitted the law, he was not compelled to repeat again and again those words. To have done so would probably have tended to confuse the jury as to the duty of furnishing facilities.

3, 4. In determining whether a failure to furnish cars for the transportation of goods offered in the usual and ordinary course of business, or as to which the company held itself out as a common carrier, was without fault on the part of the defendant, evidence of the circumstances at the time is admissible, such as the character and destination of the freight, its amount, whether the defendant had previously been carrying freight of that character, or had held itself out as a common carrier thereof, whether there was an extraordinary press of business causing what is commonly called a "car famine," [46] what cars the defendant had suitable for the purpose, and what efforts it made to furnish the cars for the shipment in question. The isolated fact that the defendant did not have cars enough to meet the demand, or the mere fact that it expected cars from other railroads, but failed to get them, would not, without more, exculpate the defendant.[47]

[46] See Yazoo & M. V. R. Co. v. Blum Co., 88 Miss. 180, 40 So. 748, 10 L. R. A. (N. S.) 432 (1906), unusually large cotton crop to be handled; and Atlantic Coast Line R. Co. v. Geraty, 166 F. 10, 91 C. C. A. 602, 20 L. R. A. (N. S.) 310 (1908), large crops raised in reliance on railroad's assurances that transportation facilities would be available, annotated in 20 L. R. A. (N. S.) 310, on "Duty of Carrier to Furnish Cars of a Type Not Owned by It." See, also, Joynes v. Pennsylvania R. Co., 235 Pa. 232, 83 A. 1016, Ann. Cas. 1913D, 964 (1912), and Montana, W. & S. R. Co. v. Morley (D. C.) 198 F. 991 (1912).

[47] Is it a valid excuse if the carrier owns sufficient equipment to take care of commerce originating upon its own lines, but the equipment is scattered over the roads of the country in interstate commerce? Is it material that the carrier employs the American Railway Association to look after the interchange and prompt return to the owner carrier of all freight cars engaged in

But these facts may be proved, and in connection with other circumstances may be sufficient to show that the defendant was not at fault.

There might be freight of such an unusual and exceptional character that a particular railroad company would not be required to anticipate its offer for carriage and provide facilities in advance for its transportation. By way of illustration, a little railroad 10 or 12 miles long, running through the pine forests of South Georgia, could hardly be expected to anticipate as freight and provide for the transportation of 42-centimeter Krupp guns, or monoliths weighing many tons. But if it held itself out to the public as a common carrier of such things, or if it were accustomed to carry them in the usual and ordinary course of its business, the duty of furnishing cars for that purpose would arise. See, on the general subject, 4 Elliott, Railroads (2d Ed.) §§ 1470, 1474, et seq.; 4 Ruling Case Law, §§ 148, 150; 1 Michie on Carriers, §§ 334, 341; Baker v. Boston & Maine R., 74 N. H. 100, 109, 65 A. 386, 124 Am. St. Rep. 937, 12 Ann. Cas. 1072; New York, etc., Railroad Co. v. Cromwell, 98 Va. 227, 35 S. E. 444, 49 L. R. A. 462, 81 Am. St. Rep. 722.

In this case the plaintiffs alleged that they requested the defendant to furnish two cars 40 feet in length, which were the ordinary and usual cars used in carrying lumber of the dimensions which they offered for shipment, and that it was the duty of the defendant to accept and safely carry the lumber and deliver it to its connecting carrier in the line of transportation to its destination. These allegations were denied by the defendant, which also averred, among other things, that the plaintiffs knew that it did not have such cars as were requested, that it had made arrangements for obtaining cars, and that it endeavored to get the cars, but that there was what is known as a "car famine" on account of greatly increased shipments, and that no cars could be had; that it did all in its power to furnish the cars, but could not do so. The charge of the court restricted the defense rather too closely, making it turn almost entirely on the quantity of the freight, without giving sufficient consideration to the contention as to its character and the requirement for its shipment of cars of a particular kind. In the same connection, he charged that the defendant would not be excused for its failure to furnish cars for transportation by the fact that it expected to get cars from other railroads, and that they refused to let it have cars because they had an unusual

interstate commerce? See McCord v. Louisville & N. R. Co., 206 Ky. 501, 267 S. W. 766 (1924), and comment thereon in 73 Univ. of Pa. Law Rev. 313. See, also, St. Louis S. W. R. Co. v. State, 85 Ark. 311, 107 S. W. 1180, 122 Am. St. Rep. 33 (1907), reversed in 217 U. S. 136, 30 S. Ct. 476, 54 L. Ed. 698, 29 L. R. A. (N. S.) 802 (1910). As to the effect of strikes in preventing a carrier from furnishing cars, see ante, p. 333, and State ex rel. Crandall v. Chicago, B. & Q. R. Co., 72 Neb. 542, 101 N. W. 23 (1904); Richland Equity Shipping Ass'n v. Chicago, M. & St. P. Ry., 177 Wis. 530, 188 N. W. 625 (1922).

demand therefor. While the mere expectation of the defendant and the refusal of other railroad companies to let it have cars because of an unusual demand upon them for cars would not alone suffice to exculpate the defendant, if it failed in its duty as to reasonably providing cars for its ordinary business, yet, when taken in connection with its context and the fact as to the order for cars of a particular length, and the reference to "western cars" in the request, this may have caused the jury to disregard facts which they might consider, with the other evidence, in determining whether the defendant's failure to furnish the cars amounted to a breach of the duty resting upon it, or whether its failure to do so was without fault on its part. * * *

Judgment reversed. All the Justices concur.[48]

ST. LOUIS & S. F. RY. CO. v. STATE et al.

(Supreme Court of Oklahoma, 1919. 76 Okl. 60, 184 P. 442, 7 A. L. R. 140.)

Complaint by the Lawton Refining Company against the St. Louis & San Francisco Railway Company to enjoin it from withdrawing certain tank cars, and praying that it be required to furnish additional tank cars. From an order of the Corporation Commission, requiring the Railroad to furnish certain tank cars, it appeals.

OWEN, C. J.[49] The refining company, a corporation doing business at Lawton, Okl., buying, selling, and shipping crude and refined oils, complained that the railroad company heretofore had furnished four tank cars for the use of the refining company in transporting its merchandise, both crude and refined oils, but had given notice that such cars would be withdrawn from its use, and the volume of business would require the use, not only of these four cars, but additional tank cars, and prayed the railroad company be restrained and enjoined from taking the four cars out of its use, and be required to furnish additional tank cars. The Corporation Commission made an order requiring the railroad company to furnish the refining company the tank cars as requested.

The railroad company contends the Corporation Commission was without jurisdiction or authority to make the order, or to make any order respecting the subject-matter of the complaint. The question

[48] See Southern Ry. Co. v. Atlanta Sand & Supply Co., 135 Ga. 35, 68 S. E. 807 (1910), and Illinois Cent. R. Co. v. River & Rail Coal & Coke Co., 150 Ky. 489, 150 S. W. 641, 44 L. R. A. (N. S.) 643, Ann. Cas. 1914C, 1255 (1912), for discussion of common-law and statutory duty to furnish cars. For a collection of cases on car shortage as affecting liability of carrier for failure to furnish cars, see 10 A. L. R. 342. The common-law duty to furnish cars is not affected by a statutory penalty for failure. Bell v. Norfolk Southern R. Co., 163 N. C. 180, 79 S. E. 421 (1913).

[49] A part of the opinion is omitted.

necessary for determination is whether it was the duty of the railroad company, under section 18, art. 9, of the Constitution, to furnish tank cars to be used by the refining company in the transportation of its products over the railroad company's tracks.

The general rule is well settled that it is the duty of every common carrier to receive for carriage and to carry the goods of any person tendered to it for transportation, provided the goods are such that it holds itself out as willing to carry. 10 C. J. 65; Covington Stock-Yards Co. v. Keith, 139 U. S. 128, 11 S. Ct. 461, 35 L. Ed. 73; Elliott on Railroads, § 1465. Subject to some exceptions, it is also the duty of the common carrier to furnish cars suitable in every respect for the safe transportation of the various kinds of property which are usually carried by it. Special cars must be furnished in some instances for transportation of perishable products, refrigerator cars for vegetables and meats, and other cars particularly adapted for the goods transported, as stock cars for cattle, and any failure to observe its duty in this regard will render the carrier liable for loss or injury caused by such failure. 10 C. J. 85; Hutchinson on Carriers, § 505; Atl. Coast Ry. Co. v. Geraty, 91 C. C. A. 602, 166 F. 10, 20 L. R. A. (N. S.) 310. This general rule, however, is not without exception and qualification. Elliott on Railroads, § 1474; United States v. Pennsylvania Ry. Co., 242 U. S. 209, 37 S. Ct. 95, 61 L. Ed. 251; C., R. I. & P. Ry. Co. v. Lawton Refin. Co., 253 F. 705, 165 C. C. A. 299. In the case of United States v. Pa. Ry. Co., supra, tank cars were held to be an exception to the general rule.[50] It was also held the Interstate Commerce Commission was without authority or power to require the common carrier to furnish such cars, and that case was followed by the Circuit Court of Appeals in the case of C., R. I. & P. Ry. Co. v. Lawton Refin. Co., supra, where it was said:

"Where articles of an extraordinary character are offered, a carrier is not bound to accept them, or provide facilities of a different kind from those usually furnished for transportation; hence a railroad company was not required to furnish tank cars to carry the oils of a refinery."

In Re Private Cars, 50 Interst. Com. Com'n R. 652, the Interstate Commerce Commission found there are 59 varieties of liquids regularly transported in tank cars, and that cars used for transportation of one kind of liquid ordinarily cannot be used for transportation of another of the varieties, many of these liquids requiring especially

[50] That it was only a jurisdictional question presented in that case, see the opinion, opening with the statement by McKenna, J., that "the question in this case is, Has the commission (Interstate Commerce Commission) the jurisdiction exercised by the order" (requiring a carrier to furnish tank cars)? The case is discussed in a note "The Tank Car Case," 17 Col. Law Rev. 230. As to whether the jurisdiction and power of the Interstate Commerce Commission have been enlarged in this respect, see the Transportation Act of 1920 (U. S. Comp. St. Ann. Supp. 1923, § 10071¼ et seq.).

constructed cars, with special fittings. In that case, among other things, it was said:

"It is more economical and more efficient for the refiner to furnish a tank car, either owning it or leasing it from some concern, than for the railroad company to own it. A refiner producing two kinds of oil, gasoline and residuum, requires two kinds of cars. Another refiner, producing all grades of oil, from the lighter oil down to coke, will require several kinds of cars."

Counsel rely upon the case of Atl. Coast Ry. Co. v. Geraty, supra, where the railroad company was held liable in damages for a failure to furnish refrigerator cars for transportation of vegetables; but the facts of that case easily distinguish it from the instant case. There the railroad company had induced plaintiff, and other vegetable growers in that region, to plant certain crops, expecting that, if they raised vegetables, refrigerator cars necessary for such vegetables would be obtained, and under these facts it was held the plaintiff was entitled to recover damages sustained by the carrier's refusal to furnish refrigerator cars on reasonable demand for transportation of plaintiff's cabbages. It was said:

"Where plaintiff, owning a farm in a truck region, was induced to plant a large quantity of cabbages by assurance of defendant railroad company that refrigerator cars would be furnished to transport the cabbages to market, which it refused to do on reasonable demand, plaintiff was entitled to recover for unharvested cabbage which spoiled because of defendant's refusal to furnish refrigerator cars. * * *"

In the instant case, the action is not for damages, but one to compel the common carrier to furnish tank cars under an alleged duty resting upon the common carrier and not by virtue of any contract. * * *

The Corporation Commission was without authority to make the order.

The case is therefore reversed, with directions to dismiss the complaint.[51]

HARRISON and BAILEY, JJ., did not participate.

The other Justices concur.

[51] Accord: Chicago, R. I. & P. Ry. Co. v. Lawton Refining Co., 253 F. 705, 165 C. C. A. 299 (1918), and Gustafson v. Michigan Central R. Co., 296 Ill. 41, 129 N. E. 516 (1920).

BEARD et al. v. ILLINOIS CENT. R. CO.

(Supreme Court of Iowa, 1890. 79 Iowa, 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. Rep. 381.)

Action to recover damages for injury sustained by plaintiffs from the negligence of defendant in transporting a carload of butter which it had received as an intermediate carrier, whereby the butter was greatly injured. There was a verdict and judgment for plaintiff. Defendant appeals.

BECK, J.[52] 1. The plaintiff delivered to the Burlington Cedar Rapids & Northern Railway Company, at West Union, in two consignments, a large quantity of butter for transportation to New Orleans. The facts as to both separate consignments are identical. In the further statement of facts they will be referred to as but one transaction. The butter was put in refrigerator cars by the company first receiving it, and was transported therein over connecting roads to St. Louis, where it was transferred by drays across the river, and delivered to the St. Louis, Alton & Terre Haute Railway Company, known as the "Cairo Short Line," and put in a common box car, and a lined fruit car, each of which was sealed, as is usually done, and sent on the same day to Duquoin, Ill., and delivered to defendant, which transported it to New Orleans, in the same cars. The butter was not examined by defendant, and no attempt was made to ascertain its condition, on the probability that it could or would not be transported in the cars, without injury, to New Orleans. The Cairo Short Line Company billed the butter to New Orleans at a rate of freight charges for common cars. It appears that the consignment took the usual course of transaction between defendant and the Cairo Short Line, at Duquoin. It is not shown that plaintiff, the initial or connecting carrier, made any demand of defendant or the Cairo Short Line Company for a refrigerator car, or for the protection of the butter from the effects of heat by the use of ice in the common car in which it was transported, and it is not shown that plaintiff, or the initial carrier, or the connecting companies to St. Louis, had any notice or information in any way, directly or indirectly, of the shipment of the butter without protection from the effects of the heat, nor did they have any notice or information of the practice and course of business adopted by defendant and the Cairo Short Line at Duquoin. We are required to determine whether, under the law upon these facts, the defendant is liable. The discussion of this question will dispose of certain objections made by the counsel of defendant to the rulings of the court below upon instructions and admissions of evidence.

2. We will proceed to inquire as to the duty of defendant upon receiving the butter in a car from the Cairo Short Line for trans-

[52] Parts of the opinion are omitted.

portation to New Orleans, without directions or instructions as to the character of the car in which it should be carried. A carrier's duty is not limited to the transportation of goods delivered for carriage. He must exercise such diligence as is required by law to protect the goods from destruction and injury resulting from conditions, which, in the exercise of due care, may be averted or counteracted. He must guard the goods from destruction or injury by the elements; from the effects of delays; indeed, from every source of injury which he may avert, and which, in the excercise of care and ordinary intelligence, may be known or anticipated. Unknown causes, or those which are inherent in the nature of goods, and cannot be, in the exercise of diligence, averted, will not render the carrier liable. The nature of the goods must be considered in determining the carrier's duty. Some metals may be transported in open cars. Many articles of commerce, when transported, must be protected from rain, sunshine, and heat, and must have cars fitted for their safe transportation. Live animals must have food and water, when the distance of transportation demands it. Fruit, and some other perishable articles, must be carried with expedition and protection from frost. So the carrier must attend to the character of the goods he transports. He is informed thereof by inspection of the freight bills, or by other papers accompanying the shipment.

In the case before us the marks on the package and the waybill disclosed that the subject of shipment was butter. The employés of defendant were endowed with intelligence which taught them that the season was summer, when warm weather prevailed; that butter, in common cars, would be greatly injured by the ordinary heat of the climate; and that the butter, as it approached its destination, would be subject, by reason of the change of latitude, to greatly increased heat from the weather. All these things are familiarly known to all men. Surely, the law will presume that defendant's employés had full knowledge thereof. The law required the defendant, having received the perishable cargo involved in this suit, to exercise the care and diligence necessary to protect it; and, if improved cars for the transportation of articles of commerce liable to injury from heat were in use, it was defendant's duty to use such cars in carrying the butter. These views are supported by the following, among other, cases: Hewett v. Railway Co., 63 Iowa, 611, 19 N. W. 790; Sager v. Railway Co., 31 Me. 228; Hawkins v. Railway Co., 17 Mich. 62, 18 Mich. 427; Railroad Co. v. Pratt, 22 Wall. 123; Wing v. Railway Co., 1 Hilt. (N. Y.) 241; Transportation Co. v. Cornforth, 3 Colo. 280. As to the duty of defendant to use cars so constructed and used as to avoid injury from heat, see Hutch. Carr. § 294; Boscowitz v. Express Co., 93 Ill. 525; Steinweg v. Railway Co., 43 N. Y. 123.

3. But it is said (1) that the defendant did not have refrigerator cars which it could have used on the day it received the butter; (2) that the cars were sealed; (3) that it was accustomed to haul the cars received from the Cairo Short Line without changing the cargo. We may here

assume that defendant will be excused from using the refrigerator cars. But it is shown that the butter could have been carried safely by the use of ice in the box cars. It was defendant's duty to use it. But, having accepted the butter for transportation, defendant cannot escape liability for not safely transporting it, on the ground that it did not have cars sufficient for that purpose. Railway Co. v. Swift, 12 Wall. 262; Helliwell v. Railway Co., 7 F. 76; Paramore v. Railway Co., 53 Ga. 385. The sealing of the car was not to protect it from defendant, the carrier having it under control. Surely, if it was necessary for the protection of the goods, defendant had full power to enter the car, and failure to exercise the power was negligence. Dixon v. Railway Co., 74 N. C. 538. The custom of the defendant and the Cairo Short Line cannot be invoked to protect one or both from negligence causing destruction to goods transported by them. A custom to take cars without changing the goods in them, when their safety demanded it, would be a custom based upon negligence, and cannot be regarded or enforced. Hamilton v. Railway Co., 36 Iowa, 31; Allen v. Railway Co., 64 Iowa, 95, 19 N. W. 870.

4. It is said that the rate of charges, as shown by the waybill, was for common cars, and the defendant, therefore, undertook to furnish no other kind. If the freight charges fixed in the waybill do not express a contract that the butter may be transported so as to destroy its value, and that the carrier is excused from the exercise of the care required of him by law, we think the freight charges in no case will limit the care to be exercised by the carrier, and restrict his liability. The defendant was not restricted, by the rate of freight charges named in the waybill, from claiming and enforcing the payment of a just compensation for charges incurred on account of outlays made in order to safely transport the goods. Sumner v. Association, 7 Baxt. (Tenn.) 345. Many of the rulings of the superior court upon the admission of evidence and instructions, objected to by defendant, are in accord with the views we have expressed. * * *

The foregoing discussion disposes of all the questions requiring consideration in this opinion. The judgment of the superior court is affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. RENFROE.

(Supreme Court of Arkansas, 1907. 82 Ark. 143, 100 S. W. 889, 10 L. R. A. [N. S.] 317, 118 Am. St. Rep. 58.)

Action by T. H. Renfroe against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals.

This was a suit begun in the Crawford circuit court by the appellees to recover damages, which, it was claimed, they had suffered by reason of the failure of the St. Louis, Iron Mountain & Southern Railway

Company to keep properly iced a refrigerator car load of berries which, they allege, were shipped by themselves from Alma, Ark., to Kansas City, Mo.

Appellees alleged that the St. Louis, Iron Mountain & Southern Railway Company "was on the 27th day of April, 1905, the lessee, operator, and manager of a line of railway from Alma, Ark., to Kansas City, Mo." Appellees then alleged that they delivered to appellant 585 crates of strawberries in good condition, which appellant received and agreed to transport from Alma, Ark., to Kansas, City, Mo., in consideration of the sum of $107.36; and appellees alleged that in consideration of the further sum of $50 appellant agreed and undertook to keep the car in which the strawberries were loaded sufficiently iced to keep it at a temperature sufficiently cold to preserve and keep said strawberries in a merchantable condition so that they would be marketable in Kansas City, Mo. Appellees then allege that the strawberries would have netted them, after paying all expenses for transportation, icing, and commissions for selling, the sum of $1,158.89, if same had reached Kansas City in merchantable condition. Appellees allege that appellant neglected, failed, and refused to keep said car iced as it agreed to do, and that by reason of its failure the strawberries became overheated in the car, and thereby became soft, mushy, mouldy, and unmarketable in Kansas City, Mo., that they netted appellees $369.35 in their unsalable condition, and that appellees were damaged by reason of the negligence and carelessness as aforesaid $789, for which sum they asked judgment.

Appellant denied all the material allegations of the complaint, and set up the defense of contributory negligence in shipping berries unfit for shipment, and in not discovering defective condition of car in respect to drain pipes if it was defective, and in not diligently placing berries on market after their arrival at Kansas City. The defense of contributory negligence, however, is not urged here. The bill of lading evidencing the contract of shipment was attached to the complaint as an exhibit. It contained the following: "And it is further especially understood that, for all loss or damage occurring in the transit of said property, the legal remedy shall be against the particular carrier only in whose custody the said property may actually be at the time of the happening thereof—it being understood that the St. Louis, Iron Mountain & Southern Railway Company's leased, operated, and independent lines, in receiving the said property to be forwarded as aforesaid, assumes no other responsibility for its safety or safe carriage than may be incurred on its own road." The bill of lading also recited that the strawberries were received to be forwarded to Kansas City, Mo. Across the face of the bill of lading were written the words and figures: "Refrigerator $50.00." The bill of lading was issued to T. H. Renfroe, one of the appellees, at Alma, Ark., by the agent of appellant.

Appellee adduced evidence tending to prove that on the 27th of

April, 1905, an American Refrigerator Transit car on appellant's road at Alma, Ark., was loaded with strawberries for Renfroe, the shipper, who sold same to the other appellees, Jones and Taylor, while in transit. The strawberries were in good merchantable condition when loaded, and were properly loaded. It was a hot day when the car was loaded. The car left Alma a little before sundown on the 27th of April. It had remained at Alma from about 3:30 o'clock p. m. the day previous. The car was sealed under the directions of appellant's agent at Alma. While the berries were being loaded it was noticed that the water was running out of the corners of the car. Witnesses testified that the water was passing out of the car all the afternoon; that it ran out in a stream; that the car was not cold on the inside. It was shown that the car left Alma at 6:23 o'clock p. m., and arrived at Van Buren 7:06 p. m., and left Van Buren at 11:20 p. m. for Kansas City on April 27, 1905. The car was re-iced at Van Buren, but not until it had stood for nearly three hours. When the car was inspected at Kansas City at about 6 p. m., April 28, 1905, the interior was found to be extremely warm. The berries were soft and beginning to mould; none of them were in merchantable condition. The temperature in the car was about 65 or 75 degrees. If the car had been kept well iced all the time, the berries would have arrived in Kansas City in good condition.

James A. Shibley, a witness for the appellant, testified that he was working for the American Refrigerator Transit Company; that he had no connection with the Iron Mountain Railway Company; that the icing of the American Refrigerator Transit Company's cars was a duty which devolved upon the American Refrigerator Transit Company; that he superintended the icing of the car complained of in this suit; that the car was iced before it left Van Buren to be loaded at Alma, and that, after being loaded at Alma, it was returned to Van Buren and re-iced at that point before starting on its journey northward; that he examined the car and found it in good condition; that the bills for icing were rendered to the American Refrigerator Transit Company, whose duty it was to attend to the icing of the car and to turning it over to the railway company for use; that he made his reports formally to the general office of the American Refrigerator Transit Company at Tyler, Tex.; that when strawberries are loaded into a refrigerator car they have the effect at first of running up the temperature of the car; that, when a refrigerator car is in proper condition and berries are being loaded into the car and the temperature runs up, ice will melt rapidly and will run out through the flow pipes at the corners of the car. * * *

The court, on its own motion, gave several instructions, and in substance told the jury that it was the duty of appellant to furnish suitable cars for the shipment of the berries, and that if the weather conditions required that the cars should be iced in order to preserve the berries during the shipment, then it was the duty of appellant to furnish cars capable of being iced, and to exercise reasonable care to ice the car so

as to preserve the berries from decay. If appellant failed to comply with its duty, and appellees were damaged as the proximate result of such failure, appellant was liable. But if appellant performed its duty, and a connecting carrier failed to discharge its duty, and that damage resulted from the failure of the connecting carrier, and not from the failure of the appellant at initial carrier to discharge its duty as defined by the court, then appellant was not liable. * * *

The verdict and judgment were for $599.50. All exceptions reserved at the trial are preserved in assignments of error in motion for new trial, which was overruled, and this appeal followed.

Wood, J. (after stating the facts).[53] The contract of shipment, as evidenced by the bill of lading, was entered into between appellant and appellee. It was for through shipment over appellant's line and connecting carriers, from Alma, Ark., to Kansas City, Mo. Appellant having accepted the berries for through transportation, it was its duty to furnish cars suitable for the purpose. Strawberries were perishable goods, and, appellant having undertaken to transport them to market, it was its duty to furnish cars especially adapted to the preservation of such goods during the time required for their transition from the place of shipment to the place of destination under the contract. "If," says Mr. Hutchinson, "the goods are of such a nature as to require for their protection some other kind of car than that required for ordinary goods, and cars adapted to the necessity are known and in customary use by carriers, it is the duty of the carrier where he accepts the goods to provide such cars for their carriage." Hutch. Carr. (3d Ed., Mathews & Dickinson) §§ 505, 508; Beard v. Railway, 79 Iowa, 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. Rep. 381; Chicago R. Co. v. Davis, 159 Ill. 53, 42 N. E. 382, 50 Am. St. Rep. 143; St. L., I. M. & So. Ry. Co. v. Marshall, 74 Ark. 597, 86 S. W. 802.

It is the contention of appellant that it discharged its duty to appellees when it furnished a refrigerator car, and that the duty of icing the car, under the evidence, devolved upon the American Refrigerator Transit Company, the owner of the car. The contention is unsound, as shown in New York, Philadelphia & Norfolk R. R. Co. v. E. F. Cromwell, 35 S. E. 444, 98 Va. 227, 49 L. R. A. 462, 81 Am. St. Rep. 722. That was a case involving the transportation of strawberries. The court said: "The California Fruit Transportation Company, for a consideration, furnished its cars to the plaintiff in error (the railway company). These cars were agencies or means employed by the plaintiff in error for carrying on its business and performing its duty to the public as a common carrier, one of which was to provide suitable cars for the safe and expeditious carriage and preservation of the freight it undertook to carry. A railway company cannot escape responsibility for its failure to provide cars reasonably fit for the conveyance of the particular class of goods it undertakes to carry by alleging that the cars used for

[53] Parts of the statement of facts and a part of the opinion are omitted.

the purposes of its own transit were the property of another. The undertaking of the plaintiff in error (railway company) was to properly care for and safely carry the fruit of the defendant in error, and it is immaterial that the cars in which it was carried were owned by the California Fruit Transportation Company, or that such company undertook to ice said cars or to pay for the ice. As between the plaintiff in error and defendant in error, the California Fruit Transportation Company and its employés were the agents of the plaintiff in error. So far as the defendant in error was concerned, the plaintiff in error was under the same obligations to care for the fruit that it would have been had the refrigerator cars belonged to it."

It matters not in the case at bar that the refrigerator car belonged to the American Refrigerator Transit Company, an independent contractor. Appellees had no contract with it to furnish cars, or to ice them when furnished. Their contract was with appellant to furnish suitable cars; and the evidence was ample to support the verdict that appellant not only undertook to furnish the car, but also to ice the same. Even if the law did not impose this upon appellant as a duty,[54] the proof shows that it undertook, for a valuable consideration, to furnish refrigeration as well as the car. The sum of $50 was charged and paid for that service to appellant. The evidence was sufficient to warrant the jury in finding that appellant negligently failed to perform this service, that it failed to carry out its contract to ice the car, and thus to furnish a suitable car. * * *

Finding no error, the judgment is affirmed.[55]

AYRES et al. v. CHICAGO & N. W. RY. CO.

(Supreme Court of Wisconsin, 1888. 71 Wis. 372, 37 N. W. 432, 5 Am. St. Rep. 226.)

This case was here on a question of pleading upon a former appeal. 58 Wis. 537, 17 N. W. 400. The amended complaint is to the effect that the defendant, the Chicago & Northwestern Railway Company, being a common carrier engaged in the transportation of live stock, and accustomed to furnish cars for all live stock offered, was notified by the plaintiffs, Volney Ayers and George Hagenah, on or about October 13, 1882, to have four such cars for the transportation of cattle, hogs, and sheep at its station at La Valle, and three at its station at Reedsburg,

[54] See Atchison, T. & S. F. R. Co. v. United States, 232 U. S. 199, 34 S. Ct. 291, 58 L. Ed. 568 (1914), for a discussion of the requirements of the Interstate Commerce Act (U. S. Comp. St. § 8563, et seq.) in the matter of refrigeration, particularly whether it is optional with the shipper to furnish the refrigeration or to call upon the carrier for it.

[55] The principal case is annotated in 10 L. R. A. (N. S.) 317, on the "Duty of a Carrier with Respect to Refrigerator Cars." See Forrester & Co. v. Southern Ry. Co., 147 N. C. 553, 61 S. E. 524 (1908), and note in 18 L. R. A. (N. S.) 508, on "Duty of Carrier to Furnish Car Adapted to the Subject of Shipment"; also, 15 Ann. Cas. 143.

ready for loading on Tuesday morning, October 17, 1882, for transportation to Chicago; that the defendant neglected and refused to provide such cars at either of said stations for four days, notwithstanding it was able and might reasonably have done so; and also neglected and refused to carry said stock to Chicago with reasonable diligence, so that they arrived there four days later than they otherwise would have done; whereby the plaintiffs suffered loss and damage, by decrease in price and otherwise, $1,700. The answer, in effect, admitted the defendant's incorporation with the privileges alleged; "that it was at times engaged in the transportation over its roads of live stock, when and if it was able to do so, and was accustomed to furnish suitable cars therefor upon reasonable notice, when within its power to do so; and to receive, transport, and deliver such live stock with reasonable dispatch, but only upon special contracts at the time entered into between the shipper and this defendant, and upon such terms and conditions as should be agreed upon in writing; that one of the lines of this defendant railway is located as in said amended complaint stated." The answer also, in effect, alleged that "within a reasonable time, and as soon as it reasonably could, and as soon as it was within its power to do so," after the application of the plaintiffs for such cars, the defendant "forwarded four suitable and empty cars to La Valle," and "three suitable and empty cars to Reedsburg," which cars were severally forwarded with reasonable dispatch, and arrived in due course, and as soon as they could with reasonable dispatch be forwarded over its line; that at the times of such respective shipments the plaintiffs entered into an agreement in writing with the defendant for the transportation of said stock at special rates, and in consideration thereof it was agreed that the defendant should not be liable for loss from the delay of trains not caused by the defendant's negligence. At the close of the trial the jury returned a special verdict to the effect * * * (2) that at the times stated the defendant was a common carrier, and as such, engaged in the transportation of live stock, and accustomed to furnish cars for, and transport all live stock offered for, that purpose; * * * (5, 6, 7, 8, 9, 10, and 14) that the plaintiffs notified the defendant's agents, at the respective stations, October 13, 1882, to have such cars in readiness at such stations, respectively, October 17, 1882, and that such notices were reasonable, and such agents promised to order the cars and have them in readiness at the time; * * * (13) that the defendant furnished two as soon as it reasonably could, but five it did not; (15) that the plaintiffs received no notice before October 17, 1882, that the cars would not be furnished as ordered; (16, 17, and 18) that prior to that time, and with the expectation that the cars would be on hand as ordered, the plaintiffs had bought sufficient stock to load said several cars, and had the same at said respective stations on the morning of October 17, 1882; (19) that the defendant, being able to furnish such cars, disregarded its duty as a common carrier of live stock in not having the same on hand when ordered; * * * (25, 26, and 27) that the loss on the hogs, by reason of depreciation of the market, was

$140.08; that the total damages of the plaintiffs on all the stock was assessed at $825.97, made up of the following items, to wit: Taking care of and feeding stock, $50; shrinkage on hogs, cattle, and sheep, $408.35; depreciation in value on hogs and sheep, $172.58; and interest on the above sums until the rendition of the verdict, $195.04. The defendant thereupon moved for judgment in its favor upon the verdict and record, which was denied. Thereupon the defendant moved to set aside the verdict, and for a new trial, upon the grounds that the verdict is against the weight of the evidence, and for errors of the court in its charge to the jury, and in its rulings on the trial and because the damages were excessive, and contrary to the proofs, which motion was denied. Thereupon, and upon the motion of the plaintiffs, judgment was ordered in their favor on the special verdict for $825.97 damages and costs. From the judgment entered thereon, accordingly, the defendant brings this appeal.

CASSODAY, J. (after stating the facts).[56] There is no finding of any agreement on the part of the defendant to have the cars in readiness at the station, on Tuesday morning, October 17, 1882. There is no testimony to support such a finding. One of the plaintiffs testified, in effect, that he told the agent that he would want the cars on the morning of the day named; that the agent took down the order, put it on his book, and said, "All right," he would try and get them, but that they were short because they were then using more cars for other purposes; that nothing more was said. It appears in the case that the cars were in fact furnished. It also appears that, as the shipments were made, special written contracts therefor were entered into between the parties, whereby it was, in effect, agreed and understood that the plaintiffs should load, feed, water, and take care of such stock, at their own expense and risk, and that they would assume all risk of injury or damage that the animals might do to themselves, or each other, or which might arise by delay of trains; that the defendants should not be liable for loss by jumping from the cars, or delay of trains not caused by the defendant's negligence. The court, in effect, charged the jury that there was no evidence of any negligence on the part of the defendant, causing delay in any train after shipment, and hence that the delay of the two cars admitted to have been furnished in time was not before them for consideration. This relieves the case from all liability on contract. It also narrows the case to the defendant's liability for the delay of two days in furnishing the five cars at the station named, as ordered by the plaintiffs, and in the absence of any contract to do so. In Richardson v. Railway Co., 61 Wis. 601, 21 N. W. 49, 18 Amer. & Eng. R. Cas. 530, it was, in effect, held competent for a railroad company engaged in the business of transporting live stock, to exempt itself by express contract "from damage caused wholly or perhaps in part, by the instincts, habits, propensities, wants, necessities, vices, or locomotion of such ani-

56 Parts of the statement of facts and parts of the opinion are omitted.

mals." And it was then said: "Since the action is not based upon contract, the plaintiff must recover, if at all, by reason of the defendant's liability as a common carrier, upon mere notice to furnish cars and a readiness to ship at the time notified. Did such notice and readiness to ship create such liability? We have seen that a carrier of live stock may, to at least a certain extent, limit its liability. Whether the defendant was accustomed to so limit its liability, or to carry all live stock tendered upon notice, without restriction, does not appear from the record. If it was accustomed to so limit, and the limitation was legal, it should at least have been so alleged, together with an offer to comply with the customary restriction. If it was accustomed to carry all live stock offered upon notice and tender, and without restriction, then it would be difficult to see upon what ground it could discriminate against the plaintiff by refusing to do for him what it was constantly in the habit of doing for others." In that case there was a failure to allege any such custom or holding out on the part of the defendant, or that reasonable notice had been given to the defendant to furnish suitable cars to the person applying therefor, or that the same was within its power to do so; and hence the demurrer was sustained. The allegations thus wanting in that case are present in this complaint. It is, moreover, in effect, admitted that the defendant was at times, when able to do so, engaged in the transportation of live stock over its roads, one line of which runs through the stations in question; that it was accustomed to furnish suitable cars therefor, upon reasonable notice, when within its power to do so; and to receive, transport, and deliver such live stock with reasonable dispatch, but only upon special contracts at the time entered into between the shipper and the defendant, and upon such terms and conditions as should be agreed upon in writing. It is, moreover, manifest that the defendant actually undertook to furnish the cars at the time designated by the plaintiffs; that it succeeded in furnishing two of them on time; that there was a delay of two days in furnishing the other five; and that the plaintiffs were willing to, and did, submit to the terms and conditions of carriage imposed by the defendant by signing the special written contracts mentioned. It must be assumed also, that such special written contracts were substantially the same as all contracts made by the defendant at that season of the year, for the shipment of similar live stock under similar circumstances. Otherwise the defendant would be justly chargeable with unlawful discrimination; the right to do which the learned counsel for the defendant frankly disclaimed upon the argument.

We are therefore forced to the conclusion that at the time the plaintiffs applied for the cars the defendant was engaged in the business of transporting live stock over its roads, including the line in question, and that it was accustomed to furnish suitable cars therefor, upon reasonable notice, whenever it was within its power to do so; and that it held itself out to the public generally as such carrier for hire upon such terms and conditions as were prescribed in the written contracts

mentioned. These things, in our judgment, made the defendant a common carrier of live stock, with such restrictions and limitations of its common-law duties and liabilities as arose from the instincts, habits, propensities, wants, necessities, vices, or locomotion of such animals, under the contracts of carriage. This proposition is fairly deducible from what was said in Richardson v. Railway Co., supra, and is supported by the logic of numerous cases. Railroad Co. v. Bank, 123 U. S. 727, 8 S. Ct. 266; Moulton v. Railway Co., 31 Minn. 85, 16 N. W. 497, 12 Amer. & Eng. R. Cas. 13; Lindsley v. Railroad Co. (Minn.) 33 N. W. 7; Evans v. Railroad Co., 111 Mass. 142; Kimball v. Railroad Co., 26 Vt. 247, 62 Am. Dec. 567; Rixford v. Smith, 52 N. H. 355; Clarke v. Railroad Co., 14 N. Y. 570, 67 Am. Dec. 205; Railroad Co. v. Henlein, 52 Ala. 606; Baker v. Railroad Co., 10 Lea (Tenn.) 304, 16 Amer. & Eng. R. Cas. 149; Railroad Co. v. Lehman, 56 Md. 209; McFadden v. Railway Co. (Mo.) 4 S. W. 689, 3 Cyc. Law, pp. 1–10, and cases there cited. This is in harmony with the statement of Parke, B., in the case cited by counsel for the defendant, that "at common law a carrier is not bound to carry for every person tendering goods of any description, but his obligation is to carry according to his public profession." Johnson v. Railroad Co., 4 Exch. 372. Being a common carrier of live stock for hire, with the restrictions and limitations named, and holding itself out to the public as such, the defendant is bound to furnish suitable cars for such stock, upon reasonable notice, whenever it can do so with reasonable diligence, without jeopardizing its other business as such common carrier. Railway Co. v. Nicholson, 61 Tex. 491; Railroad Co. v. Erickson, 91 Ill. 613; Ballentine v. Railroad Co., 40 Mo. 491; Guinn v. Railway Co., 20 Mo. App. 453. Whether the defendant could with such diligence so furnish upon the notice given was necessarily a question of fact to be determined. The plaintiffs, as such shippers, had the right to command the defendant to furnish such cars. * * *

The important question is whether the burden was upon the plaintiffs to prove that the defendant might, with such reasonable diligence, and without thus jeopardizing its other business, have furnished such cars at the time ordered and upon the notice given; or whether such burden was upon the defendant to prove its inability to do so. We find no direct adjudication upon the question. Ordinarily, a plaintiff alleging a fact has the burden of proving it. This rule has been applied by this court, even where the complaint alleges a negative, if it is susceptible of proof by the plaintiff. Hepler v. State, 58 Wis. 46, 16 N. W. 42. But it has been held otherwise where the only proof is peculiarly within the control of the defendant. Mecklem v. Blake, 16 Wis. 102; Beckmann v. Henn, 17 Wis. 412; Noonan v. Ilsley, 21 Wis. 144; Railroad Co. v. Bacon, 30 Ill. 352; Brown v. Brown, 30 La. Ann. 511. Here it may have been possible for the plaintiffs to have proved that there were at the times and stations named, or in the vicinity, empty cars, or cars which had reached their destination, and might have been emptied with

reasonable diligence, but they could not know or prove, except by agents of the defendant, that any of such cars were not subject to prior orders, or superior obligations. The ability of the defendant to so furnish with ordinary diligence, upon the notice given, upon the principles stated, was, we think, peculiarly within the knowledge of the defendant and its agents, and hence the burden was upon it to prove its inability to do so. Where a shipper applies to the proper agency of a railroad company engaged in the business of such common carrier of live stock for such cars to be furnished at a time and station named, it becomes the duty of the company to inform the shipper, within a reasonable time, if practicable, whether it is unable to so furnish, and if it fails to give such notice, and has induced the shipper to believe that the cars will be in readiness at the time and place named, and the shipper, relying upon such conduct of the carrier, is present with his live stock at the time and place named, and finds no cars, there would seem to be no good reason why the company should not respond in damages. Of course, these observations do not involve the question whether a railroad company may not refrain from engaging in such business as a common carrier; nor whether, having so engaged, it may not discontinue the same. The court very properly charged the jury, in effect, that if all the cars had been furnished on time, as the two were, it was reasonable to presume, in the absence of any proof of actionable negligence on the part of the defendant, that they would have reached Chicago at the same time the two did—to wit, Thursday, October 19, 1882, a. m., whereas they did not arrive until Friday evening. This was in time, however, for the market in Chicago on Saturday, October 21, 1882. This necessarily limited the recovery to the expense of keeping, the shrinkage, and depreciation in value from Thursday until Saturday. Railroad Co. v. Erickson, supra. The trial court, however, refused to so limit the recovery, but left the jury at liberty to include such damages down to Monday, October 23, 1882.

For this manifest error, and because there seems to have been a mistrial in some other respects, the judgment of the circuit court is reversed, and the cause is remanded for a new trial.[57]

[57] See Missouri & N. A. R. Co. v. Sneed, 85 Ark. 293, 107 S. W. 1182 (1908), where the carrier had no cars of its own but was dependent on another agency for its supply. On the general duty of carriers to furnish cars, see 43 L. R. A. 225, and 8 L. R. A. (N. S.) 108.

ZAKRZEWSKI v. GREAT NORTHERN RY. CO.

(Supreme Court of Minnesota, 1914. 125 Minn. 125, 145 N. W. 801.)

Action by Ignacy Zakrzewski against the Great Northern Railway Company. Verdict for plaintiff, and, from denial of alternative motion for judgment or for new trial, defendant appeals.

HOLT, J.[58] Defendant's railway passes through the village of Stephen, in Marshall county, this state. On Saturday of each week defendant has been accustomed to accept at that place live stock in carload lots for shipment to the markets of South St. Paul and Chicago. For handling such shipments it there maintains two stock pens and a loading chute. The shippers of stock from Stephen buy the same from farmers living within a radius of ten or more miles of the village. The sellers generally deliver the same to the shippers, or buyers, at Stephen in the afternoon preceding the day of shipment. The shippers at once upon receipt of the animals place them in defendant's pens, and, the next day being Saturday, they are loaded onto the cars and taken out by the stock train scheduled to arrive at noon. One of the two pens contained a rack for feeding hay, the other a manger, and in the alley between the pens with gates opening into each was a trough designed for watering.

In the afternoon on October 4, 1912, plaintiff placed in these pens at Stephen for shipment the next day a carload of cattle, sheep, and hogs bought of surrounding farmers and then delivered to him. He had previously ordered the car and had been notified that it would be ready for loading on Saturday, the 5th of October. The animals were shipped to South St. Paul and there sold. Plaintiff sues for damages to the shipment, claiming that defendant kept its said pens in such negligent, improper, and filthy condition that the animals could not be fed or watered, thereby causing an abnormal loss in weight, and that it so affected their appearance that the grade and market price were reduced. Plaintiff recovered, and defendant appeals from the order denying its motion in the alternative for judgment in its favor or a new trial.

Defendant does not here contend for judgment notwithstanding the verdict, but it insists that its responsibility as a common carrier did not arise until the stock was loaded on the cars, and therefore the court's instruction which stated that it was required to furnish facilities for properly caring for the stock for a reasonable time prior to shipment, including means to water the same, was incorrect. Plaintiff, on the other hand, claims that as soon as stock is turned into yards or pens of defendant for immediate shipment its responsibility as common carrier attaches. If that be incorrect, he nevertheless contends that

[58] Parts of the opinion are omitted.

defendant should here be held liable for failure to provide proper facilities for caring for the stock including water while awaiting loading.

A common carrier is required to furnish reasonable facilities for the proper conduct of its business, such as properly lighted and heated depots for its passengers, warehouses for the safe-keeping of inanimate freight, and, where reasonably necessary, pens, yards, and loading chutes for the handling of stock shipments.[59] It is plain that no hard or fast rule can be formulated as to the character of these, or that all should be furnished at every railway stopping place. Nor is it necessary to decide whether Stephen is entitled to have defendant there provide stock pens. Defendant has for years recognized that facilities for shipping stock in carload lots is reasonably required at that point, for it has undertaken to furnish the same. The evidence also tends to show the manner in which shippers availed themselves of these facilities in view of the practice of defendant to accept stock shipments on a certain day each week. There ought to be no doubt upon the proposition that at those shipping points of a common carrier where stock pens or yards are reasonably necessary the duty rests upon the carrier to furnish the same in such condition and with such facilities for handling and caring for stock that the shipper can with a reasonable degree of safety and convenience assemble and attend to the wants of the animals so that when loaded they are in a fit condition to stand the hardships of the journey. The time during which the shipper would be entitled to the use of such pens prior to loading should be measured by what is reasonable under the circumstances.

The evidence of plaintiff tended to show that the pens were in such condition that the animals literally wallowed in mud and filth, that the manger and watering trough were filled therewith, and that the rack was so broken that when an attempt was made to place hay therein it fell out and was immediately trampled down in the mud and lost. Animals should not be compelled to stand or lie in mud. Under our present laws the dumb brutes within man's power are entitled to humane treatment. This requires the place of confinement to be decently clean and dry, and food and water at the proper time. Where cattle, sheep, or hogs by the carload are received at shipping points to such an extent that pens are reasonably necessary for their reception, it would seem to be out of the question to take the animals out for feed and water either singly or collectively. Hence it should be readily conceded that proper racks, mangers, and troughs for feeding and watering are necessary equipments in stock pens.

In the main the trial court's charge correctly defined the duty of defendant, in view of the situation at Stephen, with one exception. The jury were told: "It is also the duty of such carrier to furnish and

[59] For cases on the duty of the carrier of live stock to provide stock pens and yards, see L. R. A. 1918C, 539. And see 15 A. L. R. 197, and 10 L. R. A. (N. S.) 571, as to the duty in respect of the condition of stock pens.

supply to shippers who may have assembled and placed in their yard or pens and tendered or offered such stock to the carrier at such point for shipment, reasonably fit and suitable facilities for securing and supplying water, such as well, cistern, hydrant, or pump, or the like, for the use of such live stock while confined in such yards or pens awaiting loading and shipment during a reasonable time" prior thereto. This placed a more onerous burden on defendant than the evidence and the law warranted. Plaintiff does not claim that the carrier of stock is obliged to furnish the same with feed before being loaded for shipment, but insists, it must provide facility for watering in the pens. Of course, there is a measure of plausibility in a contention that in this state water is held as free as the air we breathe, and therefore the duty to furnish it for stock pens is not to be viewed the same as if feed was required. But there is no real ground for distinction when it comes down to a matter of right. At some shipping points and at certain seasons the expense connected with furnishing water in stock pens may well be a heavy burden. Moreover, it appears that plaintiff cannot attribute loss or damage to the absence of a water supply in the pens. He well knew that these were never supplied with water, and that the shipper invariably had procured water for the stock awaiting shipment at Stephen. And in the absence of a positive statutory duty imposed on defendant, plaintiff ought not to be permitted now to claim any damage from the fact that there was no pump in the cattle pens. As somewhat indicative of a general understanding that a railroad is not required to have all shipping points equipped with facilities for providing stock with water before loading is the fact that not until the last Legislature was any law in regard thereto enacted. Section 4223, G. St. 1913. That law itself recognizes that such facility is not an indispensable requirement at every station where stock may be received for shipment, for water need be supplied only when ordered by the board of railroad and warehouse commission. We cannot hold that a common carrier must furnish water free to stock while in its stock pens awaiting shipment. * * *

We have been cited to no authority supporting, in the broadest sense, the contentions of either party. Nor have we found any similar case to the one here presented upon the facts. * * *

For the error alluded to in the charge, the order, in so far as it denies a new trial, is reversed.[60]

60 See Toledo, W. & W. Ry. Co. v. Hamilton, 76 Ill. 393 (1875), United States v. Louisville & N. R. Co. (D. C.) 18 F. 480 (1883), and Comer v. Columbia, N. & L. R. Co., 52 S. C. 36, 29 S. E. 637 (1897), all concerning the duty of the carrier to feed and water live stock en route. See Peck v. Chicago Great Western Ry. Co., 138 Iowa, 187, 115 N. W. 1113, 128 Am. St. Rep. 185 (1908), and note in 16 L. R. A. (N. S.) 883, as to showering hogs during shipment.

LOOMIS v. LEHIGH VALLEY R. CO.

(Supreme Court of the United States, 1916. 240 U. S. 43, 36 S. Ct. 228, 60 L. Ed. 517.)

In Error to the Supreme Court of the State of New York in and for the County of Ontario to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which modified, and affirmed as modified, a judgment of the Appellate Division of the Supreme Court, Fourth Department, directing a judgment for the plaintiffs upon a verdict in their favor at a trial term of the Supreme Court in an action by shippers to recover from an interstate carrier sums expended by them in constructing grain doors or bulkheads in cars furnished by the carrier.

The facts are stated in the opinion.

Mr. Justice McREYNOLDS delivered the opinion of the court:[61]

Plaintiffs in error have long been shippers of grain and produce over the line of the defendant carrier from Victor and other stations in Western New York. From time to time during a period beginning in August, 1906, and ending May 6, 1908, they requested it to furnish at such places for their use one or more cars—about two hundred altogether—suitable for transporting in bulk, wheat, oats, rye, apples, cabbages, and potatoes. In response, it sent ordinary box and refrigerator cars inadequate for the required service until fitted with inside doors or transverse bulkheads. Prior to 1906, in like circumstances, the custom was for the railroad to supply lumber without charge and shippers constructed these temporary fittings. This practice was discontinued at the stations mentioned, and, during the period specified, it refused either to supply such material or cars completely prepared for carrying in bulk the enumerated articles. Plaintiffs were therefore compelled to construct inside doors or bulkheads in the cars which they loaded and delivered to the defendant for transportation to points both within and beyond the state. The total cost of material used was $322.07,—it varied from 40 cents to $3.50 per car.

Payment of the amount so expended was demanded by plaintiffs and refused. Without preliminary resort to the interstate Commerce Commission, they then brought this action in a state court upon the theory that, the carrier having failed to perform its common-law duty to furnish adequate cars, they were entitled to recover as damages their consequent outlay. Defendant denied liability, and further challenged the court's jurisdiction over claims incident to interstate shipments because: It was and remains an interstate carrier subject to the act to regulate commerce as amended and supplemented as well as the act of Congress passed February 19, 1903, 32 Stat. at L. 847, c. 708 (Comp. Stat. 1913, § 8597), known as the Elkins Act, etc.; it had filed with

[61] Parts of the opinion are omitted.

the Interstate Commerce Commission the tariffs under which such shipments were made; these tariffs fixed rates for transportation only, and did not provide for payments or allowances for grain doors, bulkheads, or lumber for constructing the same; the rates were reasonable and just and had not been held otherwise by the Interstate Commerce Commission.

The Court of Appeals held that the common law imposed upon the railroads the duty of furnishing cars equipped with inside doors or bulkheads for transporting grain or provisions in bulk, and unless local or federal statutes had established different rules, plaintiffs were entitled to recover. Having considered the statutes, it concluded the local act created no bar to recovery on account of the intrastate shipments, but that Congress had assumed such control over interstate shipments as to deprive the state courts of power to consider claims arising out of them. 208 N. Y. 312, 101 N. E. 907. The judgment of the Appellate Division in favor of plaintiffs for total cost of material supplied by them was modified accordingly and the record and proceedings remitted to the Supreme Court, Ontario county. This writ of error was then sued out to obtain a review of the judgment of the Court of Appeals, being addressed to the Supreme Court because the record was in its possession. Shanks v. Delaware, L. & W. R. Co., 239 U. S. 556, 60 L. Ed. 436, 36 S. Ct. 188, L. R. A. 1916C, 797.

No serious dispute exists concerning the facts. The applicable duly filed interstate rate schedules made no reference to allowances for grain doors or bulkheads, and the circumstances under which these were installed, together with their cost, are not controverted. Whether there was jurisdiction in the state court to pass upon the carrier's liability incident to the interstate traffic is the sole point demanding consideration.

The effect of the act to regulate commerce, as supplemented and amended, upon the jurisdiction of courts, has been expounded in many cases heretofore decided. * * *

An adequate consideration of the present controversy would require acquaintance with many intricate facts of transportation and a consequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs, or character of equipment which it must provide, or allowances which it may make to shippers for instrumentalities supplied and services rendered. In the last analysis the instant cause presents a problem which directly concerns rate-making and is peculiarly administrative. Atchison, T. & S. F. R. Co. v. United States, 232 U. S. 199, 220, 58 L. Ed. 199, 576, 34 S. Ct. 291. And the preservation of uniformity and prevention of discrimination render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court. See Pennsylvania R. Co. v. Puritan Coal Min. Co., 237 U. S. 128, 129, 59 L. Ed. 871, 872, 35 S. Ct. 484; Pennsylvania R. Co. v. Clark Bros. Coal Min. Co., 238 U. S. 469, 470, 59 L. Ed. 1412, 35 S. Ct. 896.

If, in respect to interstate business, the courts of New York may determine, as original matters, rate-making problems, those in other states have like jurisdiction. The uncertainty and confusion which would necessarily result is manifest. Ample authority has been given the commission, in circumstances like those here shown, to administer proper relief, and in connection therewith to approve some general rule of action. In so doing it would effectuate the great purpose for which the statute was enacted.

On June 1, 1908, before this proceeding was begun, the Interstate Commerce Commission ruled: "A carrier may not lawfully reimburse shippers for the expense incurred in attaching grain doors to box cars unless expressly so provided in its tariff." (Conference Ruling No. 78.) In National Wholesale Lumber Dealers' Assn. v. Atlantic Coast Line R. Co., 14 Inters. Com. Rep. 154, June 23, 1908, after much consideration, the commission refused to order carriers either to furnish flat cars equipped in all respects for transporting lumber or grant allowances for cost incurred by shippers in connection therewith. In New York State Shippers' Protective Assn. v. New York C. & H. R. R. Co., 30 Inters. Com. Rep. 437 (1914), the regulations and practices of railroads in Western New York with respect to car fittings used in bulk transportation of grain and produce were challenged. The shippers claimed: "It is the carrier's duty to supply cars at all seasons of the year, fully equipped for the safe transportation of grain, potatoes, and other produce in bulk without further fitting; or that if a car be tendered the shipper which cannot safely be used for such commodities, in view of their nature or of the condition of the weather, it is the carrier's duty to furnish, or to pay for, all materials and labor necessary to render the car reasonably safe." This was denied. The opinions in these causes strikingly indicate the complicated administrative problem involved.[62]

We find no error in the judgment below, and it is affirmed.

[62] As to the duty under the Interstate Commerce Act (U. S. Comp. St. § 8563 et seq.) in respect of service of elevation, see Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 32 S. Ct. 22, 56 L. Ed. 83 (1911), and Union Pacific R. Co. v. Updike Grain Co., 222 U. S. 215, 32 S. Ct. 39, 56 L. Ed. 171 (1911). In the case last cited Lamar, J., said: "The long-mooted question as to whether elevation was such a part of transportation as to bring it within the jurisdiction of the Interstate Commerce Commission was answered by the Act of June 29, 1906, * * * in which Congress declared that 'the term "transportation" shall include * * * all * * * facilities of shipment, * * * irrespective of ownership, * * * and all services in connection with the * * * elevation and transfer in transit * * * and handling of property transported [U. S. Comp. St. § 8563].' * * *"

HORTON et al. v. SOUTHERN RY. CO.

(Supreme Court of Alabama, 1911. 173 Ala. 231, 55 So. 531, Ann. Cas. 1914A, 685.)

Suit by T. B. Horton and others against the Southern Railway Company. From a decree denying a temporary injunction and dismissing the bill, complainants appeal.

MAYFIELD, J.[63] Appellants filed this bill to enjoin the appellee railway company from removing its passenger depot from its present location to another, some 3,600 feet distant. The bill alleges that the present site is centrally located in Tuscumbia, which is a city of 4,000 or more inhabitants, and contains property assessed at a valuation of $2,000,000; that about 42,000 tickets are annually sold from this depot over the main and branch lines of the railroad; that the present depot is located very near that of the Louisville & Nashville; that it has been so located for about 65 or 70 years; that within a radius of 600 feet are located the hotel of the complainants and the principal business houses of the city, including two banks, the post office, city hall, courthouse, etc., and that within a radius of 1,000 feet are located the Methodist, Presbyterian, Baptist, and Episcopal churches, and within 1,500 feet is the public school building; that the defendant proposes to remove the station to a locality 3,600 feet distant, and that the newly selected and purposed site is inaccessible; that leading to and from it are no macadamized streets nor paved sidewalks, no water mains, electric car lines, etc. The bill alleges that the station is on the present ancient main line of the Southern Railway, and that said railway proposes to remove the depot to the outskirts of the city in order to put it upon the new main line, which the bill alleges will make a circuitous detour, and not tend to strengthen the line of the railway. The bill alleges, further, that complainants' hotel, the Parshall House, is near the depot, and is a convenient stopping place for many passengers coming to and going from Tuscumbia; that both the hotel and depot have been maintained at their present sites for many years, for at least two generations; and that to change the location of the depot would entail great loss upon the complainants, and would inconvenience the traveling public. The bill was accompanied by affidavits in support of the allegations of the bill.

Upon the hearing of the application for a temporary writ of injunction, and after notice to the defendant, it filed a number of affidavits for the consideration of the court, which affidavits were to the effect that the Railroad Commission of the state had passed upon and approved the proposed change; that the Commercial Club of the city of Tuscumbia had filed a protest with the Railroad Commission against the location of the depot at the place designated in the bill; that the com-

63 Parts of the opinion are omitted.

mission went upon the proposed site, and, in company with the complainants and others, examined the entire situation; that, after having once passed upon the question, they granted a rehearing, and after due consideration the commission unanimously entered an order declining to interfere in the matter of the proposed change. A copy of the order of the commission was made an exhibit of the affidavit used upon hearing. Upon the hearing of the application for the temporary writ of injunction, the chancellor reached the conclusion that the chancery court was without jurisdiction and power to entertain the bill, and to grant the relief sought.

The chancellor in his opinion which accompanies his decree dismissing the bill states that the bill makes no pretense that the court's aid can be invoked under any provision in the charter under which the defendant operates its road, and that there is no common-law principle upon which the jurisdiction of the court can be rested; that the Legislature of Alabama had undertaken to regulate the business of common carriers in this state, and to this end had created a railroad commission, upon which it had conferred power to supervise the location of passenger and freight depots, etc.; that the location of such depots should be left to the discretion of the commission; that, while the railroad company was charged with the duty of furnishing reasonably adequate and suitable depot facilities, this matter was referred to the Railroad Commission by the Legislature, and that the proposed change had met with the approval of said commission; that the chancery court should not interfere unless it clearly appeared that there was gross and arbitrary abuse of the authority. The Chancellor further expressed the opinion that, if the court's aid could be invoked in such a case as made by the bill, it should be by a public proceeding in the name of the state, and not by individuals; otherwise there would be no end to the litigation, as every individual affected in the slightest degree by the change of the site of the depot could maintain a suit. It is said on high authority that it is a part of the common-law duty of railroad companies, which are common carriers, to establish and maintain stations and depots along their roads sufficient to furnish reasonable facilities for the use of their lines by the public who may desire to use the same as travelers or shippers. State v. Republican Valley R. R., 17 Neb. 647, 24 N. W. 329, 52 Am. Rep. 424; Id., 18 Neb. 512, 26 N. W. 205.[64]

[64] As to whether a duty exists at common law, the cases are not in agreement. In People v. Chicago & Alton R. R. Co., 130 Ill. 175, 22 N. E. 857 (1889), mandamus was granted on demurrer; but see Chicago & Alton R. R. Co. v. People, 152 Ill. 230, 38 N. E. 562, 26 L. R. A. 224 (1894), where mandamus, after a trial of the same case on the facts, was reversed. In Concord & M. R. v. Boston & M. R., 67 N. H. 464, 41 A. 263 (1893), the parties were in agreement that a union station should be built, but could not agree upon a location. A petition to the court to locate the station was challenged on the ground of jurisdiction. The court said: "In the absence of a court of special and limited jurisdiction authorized to administer a particular law requiring judicial action, legal rights are maintained by the court of gen-

There is no doubt that the Legislature may require such railroads as are common carriers to establish depots or stations at particular points, if not so unreasonable as to amount to a confiscation of the property or destruction of the business of the railroad. Commonwealth v. Eastern Co., 103 Mass. 254, 258, 4 Am. Rep. 555.

The Legislature may also confer this power upon a railroad commission which may determine whether stations shall be located at certain places, and their conclusions may be made final, or they may be made reviewable by the courts. Com'rs v. Portland Railroad Co., 63 Me. 269, 18 Am. Rep. 208. The court of New York, in the case of People v. N. Y. R. R. Co., 104 N. Y. 66, 9 N. E. 856, 58 Am. Rep. 484, refused to grant a mandamus to compel a railroad company to construct and maintain a station and a warehouse sufficient to accommodate a town of more than a thousand inhabitants, and which supplied a large passenger and freight business to the road, although the Railroad Commission of New York had recommended [65] such station and warehouse. The court in that case said: "A plainer case could hardly be presented of a deliberate and intentional disregard of the public interests and the accommodation of the public. No doubt, as the respondent urges, the court may by mandamus also act in certain cases affecting corporate matters, but only when the duty concerned

eral jurisdiction performing its ordinary duty of rendering judgment and issuing process in cases in which there is no other judicial mode of administering the law. The right of these parties and the public to have the union station at Manchester located in the proper place is a legal right, the enforcement of which is not prevented by the circumstance that the remedial power is not conferred upon a tribunal of special and limited jurisdiction. It is a right which can be judicially determined at the trial term upon a petition or bill in equity seeking such relief. The procedure will be such as is considered most appropriate for the work to be done. Walker v. Walker, 63 N. H. 321, 56 Am. Rep. 514." See 12 Harv. Law Rev. 280. See State v. Chicago, St. P., M. & O. R., 12 S. D. 305, 81 N. W. 503, 47 L. R. A. 569 (1900). In McDonald v. Chicago & Northwestern R. R., 26 Iowa, 124, 138, 95 Am. Dec. 114 (1868), the court said: "But I have no hesitation in saying that, without any statute enacting it, there is a common-law duty on these companies to provide reasonable accommodations at stations for the passengers who are invited and expected to travel on their roads." The existence of such a duty was denied in People v. N. Y. L. E. & W. R. Co., 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484 (1887), discussed in the principal case; State v. Kansas City, etc., R. Co., 51 La. Ann. 200, 25 So. 126 (1899); State v. Ogden Rapid Transit Co., 38 Utah, 242, 112 P. 120 (1910), collecting the cases. See Northern Pac. Ry. Co. v. Washington Territory, 142 U. S. 492, 12 S. Ct. 283, 35 L. Ed. 1092 (1892); Mobile & Ohio R. v. People, 132 Ill. 559, 24 N. E. 643, 22 Am. St. Rep. 556 (1890). See, also, Nashville, C. & St. L. Ry. Co. v. State, 137 Ala. 439, 34 So. 401 (1903), and Florida Cent. & P. R. R. Co. v. State, 31 Fla. 482, 13 So. 103, 20 L. R. A. 419, 34 Am. St. Rep. 30 (1893).

As to the validity of contracts whereby a railway company agrees to locate a station at a designated place: Ford v. Oregon Electric R. Co., 60 Or. 278, 117 P. 809, 36 L. R. A. (N. S.) 358, Ann. Cas. 1914A, 280 (1911), void; Atlanta & W. P. R. Co. v. Camp, 130 Ga. 1, 60 S. E. 177, 15 L. R. A. (N. S.) 594, 124 Am. St. Rep. 151, 14 Ann. Cas. 439 (1908), and note in 15 L. R. A. (N. S.) 594, valid; also, L. R. A. 1916F, 691.

65 Under the statute it was held that the action of the commission was a recommendation only, without the force of law.

is specific and plainly imposed upon the corporation. Such is not the case before us. The grievance complained of is an obvious one, but the burden of removing it can be imposed upon the defendant only by legislation." * * *

The case nearest in point to the one in hand which we have been able to find, and probably as near as could be found, is that of Jacquelin et al. v. Erie Ry. Co., 69 N. J. Eq. 432, 61 A. 18. In most of the cases we have examined mandamus seems to have been the remedy pursued to compel the location, or to prevent the removal, of stations and depots; but in the Jacquelin Case the remedy sought was by injunction, as in the case at bar, and the bill was filed by property owners and citizens of the town to prevent the removal of the station and depot, and practically the same condition of facts was alleged in that bill to exist that we have in the case at bar, and the damages and inconveniences there alleged to be the necessary consequence of the change in the location of the depot were similar to those here set up. Consequently there can be no doubt that it is an authority in point, unless the Constitution and statutes regulating railroads in the two states or those pertaining to pleading and practice render it not an authority. The case seems to have been fully and well considered, and a great number of authorities are cited in support of its holdings. The bill in the New Jersey case was originally filed by one Jacquelin, and it was subsequently amended by the addition of a number of other parties as complainants, including a great number of business firms and associations, and the borough of Orville. The bill sought an injunction to restrain the railroad company from discontinuing the use of its station at Hobokus, and to require it to retain and maintain a station at that point. The bill alleged that the station at that point was the only station within the limits of the borough of Orville, and that the nearest stations thereto were those of Undercliff (about four-fifths of a mile distant) and Waldick (about a mile and a half distant). In this respect the case corresponds very closely with the one at bar, where the proposed new site is some 3,600 feet from the present location. Affidavits accompanied the bill in that case, and others by the respondent railroad company were filed upon the hearing—all bearing upon the propriety of the proposed change of site of the station, and showing a similar state of affairs to that made by the bill and affidavits in the case under consideration. In that case, as in this, the exact question for determination was whether a court of equity could grant a preliminary injunction, requiring a railroad company to continue to furnish railroad facilities at a station which the company desired to abandon; there being no charter or statutory requirements as to continuing the station at such point.

One point of difference is in regard to the law of the two states; it being decided in that case that there were no statutes in New Jersey defining the duties of railroads with respect to the establishment and

maintenance of such railroad stations, whereas there are numerous statutes of that nature in this state. The contention was made in that case, as in this, that the equity of the bill depended upon either of two theories—that the complainants had a legal right which, under peculiar circumstances, the court of equity would protect, or that they had an equitable right which the court would respect. The equitable right is based on the contention that the railroad company by its conduct had induced the complainants and other people to purchase property, build homes, and establish businesses at or near the station; that it had advertised the place as one where the public would be served; and that it would be inequitable to permit the railroad company to decline to make good its implied promise to continue to so maintain the station. The court in that case held that, if any such right as this existed, it was a legal, and not an equitable, right, and that a court of equity had no jurisdiction to enforce specifically such implied contract; that a court of equity could not specifically enforce such contract if it were an express instead of an implied one, because such an agreement would be against public policy; and that the railroad company and such contracting parties would have to be remitted to a court of law to a suit for damages rather than to a court of equity for specific enforcement of such contract, upon which proposition many authorities were cited. In that case the court declined to consider the question whether or not the complainants were the proper parties to enforce the specific performance of such contract or duty, if it existed, and was capable of such performance; or whether such suit should be brought by the Attorney General on behalf of the state as a necessary party complainant. It will be observed that, while the relief here sought is in form to restrain by prevention, it is in effect to compel performance; that is, to compel the railroad company to continue to use its present station. While railroads are quasi public corporations, and may be compelled by courts to perform the duties enjoined upon them by law, the difficult question presented is, Can a court compel a railroad company which is a common carrier to perform a duty which is not enjoined upon it by its charter nor by any other express statutory provision?

The law is well settled that a public corporation, such as a municipal one, cannot be compelled to perform any duty that is not enjoined upon it by its charter or other statutory law. It has been held by the great majority of the courts, in both England and America, state and federal, that the subject of regulating the operation of railroads and common carriers, in both the matter of locating and maintaining depots, warehouses, and like accommodations for passengers and patrons, and that of schedules, speed, and mode of operating trains, etc., is a question for the legislative department of the government, and not for the judicial; that the courts cannot originate provisions with respect thereto, but can only interpret and apply to these subjects the law as it may have been ordained by the legislative departments.

It is certainly true, however, that, wherever there is a positive duty imposed by law upon such common carriers, the courts have the power to enforce its performance or discharge, and to restrain actions in excess of the powers and rights granted to such public service corporations. It must be conceded, however, that the authorities are in conflict upon the proposition as to the power of courts to interfere with, or to direct or control, the management and operation of a railroad as to the location and maintenance of depots, stations, etc., and the line of its road, where there is no statutory or legislative requirement upon the subject. As has been before pointed out, the decisions of the courts of Nebraska and Illinois seem to hold that the courts have power and jurisdiction to interfere with the management and operation of railroads in these matters, and certainly so, in extreme cases, where the public would otherwise suffer irreparable loss. But, as held by the New Jersey court and by the Supreme Court of the United States, the correctness of these decisions may well be doubted; and the decisions of the court of Illinois upon the subject are very much in conflict with one another. It has, however, become the declared policy of a great number of states that this question should be dealt with by the Legislature, and many of them have constitutional provisions relative to conferring powers and enjoining duties upon such public service corporations in these matters which so much concern the public. These provisions require that the Legislature shall provide by law for the construction and operation of railroads; and in pursuance of these powers (and sometimes without them) the Legislatures of the several states have provided by statute for the settlement of many questions which arise between the railroad companies and the public; and such is the law in this state.

Section 243 of our Constitution of 1901 provides, among other things, that the power and authority of regulating railroad freight and passenger tariffs, the locating and building of passenger and freight depots, the correcting of abuses, preventing of unjust discriminations, etc., are conferred upon the Legislature, whose duty it shall be to pass laws from time to time for such regulation. The Constitution makers could, of course, have committed this subject to the courts, but they have seen fit to commit it to the Legislature. The Legislature, for the evident purpose of carrying out these constitutional provisions, has passed a great number of statutes upon this subject, which have been repeatedly changed, at nearly every session, and sometimes completely twice revised at one session of the Legislature. But in the main, as to the power and authority of regulating railroad passenger and freight tariffs, of locating depots, of correcting abuses, of preventing unjust discriminations and extortions, and of requiring reasonable rates, etc., the Legislature has conferred these powers and duties upon a railroad commission created by act of the Legislature, and provided for their enforcement. A part of these statutes are now embraced in various sections of the Code. Those provisions pertinent for reference here are as follows: Sec-

tion 5651 of the Code of 1907 provides that the Railroad Commission is charged with the duty of supervising, regulating, and controlling all transportation companies doing business in this state in all matters relating to the performance of public duties, and of correcting abuses by such companies, and requiring them to establish and maintain all such public service conveniences as may be reasonable and just. Section 5652 of the Code, almost copying the constitutional provision above referred to, provides that common carriers shall be subject at all times to the control of the Legislature, which may regulate freight and passenger tariffs, the locating of depots, etc., correct abuses, prevent unjust discriminations, and establish and regulate reasonable and just rates of passenger and freight tariff. Section 5667 of the Code provides for a complaint which any person or association may make against a transportation company as to any service in connection therewith in any respect unreasonable, unjustly discriminatory, or inadequate, such complaint to be made to the commission, which may notify the transportation company of same; and 10 days after such notice the commission may proceed to investigate the complaint; the conduct of such investigation being provided for in other sections of the Code.

We are of the opinion that it is the declared policy of this state to commit the regulation of matters such as are complained of in this bill to the Legislature, and that the Legislature, in turn, has committed it to the Railroad Commission, which has power to act in the premises, and is the proper and appropriate tribunal in which to right such wrongs, and that for a chancery court to attempt to determine which of two sites in a certain town a railroad depot should be located on or maintained upon would be usurping the functions and powers which the Legislature and Constitution have seen fit to repose in another tribunal, which is given legislative, judicial, and administrative functions necessary to perform the duties enjoined upon it by law. In the case of Nashville, Chattanooga & St. Louis Railway v. State, 137 Ala. 439, 34 South. 401, this court, speaking through Dowdell, J., its present Chief Justice, said: "The demurrer to the bill raises the question as to the jurisdiction and power of the court to entertain the bill and grant the relief sought. There is no pretense of authority for the filing of the bill under any provision of the charter of the defendant company. We must therefore look to the statutes alone for authority of the Railroad Commission to make the order, and for the jurisdiction of the court to entertain a bill for its enforcement. It seems that there is no common-law principle upon which such jurisdiction can be vested. While a corporation which is quasi public in its character and owes duties to the citizens which the court can and will in appropriate remedies compel it to respect, yet the location of stations and the building of depots is not within such duties when not imposed by the Legislature." The bill in that case was filed to compel the railroad company to obey an order of the Railroad Commission, requiring it to locate a station and erect a

depot, suitable for the accommodation of passengers and the handling of freight, in the town of Guntersville, the county seat of Marshall. It was shown in this case that the depot had been located just outside of Guntersville, in the town of Wyeth, and that the depot was maintained for the two towns jointly. What was said in that case is in part applicable to the facts made by the bill in this case. This court further held in that case that the statutes of this state at that time conferred nothing more than advisory functions upon the Railroad Commission, with no power to compel performance; it being authorized only to notify the railroad company what the commission deemed to be necessary changes, and to report such action to the Governor, that such authority to advise the company and report the Governor fell far short of power to order and compel the performance of their advice. But since the rendition of this decision these statutes have been several times revised and amended by the Legislature, and much more extended powers are now conferred, and more important duties enjoined, upon the Railroad Commission. It now has authority to act and require where before it had authority only to suggest and advise, and report its action to the Governor. It now has power to hear and determine the question of locating and maintaining depots and stations; and the Legislature has gone very far toward conferring upon it the powers and duties reposed in the Legislature by the Constitution. These additional powers and duties were no doubt suggested to the Legislature by the decision of this court in the case above referred to, and, whatever defects the statutes may yet have, they have not those above mentioned. * * *

It was shown upon the hearing of the application for temporary injunction, by the affidavits and exhibits introduced in evidence on the part of the complainants, that irreparable injury would ensue if the preliminary injunction did not issue; and we confess that the bill and these affidavits make a very strong case that injury will result to the complainants and other residents of the town of Tuscumbia, which cannot be easily repaired, if the railroad company does not continue to maintain its depot at its present location, and this showing would be a very strong appeal to a court of equity if such court had jurisdiction to confer the relief requested. But, on the other hand, the railroad company insists, and has introduced affidavits and exhibits to show, that it will continue to maintain reasonable railroad facilities for the accommodation of the people of Tuscumbia and the public generally, and that a change of sites will be beneficial and not detrimental to the interests of the people of the town as alleged in the bill. It further appears from this record that all these matters have been twice heard by the Railroad Commission, and that it has declined to interfere with the railroad company in consummating the proposed change in the location of its depot in Tuscumbia.

Therefore, notwithstanding the strong showing made by the bill, it

is evident that the complainants' rights have not been established at law, nor are their rights clear and indisputable in such sense that a court of equity would grant relief by injunction. Under all the authorities above referred to, we are constrained to hold in this case that the decree of the chancellor dismissing the bill and denying the temporary injunction sought was proper. To hold otherwise and grant the relief prayed would be to hold that the chancery courts of this state may locate the stations and depots of the railroads at such points as the court shall determine best, or, at least, to hold that the railroad companies cannot discontinue stations at points once established, when it is decided by such court that it would be better for the public or some individual that the station be not removed. * * *

It follows that the decree of the Chancellor should be affirmed.

Affirmed.[66]

DOWDELL, C. J., and SIMPSON and MCCLELLAN, JJ., concur.

RAILROAD COMMISSION OF CALIFORNIA v. SOUTHERN PAC. CO. et al. SAME v. ATCHISON, T. & S. F. RY. CO. SAME v. LOS ANGELES & S. L. R. CO.

(Supreme Court of the United States, 1924. 264 U. S. 331, 44 S. Ct. 376, 68 L. Ed. 713.)

Mr. Chief Justice TAFT delivered the opinion of the court.[67]

The question in this case is whether the state Railroad Commission of California has power to require the Southern Pacific Company, the Atchison, Topeka & Santa Fé Railway Company, and the Los Angeles & Salt Lake Railroad Company to build an interstate union depot in the city of Los Angeles.

66 On the power of the state to compel railway companies to build and maintain depots, see State v. Minneapolis & St. L. R. Co., 87 Minn. 195, 91 N. W. 465 (1902), affirmed 193 U. S. 53, 24 S. Ct. 396, 48 L. Ed. 614 (1904). See State v. Northern P. Ry. Co., 90 Minn. 277, 96 N. W. 81 (1903); and see L. R. A. 1915D, 91, for note on "Power to Compel Change of Location of Railroad Station." On the question whether a common carrier can be required by judicial process to unload freight and passengers at places other than such as it may choose and hold out as stopping places, Schanen-Blair Co. v. Southern Pac. Co., 68 Or. 106, 136 P. 886 (1913). And see Aandahl v. Great N. Ry. Co., 41 N. D. 577, 171 N. W. 628 (1919). As to the power of a state to compel interstate trains to stop at local stations, see Herndon v. Chicago, R. I. & P. R. Co., 218 U. S. 135, 30 S. Ct. 633, 54 L. Ed. 970 (1910). As to various kinds of accommodations and conveniences, see St. Louis, I. M. & S. Ry. Co. v. Wilson, 70 Ark. 136, 66 S. W. 661, 91 Am. St. Rep. 74 (1902), heating; Gulf, C. & S. F. Ry. Co. v. Williams (Tex. Civ. App.) 251 S. W. 553 (1923), heating; 6 Mich. Law Rev. 150, heating; Chicago & A. R. Co. v. Walker, 217 Ill. 605, 75 N. E. 520 (1905), opening and closing waiting rooms; Phillips v. Southern Ry., 124 N. C. 123, 32 S. E. 388, 45 L. R. A. 163 (1899), do.; Louisville & N. R. Co. v. Clark, 205 Ala. 152, 87 So. 676, 14 A. L. R. 695 (1920), clocks in waiting rooms.

67 Parts of the opinion are omitted.

The proceedings were begun in 1916 before the Railroad Commission by complaints of civic associations and others against the railway companies. Before the hearing and the decision were had, the Transportation Act of Congress of 1920 was enacted. Comp. St. Ann. Supp. 1923, § 10071¼a et seq. In December, 1921, after two hearings, an amended order against the railways was made, by which they were required to remove certain grade crossings and to build a union terminal within a certain defined area in the city.

The railway companies sought review of this order in the Supreme Court of the state, and their three writs were heard and disposed of as one case. The Supreme Court of the state held that the order was beyond the power of the state Railroad Commission, because the subject-matter was committed to the Interstate Commerce Commission by the Transportation Act of 1920. The court further held that, if the order had effected the elimination of grade crossings alone, it would have been valid, but that, associated as it was with the establishment of the union station, it must be annulled. We have brought the case of the Commission against each of the railways here by certiorari.

Lines of the three railways approach Los Angeles from the north and come together in the city near the North Broadway viaduct, as it crosses the Los Angeles river. * * *

The order of the Railroad Commission requires the abandonment of the passenger stations of the three railways. The Southern Pacific station is a comparatively modern depot and would be adequate for many years. Those of the other two companies are not adequate, but they have ample ground upon which to construct suitable stations. The order required the removal from Alameda street of the main line of the Southern Pacific for three miles, permitting the use of its tracks in that street for switching during a few hours at night. The order also required that, by viaducts over the river and over the Salt Lake and Santa Fé tracks on the river banks, grade crossings should be eliminated. The order further required that the three railways should purchase jointly land enough in an area reaching from Alameda street to the river and from Aliso street to Alhambra street to erect a suitable union station, to be situated somewhere near a square called the Plaza. The railways are directed to make such additions to, extensions of, improvements and changes in, the existing railroad facilities of said companies as may be reasonably necessary and incidental to the use of said union passenger station. This would require the removal of the present station of the Southern Pacific from Fifth street toward the Plaza, at least half a mile, and the stations of the Santa Fé and the Salt Lake from First street on the river to the Plaza, more than a quarter of a mile. The changes to be effected under the order will require, in the abandonment of the Southern Pacific main track on Alameda street for three miles, a joint use by the Southern Pacific of main tracks on the river bank with either the Salt Lake or the Santa Fé, or the con-

struction of its own main tracks on one side or the other along the river bank. The main tracks of the Salt Lake must be extended across the Los Angeles river on a viaduct to the area selected for the union station. The main track of the Santa Fé runs along the river side of the selected area, but an extension of its main tracks will have to be made to bring it into the new station.

The order requires the joint use of land, tracks, and terminal facilities valued at $28,050,691, the abandonment of three existing passenger stations of the railways as such, and the ultimate capital expenditure for all recommendations of from $25,000,000 to $45,000,000.

The Railroad Commission in the Supreme Court of the state pressed the argument that, in view of its finding that the union station was an indispensable element in getting rid of the grade crossings, it had the incidental right to order its building. The court rejected the argument. It said:

"That notwithstanding the views expressed by the Railroad Commission in its findings and conclusions in the proceeding herein presented for review, we can perceive no indispensable relation between the elimination of grade crossings and the establishment of union depot facilities, nor can we see an unsurmountable difficulty why jurisdiction over the matter of eliminating grade crossings may not be exercised in a proper case consistently, and it may be concurrently, with the exercise of the authority which is vested by the act of Congress of 1920 in the Interstate Commerce Commission over the subject of union terminal depot facilities."

The state Supreme Court thus modifies the findings of the Railroad Commission, in so far as they sought to tie the validity of its order establishing a union station to its unquestioned police power to regulate grade crossings in the interest of the public safety. We avoid any inquiry how far, if at all, the principle laid down in Erie R. Co. v. Board of Public Utility, 254 U. S. 394, 41 S. Ct. 169, 65 L. Ed. 322, is qualified by the provisions of the Transportation Act. Our only question here is whether the power to direct a new union station with its essential incidents is committed exclusively to the Interstate Commerce Commission under the act of 1920. * * *

On the one hand, it is urged that, with the purposes thus declared, the act commits to the supervision and control of the Interstate Commerce Commission such an undertaking as is here in question, involving a new capital investment of from $25,000,000 to $45,000,000 in the terminals of three great interstate railway systems in the largest city of our Western Coast. On the other hand, it is earnestly contended that, since no specific provision is made for the supervision of interstate union stations by the Interstate Commerce Commission, the whole subject remains in the control of the state Railroad Commissions. We must examine the sections of the act in some detail to determine the force of these counter contentions.

The term "railroad" is defined in the act (paragraph 3, § 1, as amended by section 400, Transportation Act [Comp. St. Ann. Supp. 1923, § 8563]) to include all switches, spurs, tracks, terminals and terminal facilities of every kind used or necessary in the transportation of persons or property including freight depots, yards and grounds used therein. Section 402, after defining the term "car service" under the act, as including use, control, distribution, and exchange of locomotives, cars and other vehicles used in interstate transportation, provides for just regulation of it by the Commission, and gives that body power in case of shortage of equipment or other emergency, to suspend the regulations, to give just directions, without regard to ownership, to promote the service and to adjust proper compensation for its use, and "to require such joint or common use of terminals including main track or tracks for a reasonable distance outside of such terminals, as in the opinion of the Commission will meet the emergency and the public interest and upon hearing determine just compensation for use of same. Paragraph 16 authorizes the Commission to provide transportation by other carriers if one carrier is unable to handle its traffic upon terms fixed by the Commission.

By section 405, amended section 3 of the Interstate Commerce Act (Comp. St. Ann. Supp. 1923, § 8565), provides in its third paragraph that all carriers shall afford all reasonable facilities for the interchange of traffic between their respective lines and for forwarding and delivering passengers. Paragraph 4 provides that the Commission may, in the public interest and without impairment of a carrier's power to handle its own business with its terminal facilities, require the use of its terminal facilities, including its main line track or tracks for a reasonable distance outside of its terminal for another carrier or carriers, upon such terms as may be agreed upon by the parties, fixed by the Commission or determined by suit as in condemnation proceedings.

It is obvious from the foregoing that Congress intended to place under the superintending and fostering direction of the Interstate Commerce Commission all increased facilities in the matter of distribution of cars and equipment and in joint terminals, in the exchange of interstate traffic and passengers between railways so as to make it prompt and continuous. It not only provides for the temporary expropriation of terminals and main track of one railway to the common use of one or more other railways in an emergency, but it also contemplates the compulsory sharing of one company's terminals with one or more companies as a permanent arrangement. This is a drastic limitation of a carrier's control and use of its own property, in order to secure convenience and dispatch for the whole shipping and traveling public in interstate commerce. It gives to the Interstate Commerce Commission the power and duty, where the public interest requires, to make out of what is the passenger and freight station of one interstate carrier a union station or depot.

But it is insisted that the supervisory power thus conferred does not include the installation of an interstate union station, where its terminals and main tracks are newly built, and the interstate carriers are compelled to expropriate, not the terminal property of another interstate carrier, but property of others than carriers not theretofore used for terminals. This would be giving power to the Interstate Commerce Commission to provide for a small and contracted union station of interstate carriers, limited to the terminals of one carrier, and would leave the larger and more important union stations of interstate carriers to the control of state Commissions. We think, however, that means of control over installation of such new union stations for interstate carriers is given to the Interstate Commerce Commission in amended paragraphs (18 to 21) of section 402. They provide that no interstate carrier shall undertake the extension of its line of railroad or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation over such additional or extended line of railroad unless and until the Commission shall certify that public convenience present or future requires it, and that no carrier shall abandon all or any portion of its line or the operation of it without a similar certificate of approval. Such a certificate is, we think, necessary in the construction of a new interstate union station, which involves a substantial and expensive extension of the main tracks or lines of interstate carriers who theretofore have maintained separate terminals.

It is argued that paragraphs 18 to 21 of section 402 refer only to extensions of a line of railroad having the purpose to include new territory to be served by the interstate carrier and do not refer to an extension of new main track for the mere purpose of rearranging terminals within the same city. We do not think the language of paragraphs 18 to 21 can be properly so limited. We are confirmed in this by paragraph No. 22, which immediately follows:

"The authority of the Commission conferred by paragraphs 18 to 21, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one state, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

This is a palpable distinction between the main tracks of an interstate carrier and its spur, industrial, switching or side tracks, and shows the legislative intention to retain any substantial change in the main tracks within the control of the Interstate Commerce Commission. It may well be that a mere relocation of a main track of an interstate carrier which does not involve a real addition to, or abandonment of, main tracks and terminals, or a substantial change in destination, does not come within the paragraphs 18 to 21. One might, too, readily conceive of railroad crossings, or connections of interstate carriers in which the exercise by a state commission of the power to direct the construction of merely local union stations or terminals without ex-

tensions of main tracks and substantial capital outlay should be regarded as an ordinary exercise of the police power of the state for the public convenience and would not trench upon the power and supervision of the Interstate Commerce Commission in securing proper regulation of an interchange of interstate traffic or passengers. Only a lawful order of the Interstate Commerce Commission would raise a question of the power of a state commission in such cases, as the proviso of paragraph 17, section 402, of the Transportation Act shows:

"That nothing in this act shall impair or affect the right of a state, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this act."

But there is a great difference between such relocation of tracks or local union stations and what is proposed here. The differences are more than that of mere degree, they and their consequences are so marked as to constitute a change in kind. They come within paragraphs 18 to 21 of section 402 and require a certificate of the Interstate Commerce Commission as a condition precedent to the validity of any action by the carriers or of any order by the state commission.

The proviso of paragraph 21 of section 402 is significant of the distinction we are pointing out. It forbids the Commission to authorize or order the extension of its lines "unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension * * * that the expense involved therein will not impair the ability of the carrier to perform its duty to the public."

The extensions of the lines and main tracks of these railways under the plan which the state commission has ordered are not great in distance, but they involve a new intramural destination for each railway with important changes in the handling of interstate traffic and passengers. Great expense attends such changes of the main tracks in a crowded city, and they here carry with them, as necessarily incident thereto, the abandonment of available sites and of valuable existing passenger and freight stations and the construction of a new union station elsewhere, imposing on the three railways a cost in making the changes of from $25,000,000 to $45,000,000. We think it clear that in such an extension of main lines with their terminals the Interstate Commerce Commission is required by the act to make a finding that the expense involved will not impair the ability of the carriers concerned to perform their duty to the public.

The purpose of Congress to prevent interstate carriers from incurring expense which will lessen their ability to perform well their interstate functions is further shown in section 439 of the Transportation Act (Comp. St. Ann. Supp. 1923, § 8592a) whereby the Interstate Com-

merce Act is amended by insertion of section 20a. This new section subjects to the approval or rejection of the Interstate Commerce Commission the issue by an interstate carrier of all future shares of stock, bonds, or other evidence of indebtedness, and forbids approval unless the Commission shall find that their issue is for a lawful purpose, is compatible with the public interest, is appropriate and necessary to the discharge of its public duty as a common carrier and will not impair its ability to perform that service. This is of course in pari materia with the restriction of paragraph 21 of section 402 to prevent a possible impairment of the financial ability of interstate carriers to discharge their interstate commerce duties. Such a heavy burden as that involved in this new union station and the main track changes and extensions and other accessories would in all probability require the three railways to issue new capital securities, and this could not be done without the approval of the Interstate Commerce Commission. To be sure this provision only becomes operative when securities have to be issued, and would not, of itself, prevent action by a state commission until such securities are seen to be necessary; but the provision indicates the general congressional plan.

We were advised by statements at the bar that, after the California Supreme Court handed down its decision in this case, the city of Los Angeles filed a petition with the Interstate Commerce Commission, asking for an order to provide, maintain, and use a union station, that a hearing followed, and that, pending the decision in this court, the matter is held under consideration.

For the reasons given, we think the course taken by the city of Los Angeles was the correct one. Until the Interstate Commerce Commission shall have acted under paragraphs 18 to 21 of section 402 of the Transportation Act, the respondent railways cannot be required to provide a new interstate union station and to extend their main tracks thereto as ordered by the state Railroad Commission.

The judgment of the Supreme Court of California is

Affirmed.[68]

[68] For state cases involving the question as to what power is left to the states since the enactment of the Transportation Act, see Chicago, R. I. & P. Ry. Co. v. State, 90 Okl. 173, 217 P. 147 (1923), and Shealy v. Southern Ry. Co., 127 S. C. 15, 120 S. E. 561 (1924). See State ex rel. Burr v. Seaboard Air Line Ry. Co. et al. (Fla.) 104 So. 602, 39 A. L. R. 1362 (1925). For a note on "Power to Require Establishment of Union Station," see L. R. A. 1915D, 98.

CLEVELAND v. MALDEN WATERWORKS CO.

(Supreme Court of Washington, 1912. 69 Wash. 541, 125 P. 769.)

Mandamus proceeding by Charles E. Cleveland against the Malden Waterworks Company. From an order granting a peremptory writ, respondent appeals.

CHADWICK, J.[69] The material facts in this case are as follows: The plaintiff, Cleveland, is the owner of a lot abutting on Ninth street, in the town of Malden, in Whitman county. The defendant water company is a public service corporation, owning and operating a water system along Ninth street and other streets of the town, under a franchise from the town council. Sections 1, 2, * * * and 4 of the ordinance granting the franchise read as follows:

"Section 1. That the Malden Waterworks Company, a corporation existing under the laws of this state, its successors or assigns, be and is hereby granted the right and privilege of excavating and laying pipes and mains in the public streets and alleys of said town for the purpose of furnishing to its inhabitants fresh water for domestic and sewerage purposes and for fire protection and otherwise as may be designated by proper ordinance for a period of twenty-five years from the granting and acceptance of this ordinance.

"Sec. 2. The said corporation shall lay such pipes and place hydrants as directed by the street committee or such other committee of said town as may be charged with the duties of looking after the streets and alleys, provided that a sufficient number of persons on the streets to be benefited by said extensions shall first petition and sign contracts with the company guaranteeing twelve per cent. net on the estimated cost of said extension, which said pipes and mains shall be of sufficient size and of quality to furnish ample and sufficient water for all purposes intended and to be placed and extended for consumer's use, and commence the laying of same within such time as designated by resolution of the council and directions of the said street committee. * * *

"Sec. 4. That said corporation may charge and collect such tolls for the furnishing of water to users and consumers as shall be considered reasonable and just to give them fair return on the investment, which price may be changed and revised at periods of five years after the first ten-year period, if so requested by resolution of the council and for a period of the first ten years the following rates shall be the maximum monthly amount which can be charged for the water under such reasonable rules and regulations as may be promulgated by said corporation: * * * Private dwellings, four rooms or less, $1.50. * * *"

The plaintiff tendered to the defendant company the sum of $1.50, and demanded that it furnish water to him through its pipes at the property line of Ninth street, for use in his dwelling house on the lot above

[69] Part of the opinion is omitted.

described. The company refused to comply with this demand, unless the plaintiff would pay the further sum of $14.50, the cost of extending the pipe line from the main to the property line and making the connection with the main. This proceeding was thereupon instituted, and resulted in the issuance of a peremptory writ of mandate, requiring the water company to comply forthwith with the demand of the plaintiff. From this order, the present appeal is prosecuted.

From the foregoing statement, it will be seen that the sole question presented for decision is whether the property owner or the water company must defray the expense of conducting the water from the main to the property line and making the necessary connection with the main. In the absence of a valid contract or legislative control in the matter of its rates, a water company may fix and collect rates for furnishing water, provided they are reasonable and just and do not discriminate. A reasonable rate depends in a large measure upon the amount of money invested and the returns received. State ex rel. Webster v. Superior Court, 67 Wash. 37, 120 P. 861.

If the company only lays its mains in the streets, it will, as a matter of course, have less money invested than if it carries its pipes to the property line of each individual consumer, and will be compelled to charge less in the former case than in the latter; and, if there be no contract or statutory or municipal regulation in the way, a regulation requiring the property owner to defray the expense of piping and conducting the water from the main to his property line, and in addition to pay a reasonable monthly charge for the use of the water, would not seem unreasonable, provided the two charges combined be but a reasonable charge for the services rendered. But this case is controlled by the franchise ordinance, which requires the company to furnish water to users and consumers at certain fixed rates; and we are of opinion that it is not so furnished, within the meaning of the ordinance, unless it is delivered to the consumer at his property line. Pocatello Water Co. v. Stanley, 7 Idaho, 155, 61 P. 518; Bothnell v. Consumers' Co., 13 Idaho, 568, 92 P. 533, 24 L. R. A. (N. S.) 485; Hatch v. Consumers' Co., 17 Idaho, 204, 104 P. 671; International Water Co. v. El Paso, 51 Tex. Civ. App. 321, 112 S. W. 816; Pine Bluff Corporation v. Forey, 96 Ark. 345, 131 S. W. 680, Ann. Cas. 1912B, 544.

The case of State ex rel. Foley v. Hillyard Water Co., 49 Wash. 232, 94 P. 1080, is not in conflict with the views here expressed. The court there held that the plaintiff was not entitled to water from the main from which he demanded it, and no franchise or contract obligation was involved.

The judgment is affirmed.[70]

CROW, GOSE, ELLIS, and PARKER, JJ., concur.

70 "The question of whether the company or consumer shall bear the expense of installing lateral pipes is governed where possible by the franchise, contract, or ordinances involved. Where the court can ascertain that the

PEOPLE ex rel. WOODHAVEN GASLIGHT CO. v. PUBLIC SERVICE COMMISSION OF NEW YORK.

(Supreme Court of the United States, 1925. 46 S. Ct. 83, 70 L. Ed. ——.)

Original proceeding by the People of the State of New York, on the relation of the Woodhaven Gaslight Company, to review by certiorari an order of the Public Service Commission of the State of New York. The order of the Commission was affirmed, and the proceeding dismissed, by the Appellate Division of the Supreme Court (203 App. Div. 369, 196 N. Y. S. 623), and that order affirmed by the Court of Appeals (236 N. Y. 530, 142 N. E. 271), and relator brings error.

Mr. Justice BUTLER delivered the opinion of the Court.

The gas company challenges the validity of an order of the Public Service Commission on the ground that it confiscates the company's property, is arbitrary and capricious, and therefore repugnant to the due process clause of the Fourteenth Amendment.

The order was made April 20, 1920, and directed the company to extend its mains to furnish gas to the residents of five communities—

company's rate charge was established on a computation of expenses which did not include the laying of laterals, the consumer should be made to bear the cost. See Cleveland v. Malden Waterworks Co., 69 Wash. 541, 125 P. 769 (1912); Fisher v. St. Joseph Water Co., 151 Mo. App. 530, 132 S. W. 288, (1910). In the absence of any such controlling factors, it is argued that the laterals are not a part of the general facilities of the water system, but are peculiarly for the benefit of the consumer, and should be installed by him. City of Wichita v. Wichita Water Co. (8th C. C. A. 1915) 222 F. 789, 138 C. C. A. 337. In many of the cases where the duty has been laid on the company, the courts have implied the obligation either because the rate allowed was deemed to cover such items (State v. Water Supply Co., 19 N. M. 36, 140 P. 1059, L. R. A. 1915A, 246, Ann. Cas. 1916E, 1290 [1914]), or because the consumer was excluded from excavating in the streets (Bothwell v. Consumers' Co., 13 Idaho, 568, 92 P. 533, 24 L. R. A. [N. S.] 485 [1907]), or else because the connecting pipes were deemed part of the system which the company was bound to maintain (International Water Co. v. El Paso, 51 Tex. Civ. App. 321, 112 S. W. 816 [1908]). While all of the reasons advanced are not conclusive, since abutting landowners may excavate, subject to reasonable municipal regulations (McClaugherty v. Water Co., 67 W. Va. 285, 68 S. E. 28, 32 L. R. A. [N. S.] 229 [1910], 3 McQuillin, Municipal Corporations, 1343), and will have a property right in the pipes laid by them (Jackson v. City of Ellendale, 4 N. D. 478, 61 N. W. 1030 [1894]; Mulrooney v. Obear, 171 Mo. 613, 71 S. W. 1019 [1903]), yet, in the absence of any controlling circumstances to the contrary, it would seem just to put the burden on the water company. The company is under a duty to supply water to the consumer, and this is not accomplished until the water is brought to the latter's property. The prescribed charge would seem to be for water delivered, rather than a fee permitting the consumer to tap the company's main. Cleveland v. Malden Waterworks Co., supra." 16 Col. Law Rev. 613, commenting on Birmingham W. Co. v. Hernandez, 196 Ala. 438, 71 So. 443, L. R. A. 1916E, 258 (1916). "Permission is expressly given to assess upon the householder the entire cost of installing service pipes beyond the street line (Transp. Corp. Law, § 62; Consolidated Laws, c. 63; Moore v. Champlain Electric Co., 88 App. Div. 289, 85 N. Y. S. 37 [1903]), and to demand a deposit in advance sufficient to pay therefor." Cardozo, J., in City of Rochester v. Rochester Gas & Electric Corporation, 233 N. Y. 39, 134 N. E. 828 (1922).

Locust Manor, Locust Lawn, South Jamaica Place, Springfield, and Laurelton—in the borough of Queens, New York City, and that the extensions be completed and put in service by November 1, 1920. On the petition of the company the proceedings were taken on writ of certiorari to the Appellate Division of the Supreme Court of the state, and were there confirmed. 203 App. Div. 369, 196 N. Y. S. 623. The order of that court was affirmed by the Court of Appeals. 236 N. Y. 530, 142 N. E. 271. The case is here under section 237 of the Judicial Code (Comp. St. § 1214).

At the argument in this court, October 12, 1925, the commission suggested that no real controversy exists, and, upon leave granted, filed a motion to dismiss. The grounds asserted are that, since the writ of error issued June 5, 1923, the company has laid mains to serve two of the communities, and, as a part of its present plan to furnish gas to the other places named in the order, has laid mains in adjacent territory. Affidavits were filed by the commission in support of the motion, and by the company in opposition. Taken together, they show that the order has not been complied with; that a part of the extensions ordered has been laid, but that the company has not planned, and does not intend, presently to lay the mains necessary to furnish gas to all the communities directed to be served. The company is unwilling fully to comply with the order, and maintains that it is invalid. If the judgment of the state court is not reversed, summary proceedings to compel the company to obey the order may be brought by the commission in the state court. Section 74, Public Service Commissions Law (chapter 48, Consolidated Laws, New York). And this court cannot say that the facts shown would constitute a defense. The case is not moot. The motion to dismiss will be denied. Cf. Brownlow v. Schwartz, 261 U. S. 216, 217, 43 S. Ct. 263, 67 L. Ed. 620; Levinson v. United States, 258 U. S. 198, 202, 42 S. Ct. 275, 66 L. Ed. 563.

The company has long had the privilege of laying gas mains in the streets and other public ways of the town of Jamaica (now the Fourth ward of the borough of Queens) to distribute gas for street lighting and other purposes. It does not appear that any other utility is authorized to furnish gas there, and it is to be assumed that these communities are dependent upon this company for service. When reasonably required, the company is in duty bound to furnish gas to inhabitants of the territory covered by its franchise.[71] People ex rel. Woodhaven Gas Co. v. Deehan, 153 N. Y. 528, 533, 47 N. E. 787. And the commission is empowered by statute to require reasonable extensions of the mains and service. Section 66 (2), Public Service Commissions Law, supra. In the territory already served by the company there are 150 consumers per mile of main. The sections for which service is

71 See In re Vance (Okl.) 241 P. 164 (1925), for a discussion of the public utility's obligation being limited by the extent of its profession; and see, also, footnote 2, page 313.

ordered are residential communities. They have had water and electric service for many years. The houses already there, and those being built, are of a kind to indicate that, if brought within reach, gas will be used by the larger part of the inhabitants. There are good prospects of growth in the immediate future. The facts justify reasonable anticipation of a substantial and increasing demand for gas in the territory to be reached by the extensions.

Compliance with the order requires the addition of about 16 miles of main. The affidavits filed on the motion to dismiss show that, in two of the communities directed to be served, and in the adjacent territory, the company has laid about 30 miles of mains since June 5, 1923. The state law fixes $1 per 1,000 cubic feet as the maximum rate (Laws 1906, c. 125, § 1 [2]), and that rate was in force when the order was made. The commission is without power to fix a higher rate. Section 72, Public Service Commissions Law, supra. The company's income applicable as a return on property was only $1,799.93 for the year in which the order was made. Without an increase of rate the service ordered will further decrease net earnings. It is stated in the company's brief that, in a suit brought by it in the United States District Court it was found that the cost to the company per 1000 cubic feet for 1919 was $.9992; for 1920 was $1.095; and for three months of 1921 was $1.3042, and that, September 25, 1922, the court decreed the maximum rate to be confiscatory.

The court will not substitute its own judgment as to what extensions are reasonable for the determination of the commission. New York & Queens Gas Co. v. McCall, 245 U. S. 345, 348, 38 S. Ct. 122, 62 L. Ed. 337. But it will consider the advantages to result to the public from the extensions ordered; it will also consider the investment required to make the necessary additions to property, the cost of furnishing gas in the added territory, the effect of the new service upon the company's income as a whole, and, if it appears that the power to regulate was so used as to pass beyond the exercise of reasonable judgment and to amount to an infringement of the right of ownership the order will be held invalid as repugnant to the due process clause. Under the guise of regulation, the state may not require the company to make large expenditures for the extension of its mains and service into new territory, when the necessary result will be to compel the company to use its property for the public convenience without just compensation. Atlantic Coast Line v. North Carolina Corp. Com'n, 206 U. S. 1, 20, 23 et seq., 27 S. Ct. 585, 51 L. Ed. 933, 11 Ann. Cas. 398; Missouri Pacific Ry. Co. v. Kansas, 216 U. S. 262, 276, 30 S. Ct. 330, 54 L. Ed. 472; Chicago & Northwestern Ry. Co. v. Ochs, 249 U. S. 416, 421, 39 S. Ct. 343, 63 L. Ed. 679; Norfolk Ry. v. Public Service Commission, 265 U. S. 70, 74, 44 S. Ct. 439, 68 L. Ed. 904.

It reasonably may be held that the location, present development, and prospects of growth of the communities ordered to be served justify

the extension to them of gas service, if a nonconfiscatory rate can be obtained.

But the company construes the order to require it to sell gas in the added communities at the existing rate, and it insists that, as the rate is so low that present consumers must be served at a loss, the addition of new territory will increase the loss. Even assuming that $1, fixed as a maximum rate, is noncompensatory, it does not follow that the order in question is unreasonable or invalid. This case is to be distinguished from a suit to restrain the enforcement of legislation prescribing a confiscatory rate. Here the rate is not involved. The order directs the extension; it does not deal with compensation. The commission reasonably might assume that the company will take appropriate steps to save its property from confiscation. Newton v. Consolidated Gas Co., 258 U. S. 165, 174, 177, 42 S. Ct. 264, 66 L. Ed. 538. Indeed, it is said that the prescribed maximum already has been adjudged too low and confiscatory. The company's voluntary extension of mains to increase sales greatly impairs the weight of the contention that, because the cost of service exceeds the rate, the order is arbitrary. There is nothing to show that just compensation for the service ordered may not be had, or that compliance with the order will necessarily so reduce the company's income from its operations as a whole as to be in effect a confiscation of its property, or that, at rates not unreasonable or prohibitive, consumption of gas in the communities directed to be served will not be sufficient to yield a just return on the necessary additions. The company's contention cannot be sustained.

Motion to dismiss denied.

Judgment affirmed.

SECTION 3.—EQUALITY OF SERVICE

JOHNSON v. PENSACOLA & P. R. CO.

(Supreme Court of Florida, 1878. 16 Fla. 623, 26 Am. Rep. 731.)

WESCOTT, J., delivered the opinion of the court.[72] * * *

The next question in order in view of this conclusion is, Do the facts set forth in this declaration constitute in law a cause of action?

The facts here alleged are that the defendant, a common carrier, compelled the plaintiff to pay to the defendant, between the 1st day of July, A. D. 1874, and the 1st day of March, A. D. 1877, fifty cents per thousand feet on 4,400,000 feet of lumber shipped by plaintiff over said railroad, making an aggregate of $2,200 in excess of what the said defendant charged the Perdido Bay Lumber Company for like transporta-

[72] The statement of facts and parts of the opinion are omitted.

tion over said railroad during the said period, between the 1st day of July, A. D. 1874, and the 1st of March, A. D. 1877. * * * There is no statute in this state regulating the matter of freights and charges by railroad companies. It is not denied that this company is a common carrier. We must, therefore, look to the common law for the settlement of the question involved.

The fact here stated is, that defendant compelled plaintiff to pay for lumber shipped over its road fifty cents per one thousand feet more than it charged another party for transporting lumber over its road at the same time, and the plaintiff insists that this difference of fifty cents was an illegal charge, and that he is entitled to judgment for $2,200, having been compelled to pay freight at that rate and in this manner on 4,400,000 feet of lumber. * * *

We can find in England or the United States no case involving the precise point here involved, which is whether, at common law, the defendant, a common carrier, is responsible to the plaintiff for the excess charged him upon the like material and during the same time over a charge for like freights for like material during the same time made of another.

In the case of the Fitchburg Railroad Company v. Gage and Others, 12 Gray, 393, the Supreme Court of Massachusetts held "that a railroad corporation is not obliged as a common carrier to transport goods and merchandise for all persons at the same rates." In speaking of the common-law rule, that court says: "It requires equal justice to all. But the equality which is to be observed in relation to the public and to every individual consists in the restricted right to charge in each particular case of service a reasonable compensation and no more. If the carrier confines himself to this, no wrong can be done and no cause afforded for complaint." * * * It based its conclusion upon the ground that the plaintiff did not set out a case of excessive or unreasonable charge. In the last edition of Story on Bailments, we find the rule of the common law thus stated: "At common law a common carrier of goods is not under any obligation to treat all customers equally. He is bound to accept and carry for all upon being paid a reasonable compensation. But the fact that he charges less for one than for another is only evidence to show that a particular charge is unreasonable; nothing more. There is nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate or even gratis." In support of this doctrine the following cases are cited: 12 Gray, 393; 2. P. C. 237; 4 C. B. (N. S.) 78; 12 C. B. (N. S.) 74. While the text is the reasonable deduction from remarks in these cases, still, with the exception of the case reported in 12 Gray, 393, they were (so far as we have been able to examine them) cases arising under statutes. Most of the cases treat of the common-law rule strictly as between the parties, and without comparison as to the charges against others, the cases where legislative action is being construed and is controlling being omitted as not being

in point. The cases stating the common-law rule are simply that the charge must be reasonable. Thus far there cannot be any reasonable difference between fair minds. In the next place, the right to have the service of the common carrier at a reasonable rate is common. Upon a tender of a reasonable compensation, unless there is a reasonable ground for his refusal, in case of refusal he will be liable to an action. Under such circumstances he must receive and carry all goods offered for transportation (which it is his duty to transport), by any persons whatever, upon receiving a suitable hire. * * *

Our conclusions are that, as against a common or public carrier, every person has the same right; that in all cases, where his common duty controls, he cannot refuse A and accommodate B; that all, the entire public, have the right to the same carriage for a reasonable price, and at a reasonable charge for the service performed; that the commonness of the duty to carry for all, does not involve a commonness or equality of compensation or charge; that all the shipper can ask of a common carrier is that for the service performed he shall charge no more than a reasonable sum to him; that whether the carrier charges another more or less than the price charged a particular individual may be a matter of evidence in determining whether a charge is too much or too little for the service performed; and that the difference between the charges cannot be the measure of damages in any case, unless it is established by proof that the smaller charge is the true reasonable charge in view of the transportation furnished, and that the higher charge is excessive to that degree. The obligations in this matter must be reciprocal. Where there is no express contract, the common-law action by the carrier against the shipper is for a quantum meruit, and the liability of the shipper is for a reasonable sum in view of the service performed for him. What is charged another person (in this case the amount charged the Perdido Bay Lumber Company), or the usual charge made against many others (the freight tariff), is matter of evidence admissible to ascertain the value of the service performed. In every case the legality of the charge is established and measured by the value of the service performed, and not by what is charged another, unless what is charged another is the compensating sum, in which event it is the proper sum, not on account of its equality, but because of the relation it bears to the value of the service performed as an adequate compensation therefor. To sum the whole matter up, the common law is that a common carrier shall not charge excessive freights. It protects the individual from extortion, and limits the carrier to a reasonable rate, and this on account of the fact that he exercises a public employment, enjoys exclusive franchises and privileges, derived, in the case of defendant here, by grant from the state. The rule is not that all shall be charged equally, but reasonably, because the law is for the reasonable charge and not the equal charge.[73] A statement of inequality does

[73] "In the eighth edition of Story, Bailm. § 508, it is stated that: 'At common law, a common carrier of goods is not under obligation to treat all cus-

not make a legal cause of action, because it is not necessarily unreasonable. It would be a strange rule indeed which would authorize a shipper, after being compelled to pay his freights according to established rates (this appears from the pleas and declarations), to look around and find some smaller charge for the same service during the same time, which may be either as a gratuity, or a sale of service at a noncompensating rate, or less than the reasonable charge, and claim his damages according to this difference, based upon an inequality not general in its character, but existing only by virtue of a charge made for the same service against one other person. If this court sanctions the doctrine of absolute equality, and then measures the damages by the difference in the charge as to one person named in a declaration which does not negative a fair inducement or consideration for the difference, it must sustain such a rule as that stated.

The declaration, to be good in law, must state a case of excessive charge for the service performed.[74] When it simply states a case of inequality of charge, it states no cause of action, for the smaller charge may be less than reasonable, and the greater charge may be exactly the value of the service and the reasonable charge for the transportation furnished.

Whether a charge made by A against B is reasonable cannot be determined by establishing the charge against C for the same service. It is too plain for argument that the higher charge, where there is a difference, may be what is the compensating sum, and the lower charge may be too small for the service. * * *

Independent of these questions, however, the common-law rule as we understand it, and we ascertain it by looking to the elementary principles as announced by the English and American courts, and not from any process of reasoning as to what the rule, in our judgment, ought to be, does not require an equality of charge, but only a reasonable charge in view of the service which the party gets and the carrier renders. From the very earliest English cases the measure of the right of the carrier was a quantum meruit. The carrier must receive this if tendered, and must (with certain defined exceptions) perform the service, and the shipper must pay the value of what he gets. Whether as an internal state regulation of commerce equality should be required by the Legislature is a matter of legislative discretion; at least this court can only enforce the rule of the common law as it finds it, and

tomers equally. He is bound to accept and carry for all, upon being paid a reasonable compensation. But the fact that he charges less for one than for another is only evidence to show that a particular charge is unreasonable, nothing more. There is nothing in the common law to hinder a common carrier from carrying for favored individuals at an unreasonably low rate, or even for gratis.'" Simpson, C. J., in Ex parte Benson, 18 S. C. 38, 44 Am. Rep. 564 (1882). "No rate can possibly be reasonable that is higher than anybody else has to pay." Landis, District Judge, in United States v. Chicago & A. Ry. Co. (D. C.) 148 F. 646 (1906).

[74] See Cowden v. Pacific Coast S. S. Co., 94 Cal. 470, 29 P. 873, 18 L. R. A. 221, 28 Am. St. Rep. 142 (1892).

not as it ought to be. Even as to the power of the Legislature in the premises, however, we say nothing in this case, as it is not involved.

Our conclusion is that the declaration does not contain a legal cause of action. * * *

The judgment must be affirmed.

MESSENGER v. PENNSYLVANIA R. CO.

(Court of Errors and Appeals of New Jersey, 1874. 37 N. J. Law, 531, 18 Am. Rep. 754.)

BEDLE, J. The first count of this declaration alleges that in consideration that the plaintiffs were large shippers of live hogs over the lines of the defendants' railways from Pittsburg to Jersey City, the defendants agreed to transport such stock over their railways between those termini, at the regular rates, which were fifty cents per one hundred pounds, subject to a drawback to the plaintiffs of ten cents on the one hundred pounds; also, that if the defendants transported for any other parties than the plaintiffs and seven others named, the same kind of freight from Pittsburg to Jersey City, for less than the regular rates stated, or allowed a drawback from said rates to any others than the plaintiffs and the seven named, that they would allow such further drawback to the plaintiffs as would reduce the cost of shipment to ten cents per hundred pounds less than that of any other person or persons, except the parties mentioned. The count further alleges the transportation of a large quantity of such stock at the regular rates, less the drawback; also that the defendants carried the same kind of freight for others than the plaintiffs and the favored seven, at the rate of forty cents on the one hundred pounds, and therefore that the plaintiffs are entitled to recover a further rebate of ten cents per hundred.

The second count alleges a like agreement for transportation from Chicago to Jersey City at one dollar per hundred, with a drawback of twenty cents, and a further drawback so as to reduce the cost of transportation to the plaintiffs at twenty cents a hundred pounds less than for any one else, except the seven named. This count also alleges a transportation for others than those excepted, at eighty cents per hundred, and claims a drawback of twenty cents below that rate. To these counts a demurrer is interposed. It will be seen at a glance that a contract of this nature, if valid, gives the plaintiffs an exclusive advantage or monopoly over all other transporters except the seven favorites, and compels the company, under pain of a further reduction below the lowest rates charged all others, to charge them a higher price than the plaintiffs and those excepted. A few shippers, under this arrangement, would have a practical monopoly of the carrying trade of hogs over the defendant's lines between the termini indicated, at rates which would naturally result in crippling or excluding others from

competition and giving to those few a material control of the market at the place of destination. This suit is brought to recover on these counts the additional rebate, an allowance having previously been made according to the first drawback stipulated for.

Can such a contract be legally enforced? The mere statement of the proposition at once induces an answer that it is unjust and ought not to be sustained, unless some imperative rule of law requires it. The defendants are common carriers, and not only so in the light of the common law, but like all railroad corporations they occupy a peculiar relation to the public as invested with certain franchises for the public benefit, and are bound to use them with fairness and for the common good. Apart from that, however, it is clear that the business of the company must be conducted subject to the law governing common carriers generally, and to that test this contract must first be put. In the language of the books, a common carrier exercises a public employment, and Bacon in his Abridgment, calls it a public institution. 1 Bacon, 556 (B).

The duties and liabilities are those imposed by public law, and in that respect the common carrier differs from the private. Bacon also says that common carriers "are chargeable on the general custom of the realm for their faults and miscarriages." 1 Bacon, 553 (A). Is there anything, then, in the nature of this occupation that necessarily prevents a discrimination in rates such as this contract provides? The contract is that one customer shall be charged less than others, and, as a consequence, that others shall be charged more than that one. Such inequality operates directly upon the course of trade and creates monopolies. Most of the evils of special and unequal rates have arisen since the introduction of railways. In England the subject has been expressly controlled by provisions in railway charters, or by general acts affecting them all. For that reason it has not been necessary to determine the precise condition of the common law in respect to railway carriers. The English railway cases, therefore, give us no satisfactory light upon the point in question, and in none of the cases under the ancient modes of land carriage is there a direct adjudication. The solution of the question must, then, depend upon the nature of the employment and such deductions as follow from the established principles affecting it.

The business of the common carrier is for the public, and it is his duty to serve the public indifferently. He is entitled to a reasonable compensation, but on payment of that he is bound to carry for whoever will employ him, to the extent of his ability. A private carrier can make what contract he pleases. The public have no interest in that, but a service for the public necessarily implies equal treatment in its performance, when the right to the service is common. Because the institution, so to speak, is public, every member of the community stands on an equality as to the right to its benefit, and therefore, the carrier cannot discriminate between individuals for whom he will render the serv-

ice. In the very nature, then, of his duty and of the public right, his conduct should be equal and just to all. So, also, there is involved in the reasonableness of his compensation the same principle. A want of uniformity in price for the same kind of service under like circumstances is most unreasonable and unjust, when the right to demand it is common. It would be strange if, when the object of the employment is the public benefit, and the law allows no discrimination as to individual customers, but requires all to be accommodated alike as individuals, and for a reasonable rate, that by the indirect means of unequal prices some could lawfully get the advantage of the accommodation and others not. A direct refusal to carry for a reasonable rate would involve the carrier in damages, and a refusal, in effect, could be accomplished by unfair and unequal charges, or if not to that extent, the public right to the convenience and usefulness of the means of carriage could be greatly impaired. Besides, the injury is not only to the individual affected, but it reaches out, disturbing trade most seriously. Competition in trade is encouraged by the law, and to allow any one to use means, established and intended for the public good, to promote unfair advantages amongst the people and foster monopolies, is against public policy, and should not be permitted.

A common carrier owes an equal duty to all and it cannot be discharged if he is allowed to make unequal preferences, and thereby prevent or impair the enjoyment of the common right, and, as said by Sharswood, J., in Audenried v. Phil. & Reading R. R. Co., 68 Pa. 370, 8 Am. Rep. 195, "transportation by a common carrier is necessarily open to the public upon equal and reasonable terms. An exclusive right granted to one is inconsistent with the right of all others."

Chief Justice Appleton, in the case of New England Express Co. v. Maine Central R. R. Co., 57 Me. 196, 2 Am. Rep. 31, also says: "The very definition of a common carrier excludes the idea of the right to grant monopolies, or to give special and unequal preferences." In Baxendale v. Eastern Counties Railway Co., 4 C. B. (N. S.) 63, two of the judges intimate a notion that unequal rates would not be contrary to the common law, but the same was mere dictum, foreign to the question at issue. Previous to that case, Smith, in his Leading Cases (4th Ed.) vol. 1, p. 174, had said that "the hire charged must be no more than a reasonable remuneration to the carrier, and, consequently, not more to one (though a rival carrier) than to another for the same service." That clause gave occasion for the intimation of the judges to the contrary in Baxendale v. Eastern Counties Railway Co., and I find, in examining the last edition of Leading Cases (6th Ed.) vol. 1, p. 364, that the editors have substituted for the latter part of his sentence the words, "though at common law there is no liability to carry at equal rates for all customers." The change, no doubt, was made under the force of the Baxendale Case, but, in my judgment, Mr. Smith was right in his statement. The view now contended for has been

learnedly considered and sustained by several cases in this country, and must now be taken as the common-law doctrine of this state. The following are the cases referred to: The New England Express Co. v. Maine Central R. R. Co., 57 Me. 188, 2 Am. Rep. 31; McDuffee v. Railroad, 52 N. H. 430, 13 Am. Rep. 72; Sanford v. Railroad Co., 24 Pa. 378, 64 Am. Dec. 667, 1 Am. Railway R. 530; Audenried v. Phil. & Reading R. R. Co., 68 Pa. 370, 8 Am. Rep. 195.

It must not be inferred that a common carrier, in adjusting his price, cannot regard the peculiar circumstances of the particular transportation. Many considerations may properly enter into the agreement for carriage or the establishment of rates, such as the quantity carried, its nature, risks, the expense of carriage at different periods of time, and the like; but he has no right to give an exclusive advantage or preference, in that respect, to some over others, for carriage, in the course of his business. For a like service, the public are entitled to a like price. There may be isolated exceptions to this rule, where the interest of the immediate parties is alone involved, and not the rest of the public, but the rule must be applied whenever the service of the carrier is sought or agreed for in the range of business or trade. This contract being clearly within it, and odious to the law in the respect on which a recovery is sought, cannot be sustained. But there is an additional ground upon which it is also objectionable. I entirely agree with the Chief Justice that, in the grant of a franchise of building and using a public railway, there is an implied condition that it is held as a quasi public trust, for the benefit of all the public, and that the company possessed of the grant must exercise a perfect impartiality to all who seek the benefit of the trust. It is true that these railroad corporations are private, and, in the nature of their business, are subject to and bound by the doctrine of common carriers, yet, beyond that, and in a peculiar sense, they are entrusted with certain functions of the government, in order to afford the public necessary means of transportation. The bestowment of these franchises is justified only on the ground of the public good, and they must be held and enjoyed for that end. This public good is common, and unequal and unjust favors are entirely inconsistent with the common right. So far as their duty to serve the public is concerned, they are not only common carriers, but public agents, and in their very constitution and relation to the public, there is necessarily implied a duty on their part, and a right in the public, to have fair treatment and immunity from unjust discrimination. The right of the public is equal in every citizen, and the trust must be performed so as to secure and protect it.

Every trust should be administered so as to afford to the cestui que trust the enjoyment of the use intended, and these railroad trustees must be held, in their relation to the public, to such a course of dealing as will insure to every member of the community the equal enjoyment of the means of transportation provided, subject, of course, to their reasonable

ability to perform the trust. In no other way can trade and commercial interchange be left free from unjust interference. On this latter ground, that part of the contract in question is illegal.

There are three other counts also demurred to. It is unnecessary to refer to them in detail. The same vice exists in them as in the other two. The clear intention of the contracts set out in each is to secure to the plaintiffs a monopoly of the transportation of hogs over the defendants' lines between the termini indicated, at less than any others are to be charged, except the seven named.

The judgment of the Supreme Court must be affirmed.[75]

For affirmance—The CHANCELLOR, BEDLE, DALRIMPLE, SCUDDER, WOODHULL, CLEMENT, GREEN, LILLY, WALES, JJ.

For reversal—None.

SNELL v. CLINTON ELECTRIC LIGHT, HEAT & POWER CO.

(Supreme Court of Illinois, 1902. 196 Ill. 626, 63 N. E. 1082, 58 L. R. A. 284, 89 Am. St. Rep. 341.)

This was a petition for mandamus, filed in the circuit court of De Witt county, to compel appellee to furnish appellant with electricity for lighting his house, as is alleged, upon the same terms and conditions that it required from its other consumers. The petition alleged that appellee refused to connect its wires with appellant's house unless he would pay for a transformer or converter, in addition to the usual charge for electric lighting, which payment appellant refused to make, on the ground that appellee did not require it of its other consumers,

[75] "Prior to the enactment of the Act of February 4, 1887, to regulate commerce, commonly known as the "Interstate Commerce Act" (24 Stat. 379 [U. S. Comp. St. § 8563 et seq.]), railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service (Fitchburg Railroad Co. v. Gage, 12 Gray [Mass.] 393 [1859]; Baxendale v. Eastern Counties Railway Co., 4 C. B. [N. S.] 63; Great Western Railway Co. v. Sutton, L. R. 4 H. L. 226, 237; Ex parte Benson, 18 S. C. 38, 44 Am. Rep. 564 [1882]; Johnson v. Pensacola Railway Co., 16 Fla. 623, 26 Am. Rep. 731 [1878]), though the weight of authority in this country was in favor of an equality of charge to all persons for similar services." Brown, J., in Interstate Commerce Commission v. Baltimore & Ohio R., 145 U. S. 263, 12 S. Ct. 844, 36 L. Ed. 699 (1892). See Scofield v. Lake S. & M. S. Ry. Co., 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846 (1885); Samuels v. Louisville & N. R. Co. (C. C.) 31 F. 57 (1887); and an article, "Origin of the Rule against Unjust Discrimination," by Benjamin M. Kline, 66 Univ. of Pa. Law Rev. 123. In Indiana N. & I. Gas Co. v. State, 158 Ind. 516, 63 N. E. 220, 57 L. R. A. 761 (1902), it is suggested that unjust discrimination is a violation of the Fourteenth Amendment. In Root v. Long Island R. R. Co., 114 N. Y. 300, 21 N. E. 403, 4 L. R. A. 331, 11 Am. St. Rep. 643 (1889), a rebate of 15 cents per ton on coal was found, under special circumstances disclosed in the contract, not to be unjust, and a judgment for plaintiff to recover the rebate was affirmed.

but furnished them a transformer without any additional charge. A jury heard the evidence and found the facts specially. On the findings by the jury and on the propositions of law afterward submitted and held, the court awarded the writ of mandamus. Appellee appealed to the appellate court for the Third district, which court reversed the judgment of the circuit court, and the petitioner appealed to this court. The facts as found by the jury are, substantially, that appellant applied to appellee to furnish electricity for lighting his residence upon the same terms and conditions required by it from other consumers, and that appellee refused to do so; that appellee had not required other persons to pay for the use of transformers for dwellings, and that it was its general practice and custom to furnish the use of them free of charge for its customers; that it refused to furnish the use of a transformer to appellant because it had not been employed to wire his house, he having had such wiring done by one not connected with appellee; that appellee refused to connect with appellant's house, on the ground that his residence was not properly wired, but the jury also found that such residence was properly wired; that appellee had furnished transformers free of cost to consumers in cases where it had furnished the wires and had done the wiring of the building for compensation, and that it considered the profits accruing to it therefrom to justify it in furnishing the use of transformers without a specific charge for them. * * *

CARTER, J. (after stating the facts).[76] The trial court evidently held that the law applicable to the facts as found by the jury justified the awarding of the writ, for it refused to hold the proposition of law submitted on that question by appellee, while the appellate court was of the contrary opinion, for it made no finding of facts different from those found by the jury and the court below. The only question here is, therefore, whether or not, upon the evidence as found, the appellee made an unjust discrimination against appellant in charging him for a transformer in addition to the regular rates for electric lighting.

There is no statute regulating the manner under which electric light companies shall do business in this state. They are therefore subject only to the common law and such regulations as may be imposed by the municipality which grants them privileges. At common law, whether or not a difference in the treatment accorded to different patrons amounts to a discrimination must depend upon the surrounding circumstances. A mere difference does not, of necessity, constitute unlawful discrimination. Appellee, in its answer to appellant's petition, avers that the purpose and office of a transformer is chiefly for the protection of the house or building connected with the electrical system; that it prevents an excessive number of volts of electricity from passing from the main street wire into the building to be lighted; that the wires usually used inside a building are much smaller than the street wires,

[76] Parts of the statement of facts and a part of the opinion are omitted.

and incapable of safely carrying so many volts of electricity as pass along the street wires; that if all the voltage carried on the street wires were turned into the residence the natural consequence would probably be that the house wires would melt, and the heat from the excessive voltage would cause a fire; that it is to prevent this result that a transformer is necessary. A transformer or converter is described by counsel as a coil of copper wire contained in a sheet-iron box, and is usually placed on a pole outside of the building. Its office is to reduce the current from the main line, or, rather, to induce a lesser current in the wire leading to the house for house use. In this case the voltage would have been reduced from 1,000 volts to 50 or 100 volts. It appears that without the use of a converter the effect of turning this large voltage into a house would be to burn up the wires, and in the formation of short circuits there would be great danger of fire, and that the object of the converter is the protection of the house. It is a necessary appliance for the safe lighting of houses. The appellee had been in the habit of furnishing transformers, as needed, without any extra charge, for all houses which were wired for electricity by it, but claimed the right to charge for transformers in cases where it did not do the wiring, as it made no profit on the wiring in such cases. The transformer is just as much a necessary appliance in lighting houses as the pole on which it is fastened, or the wire that carries the electricity, or the boilers and dynamo used in generating it. It is entirely immaterial who does the wiring of the house,—the electric light company or some other party; the transformer is necessary in either case. If the company does the wiring, that is a business distinct from that of furnishing electricity for lighting purposes, just as the putting in of gas and water pipes into a house is a distinct business from furnishing the gas or water to flow through them.

The jury found that the appellee had not demanded extra pay for the use of a transformer from any one else, and that it was its general practice and custom to furnish them free to its consumers. Appellee, being organized to do a business affected with a public interest, must treat all customers fairly and without unjust discrimination. While it is not bound, in the absence of statutory enactments, to treat all its patrons with absolute equality, still it is bound to furnish light at a reasonable rate to every customer, and without unjust discrimination. * * *

It has been held at common law, and, in the absence of statutes, in the case of common carriers, that, as long as they carry at a reasonable rate for every shipper, no one can complain if they are willing to carry for others at a less rate. 5 Am. & Eng. Enc. Law (2d Ed.) 179. If we apply this rule to the case at bar, it will be noticed that the appellee has demanded of appellant more than it has of any of its other customers. This is not the favor allowed by the common law, as just cited, but an unjust discrimination. Appellee has discriminated unjustly

against appellant in any view of the law and the circumstances that we can take, and it follows that the judgment of the circuit court was right.

The judgment of the appellate court will be reversed, and the judgment of the circuit court affirmed. Judgment reversed.

JOHN HAYS & CO. v. PENNSYLVANIA CO.

(Circuit Court of the United States, N. D. Ohio, 1882. 12 F. 309.)

BAXTER, Circuit Judge. The plaintiffs were, for several years next before the commencement of this suit, engaged in mining coal at Salineville, and near defendant's road, for sale in the Cleveland market. They were wholly dependent on the defendant for transportation. Their complaint is that the defendant discriminated against them, and in favor of their competitors in business, in the rates charged for carrying coal from Salineville to Cleveland. But the defendant traversed this allegation. The issue thus made was tried at the last term of the court, when it appeared in evidence that defendant's regular price for carrying coal between the points mentioned, in 1876, was $1.60 per ton, with a rebate of from 30 to 70 cents per ton to all persons or companies shipping 5,000 tons or more during the year—the amount of rebate being graduated by the quantity of freight furnished by each shipper. Under this schedule the plaintiffs were required to pay higher rates on the coal shipped by them than were exacted from other and rival parties who shipped larger quantities. But the defendant contended, if the discrimination was made in good faith, and for the purpose of stimulating production and increasing its tonnage, it was both reasonable and just, and within the discretion confided by law to every common carrier. The court, however, entertained the contrary opinion, and instructed the jury that the discrimination complained of and proven, as above stated, was contrary to law, and a wrong to plaintiffs, for which they were entitled to recover the damages resulting to them therefrom, to wit, the amount paid by the plaintiffs to the defendant for the transportation of their coal from Salineville to Cleveland (with interest thereon) in excess of the rates accorded by defendant to their most favored competitors. The jury, under these instructions, found for the plaintiffs, and assessed their damages at $4,585. The defendant thereupon moved for a new trial, on the ground that the instructions given were erroneous, and this is the question we are now called on to decide. If the instructions are correct the defendant's motion must be overruled; otherwise a new trial ought to be granted.

A reference to recognized elementary principles will aid in a correct solution of the problem. The defendant is a common carrier by rail. Its road, though owned by the corporation, was nevertheless constructed for public uses, and is, in a qualified sense, a public

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highway. Hence everybody constituting a part of the public, for whose benefit it was authorized, is entitled to an equal and impartial participation in the use of the facilities it is capable of affording. Its ownership by the corporation is in trust as well for the public as for the shareholders; but its first and primary obligation is to the public. We need not recount all these obligations. It is enough for present purposes to say that the defendant has no right to make unreasonable and unjust discriminations. But what are such discriminations? No rule can be formulated with sufficient flexibility to apply to every case that may arise. It may, however, be said that it is only when the discrimination enures to the undue advantage of one man, in consequence of some injustice inflicted on another, that the law intervenes for the protection of the latter. Harmless discrimination may be indulged in. For instance, the carrying of one person, who is unable to pay fare, free, is no injustice to other passengers who may be required to pay the reasonable and regular rates fixed by the company. Nor would the carrying of supplies at nominal rates to communities scourged by disease, or rendered destitute by floods or other casualty, entitle other communities to have their supplies carried at the same rate. It is the custom, we believe, for railroad companies to carry fertilizers and machinery for mining and manufacturing purposes to be employed along the lines of their respective roads to develop the country and stimulate productions, as a means of insuring a permanent increase of their business, at lower rates than are charged on other classes of freight, because such discrimination, while it tends to advance the interest of all, works no injustice to any one. Freight carried over long distances may also be carried at a reasonably less rate per mile than freight transported for shorter distances, simply because it costs less to perform the service. For the same reason passengers may be divided into different classes, and the price regulated in accordance with the accommodations furnished to each, because it costs less to carry an emigrant, with the accommodations furnished to that class, than it does to carry an occupant of a palace car. And for a like reason an inferior class of freight may be carried at a less rate than first-class merchandise of greater value and requiring more labor, care, and responsibility in the handling. It has been held that 20 separate parcels done up in one package, and consigned to the same person, may be carried at a less rate per parcel than 20 parcels of the same character consigned to as many different persons at the same destination, because it is supposed that it costs less to receive and deliver one package containing 20 parcels to one man, than it does to receive and deliver 20 different parcels to as many different consignees.

Such are some of the numerous illustrations of the rule that might be given. But neither of them is exactly like the case before us, either in its facts or principles involved. The case of Nicholson v. G. W. R. Co., 4 C. B. (N. S.) 366, is in its facts more nearly like the case under consideration than any other case that we have been able to

find. This was an application, under the railway and traffic act, for an injunction to restrain the railroad company from giving lower rates to the Ruabon Coal Company than were given to the complainant in that case, in the shipment of coal, in which it appeared that there was a contract between the railroad company and the Ruabon Coal Company, whereby the coal company undertook to ship, for a period of 10 years, as much coal for a distance of at least 100 miles over defendant's road as would produce an annual gross revenue of £40,000 to the railroad company, in fully loaded trains, at the rate of seven trains per week. In passing on these facts the court said that in considering the question of undue preference the fair interest of the railroad company ought to be taken into the account; that the preference or prejudice, referred to by the statute, must be undue or unreasonable to be within the prohibition; and that, although it was manifest that the coal company had many and important advantages in carrying their coal on the railroad as against the complainant and other coal owners, still the question remained, were they undue or unreasonable advantages? And this, the court said, mainly depended on the adequacy of the consideration given by the coal company to the railroad company for the advantages afforded by the latter to the coal company. And because it appeared that the cost of carrying coal in fully loaded trains, regularly furnished at the rate of seven trains per week, was less per ton to the railway company than coal delivered in the usual way, and at irregular intervals, and in unequal quantities, in connection with the coal company's undertaking to ship annually coal enough over defendant's road, for at least a distance of 100 miles, to produce a gross revenue to the railroad of £40,000, the court held that the discrimination complained of in the case was neither undue nor unreasonable, and therefore denied the application.

This case seems to have been well considered, and we have no disposition to question its authority. Future experience may possibly call for some modification of the principle therein announced. But this case calls for no such modification, inasmuch as the facts of that case are very different, when closely analyzed, from the facts proven in this one. In the former the company, in whose favor the discrimination was made, gave, in the judgment of the court, an adequate consideration for the advantages conceded to it under and in virtue of its contract. It undertook to guarantee £40,000 worth of tonnage per year for 10 years to the railroad company, and to tender the same for shipment in fully loaded trains, at the rate of seven trains per week. It was in consideration of these obligations—which, in the judgment of the court, enabled the railroad company to perform the service at less expense—the court held that the advantages secured by the contract to the coal company were neither undue nor unreasonable. But there are no such facts to be found in this case. There was in this case no undertaking by any one to furnish any specific quantity of freight at stated periods; nor was any one bound to tender coal for

shipment in fully loaded trains. In these particulars the plaintiffs occupied common ground with the parties who obtained lower rates. Each tendered coal for transportation in the same condition and at such times as suited his or their convenience. The discrimination complained of rested exclusively on the amount of freight supplied by the respective shippers during the year. Ought a discrimination resting exclusively on such a basis to be sustained? If so, then the business of the country is, in some degree, subject to the will of railroad officials; for, if one man engaged in mining coal, and dependent on the same railroad for transportation to the same market, can obtain transportation thereof at from 25 to 50 cents per ton less than another competing with him in business, solely on the ground that he is able to furnish and does furnish the larger quantity for shipment, the small operator will sooner or later be forced to abandon the unequal contest and surrender to his more opulent rival. If the principle is sound in its application to rival parties engaged in mining coal, it is equally applicable to merchants, manufacturers, millers, dealers in lumber and grain, and to everybody else interested in any business requiring any considerable amount of transportation by rail; and it follows that the success of all such enterprises would depend as much on the favor of railroad officials as upon the energies and capacities of the parties prosecuting the same.

It is not difficult, with such a ruling, to forecast the consequences. The men who control railroads would be quick to appreciate the power with which such a holding would invest them, and, it may be, not slow to make the most of their opportunities, and perhaps tempted to favor their friends to the detriment of their personal or political opponents; or demand a division of the profits realized from such collateral pursuits as could be favored or depressed by discriminations for or against them; or else, seeing the augmented power of capital, organize into overshadowing combinations and extinguish all petty competition, monopolize business, and dictate the price of coal and every other commodity to consumers. We say these results might follow the exercise of such a right as is claimed for railroads in this case. But we think no such power exists in them; they have been authorized for the common benefit of every one, and cannot be lawfully manipulated for the advantage of any class at the expense of any other. Capital needs no such extraneous aid. It possesses inherent advantages, which cannot be taken from it. But it has no just claim, by reason of its accumulated strength, to demand the use of the public highways of the country, constructed for the common benefit of all, on more favorable terms than are accorded to the humblest of the land; and a discrimination in favor of parties furnishing the largest quantity of freight, and solely on that ground, is a discrimination in favor of capital, and is contrary to a sound public policy, violative of that equality of right guarantied to every citizen, and a wrong to the disfavored party, for which the courts are competent to give redress.

The motion, therefore, for a new trial will be denied, and a judgment entered on the verdict for the damages assessed and the costs of the suit.[77]

WELKER, District Judge, concurred.

PENNSYLVANIA R. CO. v. INTERNATIONAL COAL MINING CO.

(Supreme Court of the United States, 1913. 230 U. S. 184, 33 S. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315.)

In Error to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Eastern District of Pennsylvania in favor of a shipper in an action to recover damages from a carrier because of rebates allowed to other shippers. * * *

The Pennsylvania Railroad Company brought the case here by writ of error, in which, among many other assignments of error, it complains of the court's refusal to charge that "to entitle the plaintiff to recover, the jury must be satisfied that it sustained some loss or injury due to the fact that the defendant was carrying, at the same time, at lower rates, coal shipped by other shippers."

Mr. Justice LAMAR, after making the foregoing statement, delivered the opinion of the court:[78]

The International Coal Company operated a mine in the Clearfield district and, with its competitors, shipped between 1890 and 1902 large quantities of coal in interstate commerce. In 1904 it sued the Pennsylvania Railroad Company, basing its action, in part, on the fact that prior to April 1, 1899, the railroad company had paid other shippers rebates of from 15 to 45 cents per ton, while paying plaintiff a rebate of only 10 to 25 cents per ton. Its claim for a sum equal to the difference between the rebate paid to it and that given other shippers was eliminated by the trial judge on the ground that "courts do not sit to measure the difference in degree in violation of the law in favor of one party or the other. The question of the money value that each of them received in their violation of the law will not be looked into, * * * not for the purpose of relieving the defendant, but because the plaintiff is just as culpable * * * and as much a violator of the law as the defendant."

[77] On discrimination based on quantity, see Scofield v. Lake S. & M. S. Railway Co., 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846 (1885). See, also, Lough v. Outerbridge, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, 42 Am. St. Rep. 712 (1894), exclusive arrangements. And see Railroad Discrimination Case (Hilton Lumber Co. v. Atlantic Coast Line R. Co.) 136 N. C. 479, 48 S. E. 813 (1904).

[78] Parts of the statement of facts and parts of the opinion, together with the dissenting opinion by Pitney, J., are omitted.

In view of this ruling, the case, as finally submitted to the jury, involved plaintiff's right to recover on account of shipments made after April 1, 1899. On that date the carrier increased the rates and discontinued the payment of rebates, except that for the purpose of saving shippers against loss, it made a difference between what is called "free coal" and "contract coal." Under this practice, where coal had been sold for future delivery, the carrier collected the published tariff rate, but rebated the difference between it and the lower rate in force when the contract of sale had been made. When, after April 1, 1899, the plaintiff applied for allowances, its demand was rejected, with the statement that all its contract coal would be protected in the same manner as others in the Clearfield district. The International Coal Company had no overlapping or unfulfilled contracts, and claimed that it did not learn of the practice to protect such contracts until, in 1904, it brought this suit. It proved that between April 1, 1899, and April 1, 1901, it had shipped about 40,000 tons on which it had paid the full tariff rate, while other companies shipping from and to the same places at the same time had been allowed on their contract coal rebates of 5, 10, 15, 25, or 35 cents per ton. Plaintiff recovered a verdict.

1. In the court below the railroad made no question of jurisdiction. But on the argument here it insisted that the case should be remanded with instructions to dismiss the complaint upon the ground that courts had no power to adjudicate the administrative question as to whether a carrier could make a difference in rate between shipments of free and contract coal. It argued that this was a rate-making question, and that it was for the commission, as the rate-regulating body, to determine not only whether a dissimilarity existed, but whether the rates were properly adjusted to meet that dissimilarity.

Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service, and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates, and the permissible discrimination based upon difference in conditions, are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts.[79] That power has been vested in a single body, so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals.

None of these considerations, however, operates to defeat the courts' jurisdiction in the present case. For even if a difference in rates could be made between free and contract coal, none was made in the only

[79] For an example, where prior action by the Interstate Commerce Commission was necessary, the question involved being whether a certain allowance for spur trackage was reasonable, see Mitchell Coal & C. Co. v. Penn. R. Co., 230 U. S. 247, 33 S. Ct. 916, 57 L. Ed. 1472 (1913).

way in which it could have been lawfully done. The published tariffs made no distinction between contract coal and free coal, but named one rate for all alike. That being true, only that single rate could be charged. When collected, it was unlawful, under any pretense or for any cause, however equitable or liberal, to pay a part back to one shipper or to every shipper. The statute required the carrier to abide absolutely by the tariff. * * * The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable, the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former, the right to apply to the commission for reparation.[80]

In view of this imperative obligation to charge, collect, and retain the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. It could not have been legalized by any proof, nor could the commission by any order have made it valid. The rebate being unlawful, it was a matter where the court, without administrative ruling or reparation order, could apply the fixed law to the established fact that the carrier had charged all shippers the published or tariff rate, and refunded a part to a particular class. This departure from the published tariff was forbidden, and section 8 (24 Stat. at L. 382, c. 104, U. S. Comp. Stat. 1901, p. 3159) expressly provided that any carrier doing any act prohibited by the statute should be "liable to the person * * * injured thereby for the full amount of damages sustained in consequence of any such violation * * * together with a reasonable * * * attorneys' fee."

2. But although this suit was brought to enforce a cause of action given by this section to any person injured, it is a noticeable fact in its pleading the plaintiff does not claim to have been damaged, and there is neither allegation nor proof that it suffered any injury. It contends, however, that this was not necessary, for the reason that, as matter of law, it was entitled to recover as damages the same rate per ton on all plaintiff's shipments as had been rebated any other person, on any of his tonnage, shipped at the same time, over the same route. And such a right of action was expressly given in section 2 of the original bill to regulate commerce, which, as it passed the Senate May 12, 1886, did provide that the carrier "shall be liable to all persons who have been charged a higher rate than was charged any other person or persons for the difference between such higher rate and the lowest rate charged upon like shipments during the same period; or, if such lower rate

80 As to reparation orders by the commission, see the case cited in next preceding footnote, and sections 8, 9, 13 (1, 4), 14, 16 (1, 2, 3), Interstate Commerce Act (U. S. Comp. St. §§ 8572, 8573, 8581, 8582, 8584, U. S. Comp. St. 1923, § 8581).

was made on any time contract or understanding, the said common carrier shall be liable to pay a like rebate or drawback to all other shippers over the same route, between the same points, who have shipped goods during the time that such contract or understanding was in operation."

The fact that this provision measuring the amount of recovery by rebate was omitted from the act, as finally reported to both Houses and passed, is not only significant, but so conclusive against the contention of the plaintiff that it quotes—not the report of the conference committee—but a statement made by a member of the Senate conference committee, to support the present argument that section 8 means the same thing as the omitted clause. But while they may be looked at to explain doubtful expressions, not even formal reports—much less the language of a member of a committee—can be resorted to for the purpose of construing a statute contrary to its plain terms, or to make identical that which is radically different. United States v. Trans-Missouri Freight Ass'n, 166 U. S. 318, 41 L. Ed. 1019, 17 S. Ct. 540; Maxwell v. Dow, 176 U. S. 601, 44 L. Ed. 604, 20 S. Ct. 448, 494. Section 2 of the original Senate bill said nothing about damages, but in case of rebating gave a shipper a right, in the nature of an action, for a penalty to be measured by the difference between the lawful and the unlawful rate, whether damage resulted or not. That provision was stricken, and section 8 of the act, as passed by both Houses of Congress and approved by the President, gave a right of action for damages and attorneys' fees to "the person injured," and, of course, to the extent of the injury.

3. There were many provisions in the statute for imprisonment and fines. On the civil side the act provided for compensation, not punishment. * * *

4. It is said, however, that it is impossible to prove the damages occasioned one shipper by the payment of rebates to another; and that if the plaintiff is not entitled to recover as damages the same drawback that was paid to its competitor, the statute not only gives no remedy, but deprives the plaintiff of a right it had at common law to recover this difference between the lawful and the unlawful rate.

We are cited to no authority which shows that there was any such ancient measure of damages, and no case has been found in which damages were awarded for such discrimination. Indeed, it is exceedingly doubtful whether there was at common law any right of action for any sort of damages in a case like this, while this statute does give a clear, definite, and positive right to recover for unjust discrimination. It thereby either first created the right, or removed the doubt as to whether such suit could be brought. The English courts had held that a shipper who paid a reasonable rate had no cause of action because the carrier had charged a lower rate to another. Great Western R. Co. v. Sutton, L. R. 4 H. L. 238, 38 L. J. Exch. (N. S.) 177, 22 L. T. (N. S.) 43, 18 Week. Rep. 92. The American decisions were con-

flicting, though "the weight of authority in this country was in favor of an equality of charge to all persons for similar services." Interstate Commerce Commission v. Baltimore & O. R. Co., 145 U. S. 275, 12 S. Ct. 844, 36 L. Ed. 703, 4 Inters. Com. Rep. 92. But even in those American courts which held that the rates must not only be reasonable, but equal, the doctrine had not been so far developed as to settle what was the measure of damages. Hays v. Pennsylvania Co., 12 F. 309, decided at circuit, is favorable to plaintiff's contention.[81] But Union P. R. Co. v. Goodridge, 149 U. S. 680, 13 S. Ct. 970, 37 L. Ed. 896; Louisville, E. & St. L. R. Co. v. Wilson, 132 Ind. 517, 18 L. R. A. 105, 32 N. E. 311; Messenger v. Pennsylvania R. Co., 36 N. J. Law, 407, 13 Am. Rep. 457, Id., 37 N. J. Law, 531, 18 Am. Rep. 754; Cook v. Chicago, R. I. & P. R. Co., 81 Iowa, 551, 9 L. R. A. 764, 3 Inters. Com. Rep. 383, 25 Am. St. Rep. 512, 46 N. W. 1080; Great Western R. Co. v. Sutton, L. R. 4 H. L. 226, 38 L. J. Exch. N. S. 177, 22 L. T. N. S. 43, 18 Week. Rep. 92; London & N. W. R. Co. v. Evershed, L. R. 3 App. Cas. 1029, 48 L. J. Q. B. N. S. 22, 39 L. T. N. S. 306, 26 Week. Rep. 863, 5 Eng. Rul. Cas. 351; Denaby Main Colliery Co. v. Manchester, S. & L. R. Co., L. R. 11 App. Cas. 97, 6 Ry. & C. T. Cas. 133, 55 L. J. Q. B. N. S. 181, 54 L. T. N. S. 1, 50 J. P. 340, relied on by plaintiff, do not support the proposition that damages can be recovered without proof of what pecuniary loss had been suffered as a result of the discrimination. * * *

The act of Parliament did not require the carrier to maintain its published tariff, but made the lowest rate the lawful rate. Anything in excess of such lowest rate was extortion, and might be recovered in an action at law as for an overcharge. Denaby Main Colliery Co. v. Manchester, S. & L. R. Co., L. R. 11 App. Cas. 97, 116, 6 Ry. & C. T. Cas. 133, 55 L. J. Q. B. N. S. 181, 54 L. T. N. S. 1, 50 J. P. 340. But the English courts make a clear distinction between overcharge and damages, and the same is true under the commerce act. For if the plaintiff here had been required to pay more than the tariff rate, it could have recovered the excess, not as damages, but as overcharge. * * *

Having paid only the lawful rate, plaintiff was not overcharged, though the favored shipper was illegally undercharged. For that viola-

[81] The difference between the rate paid and that accepted from the most favored shipper was held to be the measure of damages in Sullivan v. Minneapolis, etc., R. Co., 121 Minn. 488, 142 N. W. 3, 45 L. R. A. (N. S.) 612 (1913), reaffirmed, with some modification, after the decision in the principal case, in Seaman v. Minneapolis, etc., R. Co., 127 Minn. 180, 149 N. W. 134 (1914). See Tacoma E. R. Co. v. Public S. C. of Wash., 117 Wash. 609, 202 P. 1 (1921), and comment thereon in 6 Minn. Law Rev. 519. See, also, a note, "Measure of Damages for Rate Discrimination by Carriers," 14 Col. Law Rev. 68, and 17 Col. Law Rev. 631.

Who is the proper party to recover for overcharges? See Southern P. Co. v. Darnell-Taenzer L. Co., 245 U. S. 531, 38 S. Ct. 186, 62 L. Ed. 451 (1918), and comment thereon in 18 Col. Law Rev. 272; Louisville & N. R. Co. v. Sloss-Sheffield S. & I. Co., 46 S. Ct. Rep. 73, 70 L. Ed. —— (1925), and comment thereon in 26 Col. Law Rev. 479, and 74 Univ. of Pa. Law Rev. 506.

tion of law, the carrier was subject to the payment of a fine to the government, and, in addition, was liable for all damages it thereby occasioned the plaintiff or any other shipper. But under section 8, it was only liable for damages. Making an illegal undercharge to one shipper did not license the carrier to make a similar undercharge to other shippers, and if, having paid a rebate of 25 cents a ton to one customer, the carrier, in order to escape this suit, had made a similar undercharge or rebate to the plaintiff, it would have been criminally liable, even though it may have been done in order to equalize the two companies. For, under the statute, it was not liable to the plaintiff for the amount of the rebate paid on contract coal, but only for the damages such illegal payment caused the plaintiff. The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved, they could not be recovered. Whatever they were, they could be recovered, because section 8 expressly declares that wherever the carrier did an act prohibited, or failed to do any act required, it should be "liable to the person * * * injured thereby for the full amount of damages sustained in consequence of any such violation, * * * together with a reasonable * * * attorneys' fee." In view of this language it becomes necessary to inquire what the evidence shows was the injury inflicted or the damage sustained by the plaintiff in 1901 in consequence of paying rebates in 1901 on contract coal sold in 1899.

5. On various dates between April 1, 1899, and April 1, 1901, the International Company made shipments of coal from the Clearfield district to points in New Jersey, Massachusetts, and New York, its heaviest shipments being to South Amboy, New York Harbor. The aggregate was 40,000 tons, on which the lawful rate was paid. During the same period four other companies shipped to the same points, receiving rebates of from 5 to 35 cents per ton, but the amount of tonnage on which such rebates were paid does not appear. There was no proof of injury—no proof of decrease in business, loss of profits, expense incurred, or damage of any sort suffered—the plaintiff claiming that, as matter of law, the damages should be assessed to it on the basis of giving to it the same rate on all its tonnage that had been allowed on any contract coal shipped on the same dates, whether such tonnage was great or small.

Considering the multitude of instances in which discrimination has been practised by carriers, in ancient and modern times, it is remarkable how little is to be found in decisions or text-books which treat of the elements and measure of damages in such cases. In the absence of any settled rule on the subject, the new question must be determined on general principles.

The statute gives a right of action for damages to the injured party, and by the use of these legal terms clearly indicated that the damages

recoverable were those known to the law and intended as compensation for the injury sustained. It is elementary that in a suit at law both the fact and the amount of the damage must be proved. And although the plaintiff insists that in all cases like this the fact and amount of the pecuniary loss is matter of law, yet this contention is not sustained by the language of the act, nor is it well founded in actual experience, as will appear by considering several usual and everyday instances suggested by testimony in this record. For example:

If plaintiff and one of the favored companies had both shipped coal to the same market on the same day, the rebate on contract coal may have given an advantage which may have prevented the plaintiff from selling, may have directly caused it expense, or may have diminished or totally destroyed its profits. The plaintiff, under the present statute in any such case being then entitled to recover the full damages sustained;

But the plaintiff may have sold at the usual profit all or a part of its 40,000 tons at the regular market price, the purchaser, on his own account, paying freight to the point of delivery. In that event not the shipper, but the purchaser, who paid the freight, would have been the person injured, if any damage resulted from giving rebates. To say that seller and buyer, shipper and consignee, could both recover, would mean that damages had been awarded to two where only one had suffered;

Or, to take another example, a favored dealer may have shipped 10,000 tons of coal to the open New York market, receiving thereon a rebate of 35 cents a ton, or $3,500. The plaintiff at the same time may have shipped 20,000 tons and sold the same at the regular market price. Under the rule contended for it would then be entitled to 35 cents a ton on 20,000 tons, or $7,000 as damages. Such a verdict, instead of compensating it for losses sustained, would have given to the plaintiff a profit on the carrier's crime in paying a rebate of $3,500, and would have made it an advantage to it instead of an injury for the carrier to violate the law. * * *

It is said, however, that while there may be no presumption that a shipper was injured because the carrier paid a rebate on a single shipment, or on an occasional shipment, yet it could recover if rebates had been so habitually given as to establish a practice of discrimination. Proof that rebates were customarily paid would come nearer showing that injury was suffered, but would still fall short of proving the extent of the damage, and is not the theory on which the plaintiff proceeds. For it argues that whenever it showed that a lower rate had been charged on contract coal sold in 1899, it was entitled to recover the same rate on shipments made by it to the same place on the same day in 1901, even though there had been no competition in the two sales, and without proof that there had been any fall in market prices, diminution in its profits, decrease in its business, or increase in its expenses. It

claimed that it was a mere matter of mathematics, and that for every rebate on contract coal, plaintiff was entitled to a like reduction on every ton of its coal without further proof of damage or injury.

6. To adopt such a rule and arbitrarily measure damages by rebates would create a legalized but endless chain of departures from the tariff; would extend the effect of the original crime; would destroy the equality and certainty of rates; and, contrary to the statute, would make the carrier liable for damages beyond those inflicted, and to persons not injured. The limitation of liability to the persons damaged, and to an amount equal to the injury suffered, is not out of consideration for the carrier who has violated the statute. On the contrary, the act imposes heavy penalties, independent of the amount of rebate paid, and as each shipment constitutes a separate offense, the law, in its measure of fine and punishment, is a terror to evildoers. But for the public wrong and for the interference with the equal current of commerce these penalties or fines were made payable to the government. If by the same act a private injury was inflicted, a private right of action was given. But the public wrong did not necessarily cause private damage, and when it did, the pecuniary loss varied with the character of the property, the circumstances of the shipment, and the state of the market; so that, instead of giving the shipper the right to recover a penalty fixed in amount or measure, the statute made the guilty carrier liable for the full amount of damages sustained—whatever they might be, and whether greater or less than the rate of rebate paid.

7. This conclusion, that the right to recover is limited to the pecuniary loss suffered and proved, is demanded by the language of the statute, the construction put upon it years ago in the Parsons Case, and is the view taken in the only other case we find in which this question, under the act to regulate commerce, has been construed. In Knudsen-Ferguson Fruit Co. v. Michigan C. R. Co., 79 C. C. A. 46, 148 F. 974, it was said by the Circuit Court of Appeals for the Eighth Circuit that to "support a recovery under this section there must be a showing of some specific pecuniary injury. A cause of action does not necessarily arise from those acts or omissions of a common carrier that may subject it to a criminal prosecution by the government, or to corrective or coercive proceedings at the instance of the commission." * * *

Another case, on facts quite like those here involved, is that of Hoover v. Pennsylvania R. Co., 156 Pa. 220, 22 L. R. A. 263, 36 Am. St. Rep. 43, 27 A. 282, where the statute, like the commerce act, gave the party injured a right of action for damages suffered. In violation of the state law the railroad allowed a manufacturing company a rebate of 20 cents a ton on coal shipped. In a suit for the recovery of damages the trial court charged the jury that the difference between the high and low rate was the measure of recovery. This was reversed, the court saying: "The 'amount of injury suffered' is the measure of the single damages to be allowed. But it does not at all follow that the amount of

injury suffered is the difference in the rates charged. It might be or it might not be; but, in any event, it must be a subject of proof. * * * It does not appear that the plaintiffs sold their coal for any less than the current market price. * * * except when they and the other dealers were engaged in a war of prices, and sold it far below the actual cost in a struggle to capture the market."

In view of the express provisions of section 8 of the act to regulate commerce, it was error to refuse to charge that "to entitle the plaintiff to recover, the jury must be satisfied that it sustained some loss or injury due to the fact that the defendant was carrying at the same time, at lower rates, coal shipped by other shippers." The judgment of the Circuit Court of Appeals is reversed, and the case remanded to the District Court, with directions to grant a new trial.

Reversed.[82]

INTERSTATE COMMERCE COMMISSION v. BALTIMORE & O. R. CO.

(Supreme Court of the United States, 1892. 145 U. S. 263, 12 S. Ct. 844, 36 L. Ed. 699.)

Bill by the Interstate Commerce Commission to enjoin the Baltimore & Ohio Railroad Company from continuing to violate an order of the commission requiring it to desist from using "party rate" tickets. The bill was dismissed in the circuit court. 43 F. 37. The commission appeals.

This proceeding was originally instituted by the filing of a petition before the Interstate Commerce Commission by the Pittsburg, Cincinnati & St. Louis Railway Company against the Baltimore & Ohio Railroad Company, to compel the latter to withdraw from its lines of road, upon which business competitive with that of the petitioner was transacted, the so-called "party rates," and to decline to give such rates in future upon such lines of road; also for an order requiring said company to discontinue the practice of selling excursion tickets at less than the regular rate, unless such rates were posted in its offices, as required by law. The petition set forth that the two roads were competitors from Pittsburg westward; that the Baltimore & Ohio road had in operation upon its competing lines of road so-called "party rates" whereby "parties of ten or more persons traveling together on one ticket will be transported over said lines of road between stations located thereon at two cents per mile per capita, which is less than the rate for a single person; said rate for a single person being about three cents per mile." * * *

[82] An award of damages by the Interstate Commerce Commission corresponding to the amount of the rebate was upheld, on the ground that it was adequately proved as damages, in Meeker v. Lehigh V. R. Co., 236 U. S. 412, 35 S. Ct. 328, 59 L. Ed. 644, Ann. Cas. 1916B, 691 (1915).

The cause was heard before the commission, which found "that so-called 'party rate' tickets, sold at reduced rates, and entitling a number of persons to travel together on a single ticket or otherwise are not commutation tickets, within the meaning of section 22 of the act to regulate commerce, and that, when the rate at which such tickets for parties are sold are lower for each member of the party than rates contemporaneously charged for the transportation of single passengers between the same points, they constitute unjust discrimination, and are therefore illegal." It was ordered and adjudged "that the defendant, the Baltimore & Ohio Railroad Company, do forthwith wholly and immediately cease and desist from charging rates for the transportation over its lines of a number of persons traveling together in one party which are less for each person than rates contemporaneously charged by said defendant under schedules lawfully in effect for the transportation of single passengers between the same points."

The defendant road having refused to obey this mandate, the commission, on May 1, 1890, pursuant to section 16 of the interstate commerce act, filed this bill in the circuit court of the United States for the southern district of Ohio for a writ of injunction to restrain the defendant from continuing in its violation of the order of the commission. * * *

Upon the hearing before the circuit court upon pleadings and proofs the bill was dismissed, separate opinions being delivered by Judges Jackson and Sage. 43 F. 37. From this decree the Interstate Commerce Commission appealed to this court. * * *

Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.[83]

Prior to the enactment of the act of February 4, 1887 (24 St. p. 379), to regulate commerce, commonly known as the "Interstate Commerce Act," railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service (Railroad Co. v. Gage, 12 Gray, 393; Baxendale v. Railway Co., 4 C. B. [N. S.] 63; Railway Co. v. Sutton, L. R. 4 H. L. 226, 237; Ex parte Benson, 18 S. C. 385; Johnson v. Railway Co., 16 Fla. 623), though the weight of authority in this country was in favor of an equality of charge to all persons for similar services. In several of the states acts had been passed with the design of securing the public against unreasonable and unjust discrimination; but the inefficacy of these laws beyond the lines of the state, the impossibility of securing concerted action between the Legislatures towards the regulation of traffic between the several states, and the evils which

[83] Parts of the statement of facts and parts of the opinion are omitted.

grew up under a policy of unrestricted competition, suggested the necessity of legislation by congress under its constitutional power to regulate commerce among the several states. These evils ordinarily took the shape of inequality of charges made, or of facilities furnished, and were usually dictated by or tolerated for the promotion of the interests of the officers of the corporation or of the corporation itself, or for the benefit of some favored persons at the expense of others, or of some particular locality or community, or of some local trade or commercial connection, or for the destruction or crippling of some rival or hostile line.

The principal objects of the interstate commerce act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations, or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights. It was not designed, however, to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons traveling over the road. In other words, it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail. It is not all discriminations or preferences that fall within the inhibition of the statute, only such as are unjust or unreasonable. For instance, it would be obviously unjust to charge A a greater sum than B for a single trip from Washington to Pittsburgh; but, if A agrees not only to go, but to return by the same route, it is no injustice to B to permit him to do so for a reduced fare, since the services are not alike, nor the circumstances and conditions substantially similar, as required by section 2 to make an unjust discrimination. Indeed, the possibility of just discriminations and reasonable preferences is recognized by these sections, in declaring what shall be deemed unjust. We agree, however, with plaintiff in its contention that a charge may be perfectly reasonable under section 1, and yet may create an unjust discrimination or an unreasonable preference under sections 2 and 3. As was said by Mr. Justice Blackburn in Railway Co. v. Sutton, L. R. 4 H. L. 226, 239: "When it is sought to show that the charge is extortionate, as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances."

The question involved in this case is whether the principle above stated, as applicable to two individuals, applies to the purchase of a

single ticket covering the transportation of 10 or more persons from one place to another. These are technically known as "party rate tickets," and are issued principally to theatrical and operatic companies for the transportation of their troupes. Such ticket is clearly neither a "mileage" nor an "excursion" ticket within the exception of section 22; and upon the testimony in this case it may be doubtful whether it falls within the definition of "commutation tickets," as those words are commonly understood among railway officials. The words "commutation ticket" seem to have no definite meaning. They are defined by Webster (edition of 1891) as "a ticket as for transportation, which is the evidence of a contract for service at a reduced rate." If this definition be applicable here, then it is clear that it would include a party rate ticket. In the language of the railway, however, they are principally, if not wholly, used to designate tickets for transportation during a limited time between neighboring towns, or cities and suburban towns. The party rate ticket upon the defendant's road is a single ticket, issued to a party of 10 or more, at a fixed rate of 2 cents per mile, or a discount of one-third from the regular passenger rate. The reduction is not made by way of a secret rebate or drawback, but the rates are scheduled, posted, and open to the public at large.

But assuming the weight of evidence in this case to be that the party rate ticket is not a "commutation ticket," as that word was commonly understood at the time of the passage of the act, but is a distinct class by itself, it does not necessarily follow that such tickets are unlawful. The unlawfulness defined by sections 2 and 3 consists either in an "unjust discrimination" or an "undue or unreasonable preference or advantage," and the object of section 22 was to settle beyond all doubt that the discrimination in favor of certain persons therein named should not be deemed unjust. It does not follow, however, that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust. In other words, this section is rather illustrative than exclusive. Indeed, many, if not all, the excepted classes named in section 22 are those which, in the absence of this section, would not necessarily be held the subjects of an unjust discrimination, if more favorable terms were extended to them than to ordinary passengers. Such, for instance, are property of the United States, state or municipal governments; destitute and homeless persons transported free of charge by charitable societies; indigent persons transported at the expense of municipal governments; inmates of soldiers' homes, etc., and ministers of religion, in favor of whom a reduction of rates had been made for many years before the passage of the act. It may even admit of serious doubt whether, if the mileage, excursion, or commutation tickets had not been mentioned at all in this section, they would have fallen within the prohibition of sections 2 and 3; in other words, whether the allowance of a reduced rate to persons agreeing to travel 1,000 miles, or

to go and return by the same road, is a "like and contemporaneous service under substantially similar conditions and circumstances" as is rendered to a person who travels upon an ordinary single trip ticket. If it be so, then, under state laws forbidding unjust discriminations, every such ticket issued between points within the same state must be illegal. In view of the fact, however, that every railway company issues such tickets; that there is no reported case, state or federal, wherein their legality has been questioned; that there is no such case in England; and that the practice is universally acquiesced in by the public—it would seem that the issuing of such tickets should not be held an unjust discrimination or an unreasonable preference to the persons traveling upon them.

But, whether these party rate tickets are commutation tickets proper, as known to railway officials, or not, they are obviously within the commuting principle. * * *

The testimony indicates that for many years before the passage of the act it was customary for railroads to issue tickets at reduced rates to passengers making frequent trips, trips for long distances, and trips in parties of 10 or more, lower than the regular single fare charged between the same points; and such lower rates were universally made at the date of the passage of the act. As stated in the answer, to meet the needs of the commercial traveler, the 1,000-mile ticket was issued; to meet the needs of the suburban resident or frequent traveler, several forms of tickets were issued. For example, monthly or quarterly tickets, good for any number of trips within the specified time; and 10, 25, or 50 trip tickets, good for a specified number of trips by one person, or for one trip by a specified number of persons; to accommodate parties of 10 or more, a single ticket, one way or round trip, for the whole party, was made up by the agent on a skeleton form furnished for that purpose; to accommodate excursionists traveling in parties too large to use a single ticket, special individual tickets were issued to each person. Tickets good for a specified number of trips were also issued between cities where travel was frequent. In short, it was an established principle of the business that whenever the amount of travel more than made up to the carrier for the reduction of the charge per capita, then such reduction was reasonable and just in the interests both of the carrier and of the public. Although the fact that railroads had long been in the habit of issuing these tickets would be by no means conclusive evidence that they were legal, since the main purpose of the act was to put an end to certain abuses which had crept into the management of railroads, yet congress may be presumed to have had those practices in view, and not to have designed to interfere with them, except so far as they were unreasonable in themselves, or unjust to others. These tickets, then, being within the commutation principle of allowing reduced rates in consideration of increased mileage, the real question is whether this operates as an undue or unreasonable preference or ad-

vantage to this particular description of traffic, or an unjust discrimination against others. If, for example, a railway makes to the public generally a certain rate of freight, and to a particular individual residing in the same town a reduced rate for the same class of goods, this may operate as an undue preference, since it enables the favored party to sell his goods at a lower price than his competitors, and may even enable him to obtain a complete monopoly of that business. Even if the same reduced rate be allowed to every one doing the same amount of business, such discrimination may, if carried too far, operate unjustly upon the smaller dealers engaged in the same business, and enable the larger ones to drive them out of the market.

The same result, however, does not follow from the sale of a ticket for a number of passengers at a less rate than for a single passenger; it does not operate to the prejudice of the single passenger, who cannot be said to be injured by the fact that another is able in a particular instance to travel at a less rate than he. If it operates injuriously towards any one it is the rival road, which has not adopted corresponding rates; but, as before observed, it was not the design of the act to stifle competition, nor is there any legal injustice in one person procuring a particular service cheaper than another. If it be lawful to issue these tickets, then the Pittsburgh, Chicago & St. Louis Railway Company has the same right to issue them that the defendant has, and may compete with it for the same traffic; but it is unsound to argue that it is unlawful to issue them because it has not seen fit to do so. Certainly its construction of the law is not binding upon this court. The evidence shows that the amount of business done by means of these party rate tickets is very large; that theatrical and operatic companies base their calculation of profits to a certain extent upon the reduced rates allowed by railroads; and that the attendance at conventions, political and religious, social and scientific, is, in a great measure, determined by the ability of the delegates to go and come at a reduced charge. If these tickets were withdrawn, the defendant road would lose a large amount of travel, and the single trip passenger would gain absolutely nothing. If a case were presented where a railroad refused an application for a party rate ticket upon the ground that it was not intended for the use of the general public, but solely for theatrical troupes, there would be much greater reason for holding that the latter were favored with an undue preference or advantage.

In order to constitute an unjust discrimination under section 2 the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate, or other device; but, in either case, it must be for a "like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions." To bring the present case within the words of this section, we must assume that the transportation of ten persons

on a single ticket is substantially identical with the transportation of one, and, in view of the universally accepted fact that a man may buy, contract, or manufacture on a large scale cheaper proportionately than upon a small scale, this is impossible.

In this connection we quote with approval from the opinion of Judge Jackson in the court below: "To come within the inhibition of said sections, the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of like kinds of traffic under substantially the same circumstances and conditions. In respect to passenger traffic, the positions of the respective persons or classes between whom differences in charges are made must be compared with each other, and there must be found to exist substantial identity of situation and of service, accompanied by irregularity and partiality resulting in undue advantage to one, or undue disadvantage to the other, in order to constitute unjust discrimination."

[After citing and discussing certain English acts and cases, the court proceeded:]

In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge. These traffic acts do not appear to be as comprehensive as our own, and may justify contracts which with us would be obnoxious to the long and short haul clause of the act, or would be open to the charge of unjust discrimination. But, so far as relates to the question of "undue preference," it may be presumed that congress, in adopting the language of the English act, had in mind the construction given to these words by the English courts, and intended to incorporate them into the statute. McDonald v. Hovey, 110 U. S. 619, 4 S. Ct. 142.

There is nothing in the objection that party rate tickets afford facilities for speculation, and that they would be used by ticket brokers or "scalpers" for the purpose of evading the law. The party rate ticket, as it appears in this case, is a single ticket covering the transportation of 10 or more persons, and would be much less available in the hands of a ticket broker than an ordinary single ticket, since it could only be disposed of to a person who would be willing to pay two-thirds of the regular fare for that number of people. It is possible to conceive that party rate tickets may, by a reduction of the number for whom they may be issued, be made the pretext for evading the law, and for the purpose of cutting rates; but should such be the case, the courts would have no difficulty in discovering the purpose for which they were issued, and applying the proper remedy.

Upon the whole, we are of the opinion that party rate tickets, as used by the defendant, are not open to the objections found by the Interstate Commerce Commission, and are not in violation of the act to regulate commerce, and the decree of the court below is therefore affirmed.

ATCHISON, T. & S. F. RY. CO. v. KINKADE.

(District Court of the United States, D. Kansas, 1912. 203 F. 165.)

At Law. Action by the Atchison, Topeka & Santa Fé Railway Company against M. L. Kinkade. On motion to dismiss for want of jurisdiction.

POLLOCK, District Judge. The facts are the plaintiff, a corporate citizen of this state, brought this action in this court against defendant, a citizen of this state, to recover the sum of $143.71; same being the difference between the amount of $267.37 heretofore received by plaintiff from defendant for the shipment of two cars of emigrant goods carried by plaintiff and other railway companies from the city of Indianapolis, in the state of Indiana, to the town of Holcomb, in this state, and the regularly established and published tariff rate of $411.08 chargeable for the performance of such service under the provisions of the Interstate Commerce Act. Defendant moves to dismiss the case against him for want of jurisdiction in this court.

Section 24 of the new Judicial Code, regardless of the amount in controversy, provides: "This court shall have jurisdiction of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive jurisdiction of which has been conferred upon the Commerce Court."

Exclusive jurisdiction of the controversy here presented has not been by law conferred upon the Commerce Court, nor is such contention made by defendant. The only question presented by the motion is: Does this action arise under the provision of any law of the United States regulating commerce between the states? In the absence of what is known as the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), the parties would have been free to make any contract they might desire covering the shipment of the emigrant goods of defendant, and such contract when made would have been binding and enforceable. No amount in excess of that stipulated in the contract would have been chargeable or collectible. However, the price to be paid for the performance of such service as is involved in this case is no longer a matter of private contract between the parties, but both the shipper and the carrier are alike bound by the established and published tariff rate made under the Commerce Act. No other amount may be lawfully either charged, received or paid. If a greater amount is charged and received, the shipper may recover the excess. If a less amount for any reason is paid by the shipper or received by the carrier, the difference between such amount and the legally established tariff rate may by the carrier be recovered from the shipper. In other words, the rate of carriage by law established, and not the acts or contract of the parties, must control. Texas & Pacific Railway Co. v. Mugg, 202 U. S. 242, 26 S. Ct. 628, 50 L. Ed. 1011; Texas & Pac. Ry. Co. v. Abilene

Cotton Oil Co., 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; Texas & Pacific Railway Co. v. Cisco Oil Co., 204 U. S. 449, 27 S. Ct. 358, 51 L. Ed. 562; Kansas City So. Ry. v. Albers Comm. Co., 223 U. S. 573, 32 S. Ct. 316, 56 L. Ed. 556; Robinson v. Balto. & O. R. R. Co., 222 U. S. 506, 32 S. Ct. 114, 56 L. Ed. 288; Carson Lumber Co. v. St. L. & S. F. R. Co. (D. C.) 198 F. 315.

As the duty of the plaintiff to charge and collect the regularly established and published rate in this action from defendant, and the corresponding obligation of the defendant to pay the same, regardless of any understanding, agreement, or other act of the parties, arises out of the provisions of the Interstate Commerce Act and not from any contract between the parties, this court has jurisdiction, and the motion to dismiss must be overruled and denied.

It is so ordered. Defendant, if so advised, may answer the petition filed in this case within 20 days from this date.

ATLANTA, K. & N. RY. CO. v. HORNE.

(Supreme Court of Tennessee, 1900. 106 Tenn. 73, 59 S. W. 134.)

Action by John F. Horne against the Atlanta, Knoxville & Northern Railway Company. Judgment for plaintiff. Defendant appeals.

CALDWELL, J. This is an action of replevin brought by John F. Horne against the Atlanta, Knoxville & Northern Railway Company, for the possession of "one barrel of alcohol and five barrels of spirits" consigned to him at Knoxville, Tenn., by Corning & Co., at Peoria, Ill., over the road of the St. Louis, Peoria & Northern Railway Company, and connecting lines of railway; that of the Atlanta, Knoxville & Northern Railway Company being the last of them. The initial carrier issued a through bill of lading, which recited a freight rate of 51½ cents per 100 pounds on 2,235 pounds, the actual weight of the entire shipment; and when the goods reached their destination the consignee tendered to the terminal carrier the charges due on a computation at that rate, and demanded delivery. This demand was refused, but the company offered to deliver the goods on the payment of charges at the rate either of 99 cents per 100 pounds, actual weight, or of 51½ cents per 100 pounds, estimating each of the 6 barrels at 420 pounds, and limiting the value of contents to 75 cents per gallon. The alternative rate so offered is the same specified in the Southern freight classification, and approved by the interstate commerce commission for the territory of this shipment; and the refusal of the company to make delivery on other terms was based upon the idea that the federal law imperatively required the enforcement of this rate, notwithstanding the specification of a different and lower rate in the bill of lading. His tender and demand proving ineffectual, Horne resorted to this writ of replevin, and in regular course of proceeding he was adjudged entitled to the possession of the

goods in question; the trial judge being of the opinion that the rate named in the bill of lading was controlling, in the absence of evidence that the rate established by the rules of the interstate commerce commission had been brought to the attention of the public at the initial point of shipment. The defendant prosecutes an appeal in error.

Ordinarily the rate of affreightment inserted in a bill of lading is binding on the parties, and will be effectuated by the courts as an agreed compensation for the services contemplated. It is the contractual standard for computing the price to be paid for the transportation and delivery of the goods; and the tender of that price by the consignee, as a general rule, entitles him to their immediate possession, and will warrant an action of replevin if they be not promptly surrendered. That rule controls the present case, unless the federal law invoked by the company creates an exception within which it falls. Section 6 of the interstate commerce act of 1887 (chapter 104, 24 Stat. 379), as amended in 1889 (chapter 382, 25 Stat. 855), requires (1) that every common carrier engaged in interstate transportation shall furnish the interstate commerce commission a copy of its schedule of rates, and thereafter print and publicly post it at each station upon its line; (2) that all connecting carriers engaged in interstate transportation on joint schedules of rates shall in like manner file a copy thereof with that commission, and thereafter make the same public when, where, and in such manner as the commission may from time to time require; (3) that the rates, when so established, shall not be changed, except upon prescribed notice. The tenth section of the act imposes a large penalty for a violation of any of these provisions. This legislation, having been passed by the federal congress with a view of regulating interstate commerce, undoubtedly supersedes and abrogates all conflicting state statutes and general laws. Railway Co. v. Hefley, 158 U. S. 99, 15 S. Ct. 802, 39 L. Ed. 910; Railway Co. v. Harrison (Ala.) 24 So. 552. And, if applicable in this case, it is obviously controlling in the defendant's favor. Is it applicable under the facts disclosed in this record? Manifestly, the act is not self-executing as to the public. It imposes no obligations or restraints upon the public, and in no way affects it, until after certain preliminary steps have been taken by the carrier or carriers. Shippers are not affected by the act until the required publication of rates has been made, and, to bring them within its operation in a given case, the burden is upon the carrier or carriers to show compliance with that condition precedent. If the contest be with respect to a shipment over a single line, the carrier, to have the benefit of the act, against its patron, must show publication at each of its stations; and, if it be as to a transportation over connecting lines on joint account, they must show that they have made such publication as the commission directed, or the act will not be applied in their favor. It was the latter burden that rested upon the defendant in this case, the transportation here involved having been made by connecting carriers jointly. The record contains no evidence of any pub-

lication at any time or place of the alternate rate on which the defendant relied in the court below; nor, indeed, does it contain any evidence that the commission ever directed that the same should be published at all. The latter omission might with plausibility be urged as an excuse for the former one; that is, the failure on the part of the plaintiff to prove that the commission directed a publication of this rate might with some reason be said to have relieved the defendant of the necessity of proving that publication had been made, if both facts were equally dependent upon affirmative proof for their establishment. Such is not true, however. The publication required by the act is intended for the inspection, information, and advantage of the public. Railway Co. v. Hefley, 158 U. S. 101, 15 S. Ct. 802, 39 L. Ed. 910. And it is certainly contemplated that some publication shall be made in every instance, though the character and extent of publicity to be given by connecting carriers are left to the discretion and direction of the commission. The courts will presume—at least, in the absence of proof to the contrary—that the commission, in the discharge of its duty, according to the manifest spirit and clear implication of the act, directed some kind of publication to be made by these carriers when it set the seal of its approval upon their schedule of rates. This record affords no evidence that such direction was not given. Hence the presumption that it was given is conclusive for the purposes of this litigation, and the defenses of the company must fail because it did not prove compliance with that direction. This court cannot say, as did the learned trial judge, that the alternate rate urged by the company should have been published "at the initial point of shipment"; for, in the absence of the direction presumed to have been given, it cannot be known that publication at some other point or points in the route was not deemed sufficient, and directed by the commission. Some publication is presumed to have been directed, but none is shown to have been made. This excludes the case from the operation of the federal statute, and leaves the plaintiff with his rights under the bill of lading unimpairable and enforceable in this suit. It may be that this company and its associates have subjected themselves to the penalty of that law. Whether they have or not—and it is not the province of this court to decide—it is certain that they have failed to establish compliance with one of the preliminaries necessary to put it in operation as to the plaintiff. It may well be in force as to them in many of its requirements, and not as to him in any particular. For the reasons stated, the judgment of the court below is affirmed.[84]

[84] In Illinois Central Railroad Co. v. Henderson Elevator Co., 138 Ky. 220, 127 S. W. 779 (1910), a similar view was held in an action for damages, but reversed in 226 U. S. 447, 33 S. Ct. 176, 57 L. Ed. 290 (1913). "Posting * * * was not essential to make rates legally operative, and was required only as a means of affording special facilities to the public for ascertaining the rates actually in force," Van Devanter, J., in Kansas City S. R. Co. v. Albers, 223 U. S. 573, 32 S. Ct. 316, 56 L. Ed. 556 (1912). See 27 Harv. Law Rev. 737. In Gulf, C. & S. F. R. Co. v. Hefley & Lewis, 158 U. S. 98, 15 S. Ct.

LOUISVILLE & N. R. CO. v. MAXWELL.

(Supreme Court of the United States, 1915. 237 U. S. 94, 35 S. Ct. 494, 59 L. Ed. 853, L. R. A. 1915E, 665.)

In Error to the Supreme Court of the State of Tennessee to review a judgment which affirmed a judgment of the Court of Civil Appeals, affirming a judgment of the Circuit Court of Putnam County, in that state, which had affirmed a judgment of a Justice of the Peace of such county in favor of defendant in a suit by a carrier to recover an alleged undercharge on the sale of interstate railway tickets.

Mr. Justice HUGHES delivered the opinion of the court:[85]

This action was brought, before a justice of the peace in Tennessee, by the Louisville & Nashville Railroad Company, to recover $58.30 as the amount of an alleged undercharge on the sale of railroad tickets. Judgment for the defendant was affirmed by the Court of Civil Appeals and by the Supreme Court of the state. The case comes here on error.

The facts, which were said to be undisputed, were found by the state court to be as follows:

Defendant in error, G. A. Maxwell, after repeated interviews and correspondence with the representatives of the Louisville & Nashville Railroad Company in regard to rates on round trip tickets to Salt Lake City, purchased on or about the 1st day of June, 1910, "two passenger tickets from Nashville, Tennessee, to Salt Lake City, by way of Chicago, Illinois, Denver, Colorado, and routed to return by Denver, Colorado, Amarillo and Fort Worth, Texas, and Memphis, Tennessee, and paid for each ticket the sum of $49.50.

"There were at the time, published rates under the provision of the interstate commerce act by which fares over the route actually traveled, going and coming, aggregated $78.65 each, or $29.15 each more than was charged and collected therefor, making a difference of $58.30 between the amount paid by Mr. Maxwell for the tickets in question, and the amount that should have been charged and collected.

"Mr. Maxwell was informed when he first made inquiry about the tickets in January, that there were no special rate tickets at that time, but likely would be by May or June 1st. He then, and on several occasions thereafter, made known his desire to go to Salt Lake City by one route, and return by the other, and was told that he could not be furnished reduced rates except by going and coming over the same route; but after repeated inquiries, and the correspondence referred to, he

802, 39 L. Ed. 910 (1895), a state statute, which imposed a penalty for failure by the carrier to deliver on tender of rate named in the bill of lading, was held inapplicable to interstate commerce. See Mott Store Co. v. St. Louis, etc., R. Co., 184 Mo. App. 53, 168 S. W. 322 (1914), no rate on file. If the railroad's agent willfully misquotes the rates in order to obtain the shipper's patronage, has the shipper any remedy against the railroad? See 34 Yale Law J. 200.

[85] Parts of the opinion are omitted.

was informed that he could make the trip on reduced rates one way, and return another; and when he went finally to purchase the two tickets, he stated to the agent that he wanted to go by way of Chicago and Denver, and return by way of Stamford, Texas, and was given the tickets routed as hereinbefore noted, at the rates mentioned. At the time, he in fact could have gone to Salt Lake City at the rate which he paid, but over other routes, going and returning through Chicago and Denver, or through St. Louis and Denver, or through Memphis and Denver, or going through St. Louis and Denver and returning through Denver, Amarillo, and Memphis.

"Mr. Maxwell was in no way at fault in the matter. He did no more than tell the agent the points to which he wished to go, and make it known that he did not wish to go and return by the same route. The agent fixed the routing in the tickets and named the fare, and Maxwell paid without further question."

Under the interstate commerce act the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination. * * *

As was said in Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 653, 57 L. Ed. 683, 688, 33 S. Ct. 391: "Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay. The shipper's knowledge of the lawful rate is conclusively presumed, and the carrier may not be required to surrender the goods carried upon the payment of the rate paid, if that was less than the lawful rate, until the full legal rate has been paid." It was "the purpose of the act to have but one rate, open to all alike, and from which there could be no departure." Boston & M. R. Co. v. Hooker, 233 U. S. 97, 110–113, 58 L. Ed. 868, 875, 876, L. R. A. 1915B, 450, 34 S. Ct. 526. The rule is applicable to the transportation of passengers and their baggage. Id.

The Supreme Court of the state fully recognized the established principle, but stated that the majority of the court were of the opinion that it was not controlling here, for the reason that Mr. Maxwell could have gone to the point of destination, Salt Lake City, on one route, and have returned on another route, at the price actually paid for the tickets, and that, therefore, "the mere misrouting of the ticket by the railroad company" was not a discrimination. In thus holding, the assumption was that there was an error on the part of the railroad company in the rout-

ing, by which he was misled, and that, as it is said, Mr. Maxwell "could have gone to Salt Lake City at the price paid over other routes, going and returning through Chicago and Denver, or going through St. Louis and Denver, and returning through Denver, Amarillo, and Memphis, either one of which would have met his requirements."

We are unable to reach the conclusion that this ground of decision was available under the findings of fact. A misstatement or misquotation of the rate over a given route is one thing; misrouting is a different matter. We do not think that it can be said that there is a "misrouting," in any proper sense, when the route given by the company is that requested by the shipper or passenger. See Sprickels Bros. Commercial Co. v. Monongahela R. Co., 18 Interst. Com. R. 190, 191. According to the findings of fact, it appears that, after his interviews and correspondence, Mr. Maxwell finally "stated to the agent that he wanted to go by the way of Chicago and Denver, and return by the way of Stamford, Texas." His request covered four points—Chicago, Denver, Salt Lake City, and Stamford. It appears by the findings that he could have gone, at the rate actually paid, through St. Louis and Denver, returning through Denver, Amarillo, and Memphis, or that he could have made the trip, at that rate, "going and returning through Chicago and Denver, or through St. Louis and Denver, or through Memphis and Denver." But according to the findings, he was not entitled at the rate which he paid to make the trip through Chicago and Denver, returning as he desired through Stamford, Texas. We are not concerned with the reasons for the differences in rates on the various routes, but merely with the fact that they existed under the applicable tariffs as filed. Under these tariffs, the findings of fact show that the amount paid was less than the amount due over the route selected. * * *

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.[86]

Mr. Justice McReynolds dissents.

PENNSYLVANIA R. CO. v. TITUS.

(Court of Appeals of New York, 1915. 216 N. Y. 17, 109 N. E. 857, L. R. A. 1916E, 1127, Ann. Cas. 1917C, 862.)

Submission of controversy by the Pennsylvania Railroad Company against James L. Titus, doing business as Titus Bros. Judgment for plaintiff in the Municipal Court was affirmed by the Appellate Term, but reversed by the Appellate Division (156 App. Div. 830, 142 N. Y. Supp. 43), and plaintiff appeals by permission.

Collin, J. The action is to recover from a consignee a balance of freight charges which had not been claimed or collected at the delivery

86 See Galveston, H. & S. A. Ry. Co. v. Lykes Bros. (D. C.) 294 F. 968 (1923).

of the goods. The cardinal facts are: In July, 1907, the plaintiff, a common carrier by railroad, engaged in interstate commerce, delivered to the defendant as the consignee 43,080 pounds of peaches. The legal freight charge, as fixed by the schedule of rates duly published, filed, and posted, in accordance with the acts of Congress, and refrigerating charges were $491.45. On the day next following the delivery, the defendant paid the plaintiff the sum of $488, freight and refrigerating charges. The plaintiff erroneously used, in assessing the freight charges collected, the rate of 80.2 cents per hundred pounds. The correct rate was 81 cents per hundred pounds. This action is to recover the balance of $3.45. About 15 months after the delivery, the plaintiff discovered the error and demanded in vain that sum of the defendant. The peaches were consigned to defendant by one Franklin at Adairsville, Ga., under the agreement that the defendant should sell them for Franklin and remit to him the avails, less, however, his commissions and expenses, including freight and refrigerating charges, which facts were not known by the plaintiff prior to said demand. The defendant refused to pay the plaintiff the $3.45, upon the ground that he had acted in the transaction as the agent of Franklin, and before the said demand had remitted to him the avails of the sale, less his commissions and expenses, including the freight and refrigerating charges, of $488. The bills of lading delivered by the initial carrier to the shipper provided:

"Owner or consignee shall pay freight, and average, if any, and all other charges accruing on said property, before delivery, and according to weights as ascertained by any carrier hereunder; * * * in accepting this bill of lading the shipper, owner and consignee of the goods and the holder of the bill of lading agree to be bound by all of its stipulations, exceptions and conditions, whether printed or written."

The defendant was liable to the plaintiff for the lawful and correct freight charges, upon either of two grounds.[87] As to the plaintiff, the defendant stood in the relation of owner of the peaches. The bills of lading designated him as the consignee, and did not disclose his agency or the ownership of Franklin, nor did he notify the plaintiff before it delivered the peaches of either of such facts. At the time of the delivery the plaintiff did not have knowledge or notice, express or inferential, that the defendant was not the owner. Under those conditions, the plaintiff had the right, as a matter of law, to regard and deal with the consignee as the owner of the peaches, and the consignee in permitting the plaintiff to so deal with him agreed, through implication, that he would pay the plaintiff's lawful charges for transporting and delivering the peaches to him. The consignee was the presumptive owner, and when he accepted the peaches and had not informed the plaintiff and the plaintiff did not have knowledge or

[87] As to the liability of the consignee for freight charges, see an article, "Liability of Consignors and Consignees of Interstate Shipments for Unpaid Freight Charges," by Edgar Watkins, 6 Minn. Law Rev. 23.

notice before the delivery that he was a factor or agent, and that his acceptance of them would be in that capacity, he by the acceptance obligated himself to pay the unpaid legal charges of transportation. Sweet v. Barney, 23 N. Y. 335; Krulder v. Ellison, 47 N. Y. 36, 7 Am. Rep. 402; Coleman v. Lambert, 5 M. & W. 502; N. Y., N. H. & H. R. R. Co. v. York & Whitney Co., 215 Mass. 36, 102 N. E. 366; Philadelphia & Reading Ry. Co. v. Baer, 56 Pa. Super. Ct. 307; Sheets v. Wilgus, 56 Barb. 662. The obligation arose from the presumptive ownership, the acceptance of the goods, and the services rendered and benefits conferred by the plaintiff for charges made and to be paid.

The bill of lading under which the peaches were transported and delivered to the defendant contained the provisions we have already quoted. Thereunder the delivery of the goods was to be withheld until the freight charges were paid. The payment of the charges was made by the bill of lading, or by one of the terms of the shipment controlling the rights of the consignee, the condition of a delivery to the consignee. When he accepted the delivery under such bill of lading or provision, the law implied a promise on his part to pay the charges, such being the terms on which the peaches were to be delivered. In accepting and receiving the goods, he made himself a party to the contract between the consignor and the plaintiff, or entered into an original contract to pay, which took the place of the right of the plaintiff to retain the property until the charges were paid. Merian v. Funck, 4 Denio, 110; Hinsdell v. Weed, 5 Denio, 172; Davison v. City Bank, 57 N. Y. 81; Hatch v. Tucker, 12 R. I. 501, 34 Am. Rep. 707; N. Y., N. H. & H. R. R. Co. v. York & Whitney Co., 215 Mass. 36, 102 N. E. 366.

The defendant, therefore, became bound to pay to the plaintiff the freight charges—not those charges as erroneously or illegally computed by the plaintiff or himself, but the lawful and correct charges. If the amount of them were subject to the determination of the plaintiff, it might, of course, remit them in part or, perhaps, estop itself from collecting a balance. We have no concern here in regard to such hypothesis. The one and only lawful and correct freight rate was that set forth in the schedule or tariff filed in the office of the Interstate Commerce Commission and duly published and posted. The United States statutes, known as the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379), made that rate arbitrary, immutable by the agreement, mistake, or artifice of the parties, and not to be deviated from. The consignor, consignee, and carrier were alike charged with full knowledge of it and its inescapable force, and it was the rate which the defendant agreed to pay in accepting the goods. Central R. R. Co. of N. J. v. Mauser, 241 Pa. 603, 88 A. 791, 49 L. R. A. (N. S.) 92; N. Y., N. H. & H. R. R. Co. v. York & Whitney Co., 215 Mass. 36, 102 N. E. 366; Penna. R. R. Co. v. Crutchfield, 55 Pa. Super. Ct. 346; Louisville & Nashville R. R. Co. v. Maxwell,

237 U. S. 94, 35 S. Ct. 494, 59 L. Ed. 853; Union Pac. R. Co. v. American Smelting & Refining Co., 202 F. 720, 121 C. C. A. 182.

Obviously, the payment of a part of the correct amount did not fulfill or release performance by the defendant of his contract. The record does not present a question of estoppel on the part of the plaintiff, which could not, by its act, intentional or unintentional, relieve the defendant or itself from the compulsory direction of the statutes. The fact that the defendant had remitted to the consignor the net avails of the sale of the peaches is immaterial.

The order of the Appellate Division should be reversed, and that of the Appellate Term affirmed, with costs in the Appellate Division and this court.

WILLARD BARTLETT, C. J., and WERNER, HISCOCK, CHASE, and CARDOZO, JJ., concur.

Order reversed, etc.[88]

DAVIS v. AKRON FEED & MILLING CO.

(Circuit Court of Appeals of the United States, Sixth Circuit, 1924. 296 F. 675.)

Action by James C. Davis, Director General of Railroads, against the Akron Feed & Milling Company. Judgment for defendant, dismissing the petition, and plaintiff brings error.

PER CURIAM. In October, 1919, a shipment of wheat originated at Isabel, Kan., and another shipment originated at Pretty Prairie, in the same state. These two shipments of wheat were milled at Hutchinson, Kan., and reshipped by a connecting carrier of the Erie Railroad, under bill of lading dated November 19, 1919, consigned to the order of Larabee Flour Mills, at Kansas City, Kan. It was thereafter reconsigned to E. P. Mueller, at Chicago, and by Mueller was reconsigned to the Akron Feed & Milling Company, Akron, Ohio.

The Akron Feed & Milling Company agreed to pay Mueller for this shipment $1,050 f. o. b. cars at Akron. A bill of lading was forwarded to an Akron bank. When the consignment reached Akron, the Erie Railroad Company represented to the Akron Feed & Milling Company that all freight chargeable against this shipment up to the time of its arrival in Chicago had been paid. The scheduled rate from Chicago, including war tax, amounted to $64.38, of which amount the milling company paid, at the time the bill was presented to it by the railway

[88] See 27 Harv. Law Rev. 83 and 177; and New York Cent. & H. R. R. Co. v. York & Whitney Co., 256 U. S. 406, 41 S. Ct. 509, 65 L. Ed. 1016 (1921). Accord: Pittsburgh, C., C. & St. L. Ry. Co. v. Fink, 250 U. S. 577, 40 S. Ct. 27, 63 L. Ed. 1151 (1919). See Nashville, C. & St. L. R. Co. v. Gilliam, 212 Ala. 120, 101 So. 889 (1924), and comment thereon in 23 Mich. Law Rev. 657.

company, the sum of $53.46, and later paid to the Erie Railroad Company the balance of this freight, amounting to $10.92. The milling company, relying upon the representations made by the railway company that all freight upon this consignment had been paid to Chicago accepted the consignment, paid the freight charges demanded, and then paid to the Akron bank upon the bill of lading the sum of $1,050, less the freight charges of $64.38.

No contention is made that the milling company did not pay the full and correct freight charges upon this shipment, including the war tax, from Chicago to Akron, but the railway company later discovered that the freight charges, amounting, with war tax, to $128.59, from Kansas City to Chicago, had not been paid, and thereupon brought an action against the Akron Feed & Milling Company to recover that sum.

For a defense to this action the milling company claims that it relied, and had a right to rely, upon the representation made to it by the railway company that all freight had been paid upon this shipment to Chicago, where it had purchased this merchandise from E. P. Mueller, and had paid E. P. Mueller in full the agreed price of this merchandise, less the freight from Chicago. It further appears by the stipulation of counsel that:

"Neither the Akron Feed & Milling Company, nor plaintiff, the Erie Railroad, were able to collect this undercharge from the consignor, notwithstanding attempts were made by both plaintiff and defendant."

There is no dispute as to the facts above stated. A jury was waived, and the District Court, upon this agreed statement of facts, entered a judgment for the defendant, dismissing the plaintiff's petition, with costs.

The law is well settled that representations or claims made by the carrier as to the correct amount of freight to be charged will not relieve a consignee from the payment of the scheduled rate, for the reason that a shipper or consignee has equal opportunity with a carrier to know the published rate, and he is conclusively presumed to have such knowledge. Railway Co. v. York & Whitney, 256 U. S. 406, 41 Sup. Ct. 509, 65 L. Ed. 1016. It is apparent that any other construction would defeat the purpose of the act, requiring full and exact payment of the published scheduled tariff upon every shipment of freight, and would afford opportunity for collusion and fraud between the carrier and favored shippers, to the injury and prejudice of the public.

The question here presented, in the absence of any claim or proof of fraud and collusion, must be determined upon wholly different considerations. The consignee in this case had no knowledge, nor had it equal means with the railway company of acquiring knowledge, that the freight from Kansas City to Chicago had not been paid. No circumstance whatever is suggested in the agreed statement of facts that

would put the consignee upon inquiry. The railway company knew, or ought to have known, that this freight was not paid, and when it expressly stated that it had been paid, the consignee relied upon that representation, instead of refusing to accept the consignment until it had made full inquiry with reference to that fact, which inquiry would involve, not only delay, but expense, including demurrage. Nor had the consignee any more reliable source of information than the railway company itself.

The consignee, at the time these representations were made to it, was in position to protect itself fully in the payment of all freight charges. It was wholly a matter of indifference to it whether these charges were $100 or $200. Whatever freight charges it was required to pay it could deduct from the purchase price of the merchandise. It is admitted that, if it is now compelled to pay this freight, it cannot recover the same from the consignor and must suffer the loss. If the matter were one wholly between the carrier and the consignee, there would be no question that the carrier's representation would estop it from demanding further payment of freight. While the statute requiring every shipper and consignee of freight to pay the full published scheduled rate is a salutary one for the protection of the public, nevertheless, in construing and enforcing this statute, courts should not wholly ignore private rights. It is equally important that the rights of private individuals should be protected.

Counsel has not directed our attention to any case in which this exact question has been presented to the Supreme Court, nor does it appear from the investigation we have been able to make that the Supreme Court has held a shipper or consignee of freight liable for the payment of the full published scheduled rate, regardless of misrepresentations by the railway company, upon any theory other than that the shipper and consignee are conclusively presumed to know the published scheduled rate, and therefore may not rely upon the representations made by the carrier. In this case no presumption obtains that the consignee knew that the freight upon this consignment from Kansas City to Chicago had not been paid. That was not a matter of public knowledge. While the question of legal liability is not free from doubt, the equities are clearly with the consignee, and we are not impressed that the public interest demands such construction of the law as would make the consignee suffer a loss due to the fault, negligence, and misrepresentations of the carrier.

For the reasons stated, the judgment of the District Court is affirmed.[89]

[89] See comment on this case in 34 Yale Law J. 200, and Cleveland, C., C. & St. L. Ry. Co. v. McKenzie Lumber Co., 112 Ohio St. 80, 147 N. E. 8 (1925), and comment thereon by E. W. Puttkammer in 20 Ill. Law Rev. 372.

NEW YORK & PENNSYLVANIA CO. et al. v. DAVIS et al.

(District Court of the United States, E. D. Pennsylvania, 1924. 2 F.[2d] 858.)

In Equity. Suit by the New York & Pennsylvania Company and others against James C. Davis, Director General of Railroads and Agent, and another. Sur motion to dismiss bill.

DICKINSON, District Judge.[90] This motion is urged on nine different grounds. The approach by which one not familiar with the business of international freight shipments nor with its nomenclature must reach the questions of law which arise is doubtless painfully academic to those who know the subject. Notwithstanding this, there is no other mode of approach for the uninformed mind.

The first act of Congress (Act April 2, 1792, § 20, 1 Stat. 250 [Comp. St. § 6535]) by which our monetary system was established provided that our "money of account" should be "expressed" in words which by custom have been reduced to "dollars" and "cents." Our laws have further given substance to the things for which these words stand by defining what is their nominal value.

The Canadian law has similar provisions, and it happens that their "money of account" is "expressed" in the same words as our own.

This controversy has grown out of the fact that there is not merely a difference but a daily varying difference between the commercial or exchangeable value of a Canadian dollar and a dollar of the United States. As our law has undertaken to regulate freight payments by prescribing that the charges must be fair and reasonable, all are agreed that the Commission alone can determine what the proper charge is, and it is prescribed by a published tariff. When transportation is made partly over Canadian and partly over our territory, the charge is established, as we understand it, if the shipment goes under a through rate, by the "through rates being set out and contained in tariffs issued by the carriers operating in the Dominion of Canada, which said tariffs have been and are duly published and filed with the Board of Railway Commissioners for Canada and with the Interstate Commerce Commission of the United States." This means, as we interpret it, that if a shipment originates in Canada and is transported by a Canadian carrier to the international boundary line and is then taken over by a United States carrier (or by two or more of them in succession) and transported to its destination in Pennsylvania, the consignee paying the freight would be informed what the lawful charge was. He would, however, be informed by the use of the words "dollars and cents," or equivalent symbols and figures. It is clear enough that before he had a real knowledge of what he was doing he must learn whether the "dollars" in which he was to pay were Canadian dollars or our dollars. The laws of the

[90] A part of the opinion is omitted.

respective countries would inform him of the difference, if there was any, in the nominal values of these dollars; but the commercial or exchangeable value of each could be learned only through the exchanges, and these values vary from day to day. Moreover, the shipper or consignee paying the freight is concerned only with the sum he pays, but the carriers are concerned not only with this sum but with its apportionment among the carriers. The practical fact stares us in the face that, under conditions in which Canadian money is of less exchangeable value than our own, if the shipper pays the freight in Canadian money he pays less than the consignee pays if he pays in our money. It is equally clear there would be a like gain or loss in the settlements between or among the carriers.

As an administrative question, what should be done is affected by other considerations, among which is the effect upon shipments and the danger of the disruption of the relations of carriers with shippers and with each other now dealt with by a system which is the fruit of years of labor. The balancing of these interests calls for great nicety of adjustment. The Canadian Board has dealt with the problem, but our Commission has not. The former has met the complaints, which were felt to be well founded, by as fairly as possible but arbitrarily fixing what the rate of exchange is and when the freight is prepaid in Canadian money to permit a surcharge of an arbitrary percentage of the exchange thus determined. This additional charge, however, cannot be made if the freight is paid by the consignee in our money.

We are thus, after this lengthy preamble, brought to the consideration of the bill and the ninth ground of dismissal. The defendants read the bill, as we read it, to aver as the sole cause of action (in the sense that the plaintiffs have no cause without this) that the defendants (one during one period and the other afterwards) unlawfully exacted payment of the tariff rates in money of the United States. It follows that if it was lawful for the defendants to have so done, the bill presents no cause of action. To make this entirely clear, there is no averment of the collection of a surcharge which could not lawfully be made when the tariff charges were paid in our money. The challenge of the bill is made in these words:

"The contract, tariff and regulations under which the shipments * * * were transported must of necessity * * * call for * * * payment * * * in American dollars."

We see no way of escape from this conclusion. The laws of the United States make it lawful for the shipper or consignee to pay a prescribed sum of money and unlawful for the collecting carrier to exact more or to accept less. The sum to be thus paid and accepted is the sum set forth in published tariffs. This sum is expressed in words, directly or through conventional symbols. The words thus used are "dollars" and "cents." The sole question thus becomes what do these words mean. What is the thing called a "dollar" which is

to be paid. The word is defined by law. The act of 1792, already referred to, in effect declares that our "money of account" shall "be expressed in dollars or units, dimes or tenths, cents or hundredths and mills or thousandths," etc. Usage has shortened this by the disuse of all except "dollars" and "cents." This provision of the original act has never been changed. It is, of course, perfectly obvious that these words are mere words or mere verbiage or a mode of expression, but the words are words of the language of the United States, and we must use these words whenever we express values in monetary terms when the money is the money of the United States. We say we must use these words because there are no others. Congress, by other provisions of the laws, took the word "dollar" out of the domain of verbiage and gave it substance and made of it the name of a substantial thing. What the thing is, of which a "dollar" is the name, has varied from time to time, and we now have dollars which differ in their form embodiment; but under our present laws, whatever the form, each one of these dollars is a thing which has the same commercial or exchangeable value which a minted coin of 25.8 grains of gold 900 fine has (or would have if there was one) in the marts of trade. When a freight tariff calls for the payment of $100, we see no other thing which the carrier is to receive than what a creditor would receive in payment of a hundred dollar debt. All this, of course, has the flavor of the hornbooks, but it goes to the vitals of the cause of action set up in the bill.

In reaching the conclusion stated, we are not unmindful of an at least seeming dilemma. If the delivering and collecting carrier receives the published rates in money of the United States, it is, when it comes to settle with the other carriers, confronted with a difficulty. If it transmits the Canadian charges in Canadian money, retaining the balance, it receives more than it would receive if the two kinds of money were on a parity and more than the tariff charges. If it transmits money of the United States, then the Canadian carrier receives more than it would receive if there was no difference in exchange, and likewise more than the Canadian tariff. We also do not lose sight of the thought of the injustice which is always wrought when there is a shift in the exchangeable value of money. The limits of an opinion forbid us to follow the very interesting discussion in which counsel for the plaintiffs has indulged. The remedy for the evil, if there be one, is however in the legislative and not the judicial hands. The fact is that the value of money is always in a state of flux and will be until some means has been devised to give it what is called "stability." There is not only the variations recorded in the foreign exchanges, but differences in exchangeable value at different times within the country issuing the money, evidenced by the figures which show the relation between its exchangeable value and the value of other things or the general price level as contrasted with its debt-paying value. In this sense $40 may discharge a hundred dollar debt at one time and $100 be required

to pay a $40 loan at another. It may be due to what is commonly called a "depreciated currency" or the inability of a country to maintain the nominal value of its money. It may be due to natural causes which have affected the exchangeable value of that to which the value of the money has been referred. It may be due to changes in the law which establishes the nominal value of the money. Nothing is more common than the suspicion, however ill founded, that individuals possess and wield the power to work such changes at will and no one thing has called forth more bitter invectives. It is no fresh complaint. The prophet Amos, of old, called down maledictions upon the heads of those who made "the ephah small and the shekel great." The rate of foreign exchange may, on the other hand, be controlled wholly by the state of the trade between the two countries. In such case the difference would theoretically at least be measured by the cost of transporting gold in payment of trade balances. To whatever the difference may be due, and whatever its extent, we do not see that the fact that the difference works advantage to one or disadvantage to another changes the necessity of paying charges prescribed by law in the money of the country. * * *.

As this disposes of the case, there is no need to discuss the other grounds of demurrer.

Following the usual practice, no decree is now made, but a formal decree dismissing the bill for want of equity, with costs to defendants, may be submitted.[91]

CHICAGO & A. R. CO. v. KIRBY.

(Supreme Court of the United States, 1912. 225 U. S. 155, 32 S. Ct. 648, 56 L. Ed. 1033, Ann. Cas. 1914A, 501.)

In Error to the Supreme Court of the State of Illinois to review a judgment affirming a judgment of the Appellate Court for the Third District, which affirmed a judgment of the Circuit Court of Sangamon County, in that state, in favor of plaintiff in an action of assumpsit.

Mr. Justice LURTON delivered the opinion of the court:[92]

Action in assumpsit to recover damages for the breach of a special contract for the shipment of a carload of high-grade horses from Springfield, Illinois, to New York city. There was a jury, verdict and judgment, which was affirmed by the supreme court of Illinois. The facts essential to be here stated are these: Kirby was engaged in developing high-grade horses, and desired to send a carload to be sold at

[91] Accord: New York & Pennsylvania Co. v. Davis (D. C.) 8 F.(2d) 662 (1925); and see Mountain Lumber Co. v. Davis (D. C.) 9 F.(2d) 478 (1925). The principal case was affirmed by the Circuit Court of Appeals. 9 F.(2d) 911 (1926).

[92] Parts of the opinion are omitted.

a public sale to be held in Madison Square Garden, New York city. Several routes were available, and the published livestock rates for carload shipments were the same by each route. It was, however, desirable to send them by the route which would insure their arrival in the shortest time after delivery to the carrier.

The declaration in substance avers that the plaintiff in error, knowing the anxiety, of the shipper for quick transportation, and that the horses were to enter the horse sale to be held late in the month, did, on January 24, 1906, contract and agree to carry a car, rented by defendant in error, loaded with horses, for the consideration of $170.60, over its own rails from Springfield to Joliet, Illinois, and there deliver so that it would be carried by a fast stock train known as the "Horse Special," over the M. C. Railroad, through to New York. Said horse special was run but three times each week, and was due to leave Joliet the following morning. It is then alleged that the defendant in error, as directed by the railroad company, delivered and loaded his horses on the afternoon of the 24th; but that the company did not promptly carry and deliver the same to the said fast stock train on the morning of the 25th, as it had guaranteed to do, having failed to make connection with that train; and, that, as a consequence, the car was forwarded by a later and much slower train, and the horses were delivered in New York forty-eight hours after they would have arrived had they been carried by the Horse Special, as the plaintiff in error undertook. As a result of this prolonged transportation, the horses did not reach New York in time to be put in proper condition for the horse sale, whereby the defendant in error sustained damages aggregating several thousand dollars.

The plaintiff in error pleaded the general issue and under this presented certain defenses which we shall pass by, as not constituting questions of law or fact open to review upon a writ of error to a state court.

The single federal question arises upon the validity of the contract to so carry these horses as to deliver them at Joliet, to be carried through to New York by the Horse Special, leaving Joliet on the 25th of January.

That the railroad company had established and published through joint rates and charges upon carload shipments of live stock to New York is not disputed. The rates furnished the defendant in error were the regularly published rates. Those rates and schedules did not provide for an expedited service, nor for transportation by any particular train. Neither was Kirby required to pay any other or higher rate for the promised special service, by which his car was to be carried so as to be attached to the fast stock special and carried by it to New York.

By the third section of the original act of 1887 (24 Stat. at L. p. 379, c. 104, U. S. Comp. Stat. Supp. 1911, p. 1284), it is made unlaw-

ful to give any undue or unreasonable "preference or advantage" to any particular person, or to subject any particular person to "any undue or unreasonable prejudice or disadvantage in any respect whatever." By the 6th section of the same act it is required that the carriers subject to the act shall print and keep for public inspection schedules showing the rates, charges, and classifications, "and any rules or regulations which in any wise change or affect or determine any part or the aggregate of such aforesaid rates and fares and charges." The same section also provides as follows: "And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force."

By the Act of February 19, 1903, known as the Elkins Act, amending the Act of 1887 (32 Stat. at L. p. 847, c. 708, U. S. Comp. Stat. Supp. 1911, p. 1309), it is made "unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive, any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto, whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practised."

The implied agreement of a common carrier is to carry safely and deliver at destination within a reasonable time. It is otherwise when the action is for a breach of a contract to carry within a particular time, or to make a particular connection, or to carry by a particular train. The railroad company, by its contract, became liable for the consequence of a failure to transport according to its terms. Evidence of diligence would not excuse. If the action had been for the common-law carrier liability, evidence that there had been no unreasonable delay would be an answer. But the company, by entering into an agreement for expediting the shipment, came under a liability different and more burdensome than would exist to a shipper who made no such special contract.

For such a special service and higher responsibility it might clearly exact a higher rate. But to do so it must make and publish a rate open to all. This was not done.

The shipper, it is also plain, was contracting for an advantage which was not extended to all others, both in the undertaking to carry so as to give him a particular expedited service, and a remedy for delay not due to negligence.

An advantage accorded by special agreement which affects the value of the service to the shipper and its cost to the carrier should be published in the tariffs; and for a breach of such a contract, relief will be denied, because its allowance without such publication is a violation of the act. It is also illegal because it is an undue advantage, in that it is not one open to all others in the same situation.

In Armour Packing Co. v. United States, 209 U. S. 57, 72, 52 L. Ed. 681, 691, 28 S. Ct. 428, Mr. Justice Day, dealing with a violation of the act by carrying out a contract for a rate after the rate had been changed by publication of a higher rate, said:

"The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published, and posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published."

The broad purpose of the commerce act was to compel the establishment of reasonable rates and the uniform application. That purpose would be defeated if sanction be given to a special contract by which any such advantage is given to a particular shipper as that contracted for by the defendant in error. To guarantee a particular connection and transportation by a particular train was to give an advantage or preference not open to all, and not provided for in the published tariffs. * * *

That the defendant in error did not see and did not know that the published rates and schedules made no provision for the service he contracted for is no defense. For the purposes of the present question he is presumed to have known. The rates were published and accessible, and however difficult to understand, he must be taken to have contracted for an advantage not open to others. Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. Ed. 1011, 26 S. Ct. 628. * * *

For the error in not holding the special contract invalid under the Interstate Commerce Act, the judgment must be reversed and the case remanded for such further proceedings as are not inconsistent with this opinion.[93]

[93] Similarly, as to a contract to furnish cars on a specified date, Davis v. Cornwell, 264 U. S. 560, 44 S. Ct. 410, 68 L. Ed. 848 (1924), and comment thereon, with a collection of inter- and intra-state cases, in 9 Minn. Law Rev. 67. And see Falmouth Co-operative Marketing Ass'n v. Pennsylvania R. Co., 232 Mich. 538, 205 N. W. 477 (1925). For a contrary rule in respect of intrastate commerce, see German v. Chicago, M. & St. P. Ry. Co. (Mo. App.) 276 S. W. 1041 (1925). As to the validity of an agreement to delay a shipment in transit in order to take advantage of a rising market at destination, see Eastern Shore of Virginia Produce Exch. v. New York, P. & N. R. Co., 141 Va. 611, 126 S. E. 674 (1925).

DAVIS v. HENDERSON.

(Supreme Court of the United States, 1924. 266 U. S. 92, 45 S. Ct. 24, 69 L. Ed. 182.)

Action by George D. Henderson against James C. Davis. From a judgment of the Supreme Court of Arkansas (157 Ark. 43, 247 S. W. 1070), affirming a judgment for plaintiff, defendant brings error and petitions for certiorari.

Mr. Justice BRANDEIS delivered the opinion of the Court.

Henderson, a shipper of cattle, brought this suit in a state court of Arkansas against an interstate carrier then under federal control. The cause of action alleged was failure to furnish a car within a reasonable time after notice. The carrier defended on the ground that the shipper had not complied with a rule, approved by the Interstate Commerce Commission, and contained in its tariff, which provided that orders for cars must be placed with the local agent in writing. Written notice was not given. The plaintiff was permitted to testify that he had notified the station agent orally and that the latter had accepted his oral notice. The trial court refused to instruct the jury that the shipper could not recover without proving a notice in writing. Exceptions were duly taken. The plaintiff got the verdict; and the judgment entered thereon was affirmed by the highest court of the state. 157 Ark. 43, 247 S. W. 1070. The carrier brought this writ of error, and also filed a petition for a writ of certiorari, consideration of which was postponed until the hearing on the writ of error. The former must be dismissed. Act Sept. 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214). The writ of certiorari is now granted.

There is no claim that the rule requiring written notice was void. The contention is that the rule was waived. It could not be. The transportation service to be performed was that of common carrier under published tariffs. The rule was a part of the tariff. Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co., 241 U. S. 190, 197, 36 S. Ct. 541, 60 L. Ed. 948; Missouri, Kansas & Texas Ry. Co. v. Ward, 244 U. S. 383, 388, 37 S. Ct. 617, 61 L. Ed. 1213; Davis v. Cornwell, 264 U. S. 560, 562, 44 S. Ct. 410, 68 L. Ed. 848.

Writ of error dismissed.

Writ of certiorari granted.

Judgment reversed.

METZ CO. v. BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts, 1917. 227 Mass. 307, 116 N. E. 475.)

Action by the Metz Company against the Boston & Maine Railroad. On defendant's exceptions to judgment for plaintiff.

RUGG, C. J.[94] This is an action to recover the value of certain castings shipped in interstate commerce from Black Rock in the state of New York to Waltham in this commonwealth, and lost in transportation. It was admitted that a bill of lading "was issued according to law and that a copy of said bill of lading had been duly filed with the tariff schedules of the issuing carrier with the Interstate Commerce Commission and these tariff schedules had been duly published and kept open for inspection in accordance with the acts of Congress and amendments thereto relating to interstate commerce." One clause of this bill of lading was in these words:

"Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable." * * *

The jury made an express finding, however, that the condition of the bill of lading requiring written notice of loss within four months had been waived by the defendant. This finding was warranted by the evidence. Therefore, the single question presented is whether such a condition in a bill of lading can be waived under the federal laws relating to interstate commerce. This is a question touching which the decisions of the Supreme Court of the United States are binding. The Interstate Commerce Act supersedes all state laws as to the subject over which Congress thus has put forth its superior power. Corbett v. Boston & Maine R. R., 219 Mass. 351–356, 107 N. E. 60. This question presented in the case at bar seems to us to be set at rest by Georgia, Florida & Alabama Ry. v. Blish Milling Co., 241 U. S. 190, at page 197, 36 S. Ct. 541, at page 544 (60 L. Ed. 948), where it was said:

"The parties could not waive the terms of the contract under which the shipment was made pursuant to the federal act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the

[94] Parts of the opinion are omitted.

act was aimed. Chi. & Alt. R. R. v. Kirby, 225 U. S. 153, 166 [32 S. Ct. 648 (56 L. Ed. 1033, Ann. Cas. 1914A, 501)]."

Those words are exactly applicable to the facts here presented. They were used in the course of a decision respecting a clause in a bill of lading in effect the same as that here involved. While the facts of that case were slightly dissimilar to those of the case at bar, they are not different in substance, and they call for the operation of the same principles of law. It cannot be presumed that the words just quoted were used inadvisedly or without a full appreciation of the natural force to be attributed to the comprehensive reference to waiver in that connection. This decision appears to mean that, when the form of the bill of lading with its numerous contractual provisions has been filed according to law with the Interstate Commerce Commission, and the interstate rate for transportation has been fixed with reference to the terms and obligations of that uniform bill of lading, then those contractual terms and obligations become a part of the rate established and neither party can depart from them. The shipper and the carrier become bound inexorably by them. This decision was foreshadowed by Southern Ry. Co. v. Prescott, 240 U. S. 632, 36 S. Ct. 469, 60 L. Ed. 836, Kansas Southern Ry. v. Carl, 227 U. S. 639, 33 S. Ct. 391, 57 L. Ed. 683, and Chicago & Alton R. R. v. Kirby, 225 U. S. 155, 32 S. Ct. 648, 56 L. Ed. 1033, Ann. Cas. 1914A, 501, and perhaps in other decisions. Waiver by the railroad of an obligation resting on the shipper or consignee would operate to that extent to create a preference in favor of that particular shipper or consignee and a discrimination against all others to whom a like concession is not made. But it is the plain purpose of the Interstate Commerce Act and its amendments to prevent all favoritism by the carrier toward shippers and to put all shippers on the same footing. The public policy of the country has been declared to this end in no unmistakable terms in numerous decisions. * * *

The doctrine of waiver is not applicable to any subject where the public policy has been authoritatively declared to be contrary to waiver of rights. Laws founded upon considerations of public policy cannot be evaded by the device of waiver. The absolute defense is allowed in such instances, not for the sake of the defendant, but because it is the established principle of the law. It stands on the same footing in law as things forbidden to be done on grounds of public policy. There can be no waiver of an express prohibition embodied in the law for the general welfare. There are numerous examples of this character as to which the law says there can be no waiver, as, for example, contracts with a public enemy, Coppell v. Hall, 7 Wall. 542, 558, 19 L. Ed. 244, contracts made on the Lord's Day, Day v. McAllister, 15 Gray, 433, and others of like nature. Clark v. Spencer, 14 Kan. 398, 404, 19 Am. Rep. 96; Boutelle v. Melendy, 19 N. H. 196, 49 Am. Dec. 152; Kneettle v. Newcomb, 22 N. Y. 249, 78 Am. Dec. 186. There

are other examples of absolute requirements of the law in the nature of conditions precedent which cannot be waived because established by the law for the public benefit. A notice of injury received upon a highway, Gay v. Cambridge, 128 Mass. 387, or the peremptory requirement for the filing of a list by a taxpayer as a prerequisite for an abatement, Winnissimmet Co. v. Chelsea, 6 Cush. 477, Sears v. Assessors of Nahant, 205 Mass. 558, 566, 91 N. E. 913, are of this class.

There are many decisions of other courts which have held that such a clause in an interstate bill of lading may be waived. In these opinions, however, the point that the form of the bill of lading was filed with the Interstate Commerce Commission in compliance with the law and in connection with the rate schedules has not been discussed.[95] Moreover, most, if not all, of these decisions were made before the case of Georgia, Florida & Alabama R. R. v. Blish Milling Co., 241 U. S. 190, 36 S. Ct. 541, 60 L. Ed. 948, which, as has been pointed out, is decisive the other way and which must be followed. * * *

The exceptions must be sustained and in accordance with St. 1909, c. 236, judgment is to be entered in the superior court for the defendant.

So ordered.[96]

INTERSTATE COMMERCE COMMISSION v. ILLINOIS CENT. R. CO.

(Supreme Court of the United States, 1910. 215 U. S. 452, 30 S. Ct. 155, 54 L. Ed. 280.)

Appeal from the Circuit Court of the United States for the Northern District of Illinois to review a decree restraining the enforcement of an order of the Interstate Commerce Commission, commanding a railway company to desist from its practice not to take into account the company fuel cars in the daily distribution of coal cars in times of car shortage to the bituminous coal mines along its line, and requiring it, for a future period of two years, to count such cars against the share of the mine receiving them.

Mr. Justice WHITE delivered the opinion of the court:[97]

Whether a duty rested upon the Illinois Central Railroad Company to obey an order made by the Interstate Commerce Commission is the question here to be decided.

On the ground that preferences were created and discriminations engendered by regulations established by the railroad company concerning the daily distribution of coal cars to mines along its line in

95 The marginal citations by the court are omitted.

96 See comment on this case in 17 Col. Law Rev. 723. Is it part of plaintiff's case to establish compliance with the requirement as to notice, or is noncompliance an affirmative defense? See Williams v. Western Union Tel. Co. (Mo. App.) 275 S. W. 570 (1925), for a comparison of state and federal rules.

97 Parts of the opinion are omitted.

periods when the supply of such cars was inadequate to meet the demand upon it for the movement of coal, the order in question commanded the railroad company to desist from enforcing the regulations found to be preferential, and for a future period of two years to deliver cars to mines along its line in conformity with the rule announced by the Commission.

A clearer preception of the question to be considered will be afforded by giving a brief statement of the cause of car shortage referred to, accompanied with a mere outline of the steps generally taken by carriers to deal with the subject, and the particular method applied by the Illinois Central Railroad Company prior to the date when the complaint was made against it, concerning which the order previously referred to was entered.

It is conceded in argument that bituminous coal mines, which are the character of mines here involved, must dispose of their product as soon as the coal is delivered at the surface, as it is not practicable for an operator to store such coal, and the amount that a mine will produce is therefore directly dependent upon the quantity that can be taken away day by day. As a result of this situation, it is also conceded that railroads upon whose lines coal mines are situated pursue a system by which daily deliveries of cars, based upon requisitions of the respective mines, are made to such mines to permit of the removal of their available output for that day. * * *

In a general sense, however, all the regulations of the various railroads, either for ascertaining the capacity of coal mines, or in order to determine the pro rata share for daily distribution of cars to the respective mines in case of shortage, dealt with four classes of cars: (1) System cars, that is, cars owned by the carrier and in use for the transportation of coal; (2) company fuel cars, that is, cars belonging to the company, and used by it when necessary for the movement of coal from the mines on its own line, and which coal had been bought by the carrier, and was used solely for its own fuel purposes; (3) private cars, that is, cars either owned by coal mining companies or shippers or consumers, and used for the benefit of their owners in conveying coal from the mines to designated points of delivery; (4) foreign railway fuel cars, that is, cars owned by other railroad companies, and which were by them delivered to the carriers on whose lines mines were situated, for the purpose of enabling the cars to be loaded with coal and returned to the company by whom the cars had been furnished, the coal being intended for use as fuel by such foreign railroad companies.

The various regulations, irrespective of minor differences between them, fell upon one or the other side of this broad line of division. One system took into account class 2, the fuel cars of the carrier, class 3, the private cars, and class 4, the cars of foreign railroads, and deducted from the rated capacity of the mine the sum of coal delivered by that mine in such cars, and upon the basis thus resulting apportioned ratably,

in case of shortage, the system cars; that is, those embraced in class 1. On the other hand, the other class of regulation not only took no account of the cars in classes 2, 3, and 4, as a means of rating the capacity of the mine, but moreover did not charge against any mine, for the purpose of ascertaining the daily pro rata of the cars to which such mine was entitled, any car whatever furnished such mine on such day embraced within classes 2, 3, and 4, that is, any company fuel car, foreign railway fuel car, or private car. By this system, therefore, where a mine was entitled daily to a given pro rata of the cars subject to general distribution, it received its full share of such cars, and in addition on that day also received such of the company fuel cars, foreign railway fuel cars, and private cars as might have been sent to it for loading on that day. This absolute disregard in the allotment of the company fuel cars, foreign railway fuel cars, and private cars was not in all respects common to all the systems which took no account of such cars in fixing capacity, since in some of the regulations one or the other of the classes was taken into account in fixing the pro rata for distribution.

Previous to 1907, the Railroad Commission of the State of Ohio filed with the Interstate Commerce Commission two complaints against the Hocking Valley and another railroad company. These complaints were based upon the ground that the failure of the railroads in times of car shortage to include in the pro rata of cars for distribution foreign railway fuel cars and private cars, and to charge the mines which had received such cars with the same as part of their distributive share, created an undue preference, and worked unjust discrimination, in violation of the act to regulate commerce. On July 11, 1907, the report and opinion of the Commission was announced in the cases referred to. 12 Inters. Com. Rep. 398. It was declared that the complaints were well founded, and the relief prayed was awarded. Nine days afterwards —presumptively in ignorance of the finding of the Commission just referred to—the Illinois Central Railroad Company promulgated rules governing the distribution of cars to coal mines. Although by these rules foreign fuel cars, private cars, and company fuel cars were not taken into account in ascertaining the capacity of a mine or mines, such cars were expressly directed not to be counted for the purpose of the daily distribution of cars among the respective mines. On August 15 following, however, presumably to cause the regulations to conform to the interpretation of the interstate commerce act adopted by the Commission in the Hocking Valley Case, a circular was issued by the Illinois Central Railroad Company, to go into effect September 1, 1907, canceling the circular of July 20, 1907, and directing that account should be taken in the distribution of cars to a particular mine or mines of both foreign railway fuel and private cars. Before the date fixed for the going into effect of this last-named circular, the Majestic Coal & Coke

Company, a West Virginia corporation, filed a suit against the Illinois Central Railroad Company in the United States circuit court for the northern district of Illinois, complaining that to charge against its distributive share of coal cars, in the event of a car shortage, the fuel cars and private cars furnished it, would violate its legal rights. After hearing a temporary injunction preventing the going into effect of the regulations in the particulars mentioned, was issued. The distribution of coal cars thereafter continued to be made as provided in the prior circular.

With this prelude we come more immediately to the origin of the controversy before us.

On October 31, 1907, the Illinois Collieries Company filed with the Interstate Commerce Commission a complaint against the Illinois Central Railroad Company. The regulations of the railroad company as to the distribution of coal cars were assailed as unjustly discriminatory, in violation of the act to regulate commerce, particularly as respected the practice of not taking into consideration foreign railway fuel cars and private cars in determining the distribution of coal cars among the various coal operators along the lines of the railroad on interstate shipments of coal. It appears that the complaint just referred to was heard before the Commission, with two other complaints against other railroads, involving the same general subject. In its report, which was filed in all three of the cases on April 13, 1908 (13 Inters. Com. Rep. 451), the Commission held that not to count, in times of car shortage, when the daily distributions were made against the mine receiving the same, company fuel cars, foreign railway fuel cars, and private cars, was a violation of the act to regulate commerce. In announcing this conclusion, reference was made to the previous opinion of the Commission in the Hocking Valley Case, supra, and it was declared that the Illinois Central Railroad Company, on the hearing before the Commission, had conceded the controlling effect of the previous ruling of the Commission. Considering the temporary injunction issued by the circuit court of the United States for the northern district of Illinois, the Commission declared that, in view of the decision of this court in the case of the Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, 9 Ann. Cas. 1075, it was the duty of the Commission to order the carrier to desist from the unlawful discrimination.

Although the complaint in the case of the Illinois Central Railroad Company differed from the complaints in the two other cases which were considered and passed upon by the Commission at the same time, in that it did not assail the failure to take into account the company fuel cars in making distribution in times of car shortage, nevertheless the Commission declared that the Illinois Central Railroad Company, both in its brief and argument, had conceded the importance of the subject to that company, and had invoked the action of the Commission thereon.

The order of the Commission, as heretofore stated, therefore, not only directed the desisting from the practice of failing to take into account the foreign railway fuel cars, private cars, and the company fuel cars, but also required the carriers to establish regulations for a period of two years from July 1, 1908, providing for the counting of all such cars. The general scope of the order was, however, qualified by expressly authorizing a railroad company to deliver to a particular mine all the foreign railway fuel cars, the private cars, and the company fuel cars consigned or assigned to said mine, even although the number thereof might exceed the pro rata share of the cars attributable to said mine when ascertained by taking into account all the cars which the order required to be considered. Where, however, the number of such cars was less than the pro rata share of the mine, the order only permitted the carrier to add a sufficient number of system cars to make up the rightful pro rata number.

Being unwilling to comply with the order of the Commission, the Illinois Central Railroad Company commenced the suit which is now before us to enjoin in all respects the enforcement of the order of the Commission. It was averred that, although the company was adequately equipped with coal cars, and with sufficient motive power and operative forces, yet at times an inadequate supply of coal cars to meet the demand arose from the circumstances which we have previously stated. It was alleged that the regulations adopted by the company for ascertaining the capacity of the mines and for the distribution of cars were, in all respects, just and reasonable, and it was charged that the order of the Commission, directing the taking into account of private cars in the distribution of cars was unjust, unreasonable, oppressive, and unlawful, because it deprived the owners of such cars of the right to the use of their own property. It was further alleged that, as to the foreign railway fuel cars, the order was also unjust, unreasonable, oppressive, and unlawful, because such cars constituted no part of the equipment of the road, and failing to count them could not constitute an unlawful discrimination or the giving of an unjust preference within the intendment of the act to regulate commerce. Besides charging that the order to count the company fuel cars was unjust, unreasonable, etc., it was averred that the attempt of the Commission to deal with such cars was beyond its power, and was but an effort to deprive the company of its lawful right to freely contract for the purchase of the fuel necessary for the operation of its road. In addition, the proceedings in the suit brought by the Majestic Coal Company were set out, the granting of a temporary injunction therein as to counting foreign railway fuel cars and private cars was alleged, and it was charged that, in any event, as to those two classes of cars, the order of the Commission was not lawful, since it compelled the company to violate the injunction which was yet in force. The Commission answered by asserting the validity in all respects of the order by it made, substantially upon the grounds

which had been set out in its report and opinion announced when the order was made. All the averments in the complaint as to want of power were traversed, and it was expressly charged that the subject of the distribution of coal cars, as dealt with by the order, was within the administrative power delegated to the Commission by the terms of the act to regulate commerce. * * *

A certificate as to the public importance of the cause was filed by the attorney general, in compliance with section 5 of the act of June 29, 1906 (34 Stat. at L. 584, c. 3591, U. S. Comp. Stat. Supp. 1909, p. 1149), and the cause was thereafter submitted at the same time with one brought by the Alton Railroad, involving a similar question, to a circuit court held by Judges Grosscup, Baker, and Kohlsatt. A single opinion was anounced in both cases. 173 F. 930. While deciding that the complainants were not entitled to relief in so far as the order of the Commission concerned the counting of foreign railway fuel cars and private cars, it was yet held that the railway companies were entitled to an injunction restraining the enforcement of the orders of the Commission in so far as they directed the taking into account of the cars employed by the company in hauling its own fuel. The conclusion on this latter subject was based upon the theory that, as the railroad companies took the coal which they bought for their own use from the tipple of a coal mine, and thereafter moved it for their own account, and not for commercial purposes, that the cars used for that purpose could not be treated as being engaged in commerce as "commerce, under these circumstances ends at the tipple." * * *

We think the issues for decision will be best disposed of by at once considering the contentions advanced by the railroad company to establish that there was a want of power in the Commission to make that portion of the order which the court below enjoined. The contentions on this subject are stated in argument in many different forms, and, if not in some respects contradictory, are, at all events, confusing, since, considered logically, we think they virtually intermingle power and expediency as if they were one and the same thing. We shall not, therefore, in making an analysis of the contentions, follow their mere form of statement, but shall treat them all as reducible to two propositions, viz.: First. That the act to regulate commerce has not delegated to the Commission authority to consider, where a complaint is made on such subject, the question of the distribution of company fuel cars in times of car shortage as a means of prohibiting unjust preference or undue discrimination. Second. That, even if such power has been delegated to the Commission by the act to regulate commerce, the order whose continued enforcement was enjoined by the court below was beyond the authority conferred by the statute.

As the Interstate Commerce Commission alone has appealed, it is patent that those portions of the order of the Commission which concern foreign railway fuel cars and private cars, and which the court below

refused to enjoin, are not open to inquiry. The suggestion at once presents itself whether, if these subjects are not open, they do not necessarily carry with them the question of company fuel cars, on the ground that the three classes rest upon one and the same consideration, and that to divorce them would bring about conditions of preference and discrimination which the act to regulate commerce expressly prohibits. In view, however, of the great importance of the questions directly arising for decision, and the fact that the court below has treated the company fuel cars as distinct, we shall not be sedulous to pursue the suggestion, and come at once to the propositions of power previously stated.

First. That the act to regulate commerce has not delegated to the Commission authority to regulate the distribution of company fuel cars in times of car shortage as a means of prohibiting unjust preferences or undue discrimination.

When coal is received from the tipple of a coal mine into coal cars by a railway company, and the coal is intended for its own use and is transported by it, it is said there is no consignor, no consignee, and no freight to be paid, and therefore, although there may be transportation, there is no shipment, and hence no commerce. In changed form, these propositions but embody the reasoning which led the court below to its conclusion that, under the circumstances, commerce ended at the tipple of the mine. The deduction from the proposition is, as the movement of coal under the conditions stated is not commerce, it is therefore not within the authority delegated to the Commission by the act of Congress, as all such acts have relation to the regulation of commerce, and do not, therefore, embrace that which is not commerce. It is to be observed, in passing, that if the proposition be well founded, it not only challenges the authority of the Commission, but extends much further, and in effect denies the power of Congress to confer authority upon the Commission over the subject. * * *

Under these conditions, it is clear that doubt, if it exist, must be resolved against the soundness of the contentions relied on. But that rule of construction need not be invoked, as, we think, when the erroneous assumption upon which the proposition must rest is considered, its unsoundness is readily demonstrable. That assuumption is this: that commerce, in the constitutional sense, only embraces shipment in a technical sense, and does not, therefore, extend to carriers engaged in interstate commerce, certainly in so far as so engaged, and the instrumentalities by which such commerce is carried on—a doctrine the unsoundness of which has been apparent ever since the decision in Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23, and which has not since been open to question. It may not be doubted that the equipment of a railroad company engaged in interstate commerce, included in which are its coal cars, are instruments of such commerce. From this it necessarily follows that such cars are embraced within the govern-

mental power of regulation, which extends, in time of car shortage, to compelling a just and equal distribution, and the prevention of an unjust and discriminatory one.

The corporation, as a carrier engaged in interstate commerce, being, then, as to its interstate commerce business, subject to the control exerted by the act to regulate commerce, and the instrumentalities employed for the purpose of such commerce being likewise so subject to control, we are brought to consider the remaining proposition, which is:

Second. That, even if power has been delegated to the Commission by the act to regulate commerce, the order whose continued enforcement was enjoined by the court below was beyond the authority delegated by the statute.

In view of the facts found by the Commission as to preferences and discriminations resulting from the failure to count the company fuel cars in the daily distribution in times of car shortage, and in further view of the far-reaching preferences and discriminations alleged in the answer of the Commission in this case, and which must be taken as true, as the cause was submitted on bill and answer, it is beyond controversy that the subject with which the order dealt was within the sweeping provisions of § 3 of the act to regulate commerce, prohibiting preferences and discriminations. 24 Stat. at L. 380, c. 104, U. S. Comp. Stat. 1901, p. 3155. But it is contended that although this be the case, as the order of the Commission not only forbade the preferences and discriminations complained of, but also commanded the establishment of a rule excluding such discriminations for a future definite period of not exceeding two years, the order transcended the authority conferred upon the Commission. This proceeds upon the assumption that section 4 of the act to regulate commerce, as enacted by the Act of June 29, 1906, while conferring upon the Commission the authority, upon complaint duly made, to declare a rate or practice affecting rates illegal, and to establish a new and reasonable rule or practice affecting such rates for a term not exceeding two years, has no relation to complaints concerning preferences or discriminations, unless such practices, when complained of, are of a character to affect rates, which it is insisted is not here the case. The pertinent part of the section in question 4 reads as follows:

"That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section 13 of this act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this act, for the transportation of persons or property, as defined in the first section of this act, or that any regulations or practices whatsoever of such carrier or carriers af-

fecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed.

"All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction."

The contention gives to the words found in the earlier part of the section, "any regulation or practice whatsoever of such carrier or carriers affecting such rates," a dominant and controlling power, so as to cause them to limit every other provision in the section, however general in its language. We do not stop to critically examine the provision relied upon, for the purpose of pointing out, as a matter of grammatical construction, the error of the contention, because we think, when the text of the section is taken into view and all its provisions are given their natural significance, it obviously appears that the construction relied upon is without foundation, and that to sustain it would be to frustrate the very purpose which it is clear, when the entire provision is considered, it was designed to accomplish, and thus would be destructive of the plain intent of Congress in enacting the provision. The antecedent construction which the interstate commerce act had necessitated, and the remedial character of the amendments adopted in 1906, all serve to establish the want of merit in the contention relied upon. In addition, to adopt it would require us to hold that Congress, in enlarging the power of the Commission over rates, had so drafted the amendment as to cripple and paralyze its power in correcting abuses as to preferences and discriminations which, as this court has hitherto pointed out, it was the great and fundamental purpose of Congress to further.

Conceding, for the sake of the argument, the existence of the preferences and discriminations charged, it is insisted, when the findings made by the Commission are taken into view and the pleadings as an entirety are considered, it results that the discriminations and preferences arose from the fact that the railroad company chose to purchase its

coal for its fuel supply from a particular mine or mines, and that, as it had a right to do so, it is impossible, without destroying freedom of contract, to predicate illegal preferences or wrongful discriminations from the fact of purchase. But the proposition overlooks the fact that the regulation addresses itself, not to the right to purchase, but to the duty to make equal distribution of cars. The right to buy is one thing, and the power to use the equipment of the road for the purpose of moving the articles purchased in such a way as to discriminate or give preference are wholly distinct and different things. The insistence that the necessary effect of an order compelling the counting of company fuel cars in fixing, in case of shortage, the share of cars a mine from which coal has been purchased will be entitled to, will be to bring about a discrimination against the mine from which the company buys its coal, and a preference in favor of other mines, but inveighs against the expediency of the order. And this is true also of a statement in another form of the same proposition; that is, that if, when coal is bought from a mine by a railroad, the road is compelled to count the cars in which the coal is moved in case of car shortage, a preference will result in favor of the mine selling coal and making delivery thereof at the tipple of the mine to a person who is able to consume it without the necessity of transporting it by rail. At best, these arguments but suggest the complexity of the subject, and the difficulty involved in making any order which may not be amenable to the criticism that it leads to or may beget some inequality. Indeed, the arguments just stated, and others of a like character which we do not deem it essential to specially refer to, but assail the wisdom of Congress in conferring upon the Commission the power which has been lodged in that body to consider complaints as to violations of the statute, and to correct them if found to exist, or attack as crude or inexpedient the action of the Commission in performance of the administrative functions vested in it, and upon such assumption invoke the exercise of unwarranted judicial power to correct the assumed evils. It follows from what we have said that the court below erred in enjoining the order of the Commission, in so far as it related to company fuel cars, and its decree is therefore reversed, and the case remanded for further proceedings in conformity with this opinion.[98]

Mr. Justice BREWER dissents.

[98] See United States v. New River Co., 265 U. S. 533, 44 S. Ct. 610, 68 L. Ed. 1165 (1924); Berwind-White Coal Mining Co. v. United States (D. C.) 9 F.(2d) 429 (1925).

"It is claimed for complainant that, inasmuch as the private and foreign fuel cars deal only with intrastate transactions, the transactions in question do not come within the terms or spirit of the Interstate Commerce Act. It is the plain intent of the act that railroad companies shall not extend any advantage to any shipper. It follows, therefore, that any act of a railroad company which directly or indirectly results in the extension of advantage to any one or more shippers over other shippers dealing with that road in interstate commerce is forbidden by the statute. It appears from the bill that the defendant is engaged in such commerce. There exists, therefore,

MARSHALL v. NEW YORK CENT. R. CO. (1866) 45 Barb. (N. Y.) 502, 506, per E. DARWIN SMITH, J.: "The first exception to the charge presented on the argument was that the judge erred in charging the jury that preference was to be given to perishable property. The proposition in the charge excepted to is as follows: 'Where two kinds of property are delivered at the same time by different owners, one of which kind is perishable and the other not, preference is to be given to that which is perishable in transportation, and if either must wait, it must be that which is not perishable.'

"I do not see in the evidence any particular occasion for the statement of such a proposition. It seems to me that it was a mere abstract remark not essential to the case, and one which could not have done any injury if erroneous. But I am not prepared to say that it was erroneous. It merely affirms, as most reasonable, what the defendants proved to have been the practice of the agents of the company. A witness for the defendants (Gates), the clerk of the superintendent of the Western division of the defendants' railroad, testified that there was a greater demand for cars during the month of November, 1860, than there had ever been at any previous month, and that 'Mr. Collamer (the superintendent) made it a rule to give perishable property a preference if possible.'

"This, it seems to me, was a very rational rule, and as the duty of the defendants rested upon the ground of reasonable diligence in the transportation of property, and their liability for loss and injury resulting from delay in the transmission of property could only be predicated upon proof and a finding that they neglected to transport such property within a reasonable time after its receipt. The question how the carrier was employed, and how he used and employed his means of transportation, during any given period when property was delayed, would always be a proper subject of inquiry, and that on this inquiry proof that his means of transportation were employed in

this situation, viz.: The railroad is giving to the coal company facilities, in intrastate commerce, it may be, which enable the latter to place its coal upon the market for interstate shipment at a less price than that at which other coal mines can afford to sell coal. Of course, such a situation might arise from other causes, as, for instance, more accessible strata or greater quantities of coal or better mining facilities or lower wages. These advantages might be lawful in themselves, and not at all within the statute, and would be proper data to be considered in fixing the quota of cars. The law, however, deals with the interstate carrier. It may not in any way become a party to complainant's unfair advantage over other shippers in affording greater facilities pro rata to one shipper than to another. It is a creature of the law, and amenable to the varying provisions thereof. It was quite within the power of Congress to enact that a railroad shall not lend its great advantages to any enterprise which in any way seems to discriminate in favor of or against any person dealing with it. That it is doing so in this case is beyond question. * * *" Kohlsaat, J., in Majestic Coal & Coke Co. v. Illinois Cent. R. Co. (C. C.) 162 F. 810 (1908). And see Baltimore & O. R. Co. v. Public Service Commission, 81 W. Va. 457, 94 S. E. 545, L. R. A. 1918D, 268 (1917), and comment thereon in 31 Harv. Law Rev. 1029.

transporting perishable property in preference to other property received at the same time, would always be held a sufficient excuse for delay. The judge so states the rule. The preference, as he states it, is between property received at the same time. If the carrier in such case cannot carry all the property received, it seems to me that he may give preference to the perishable property over that not perishable, and that the giving of such preference cannot be a matter of complaint, but rather would be a matter of duty on his part, in such a case. I therefore do not think that this exception should be allowed. * * *"

GAMBLE-ROBINSON COMMISSION CO. v. CHICAGO & N. W. RY. CO.

(Circuit Court of Appeals of the United States, Eighth Circuit, 1909. 168 F. 161, 94 C. C. A. 217, 21 L. R. A. [N. S.] 982, 16 Ann. Cas. 613.)

SANBORN, Circuit Judge.[99] Section 3 of the Act of February 4, 1887, commonly called the "Interstate Commerce Act," provides:

"That it shall be unlawful for any common carrier subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." 24 Stat. 380, c. 104 (3 U. S. Comp. St. 1901, p. 3155).

Is it a violation of this section for a common carrier which customarily delivers to consignees a certain class of freight, holds the freight bills until after any question arising concerning the correctness of any transportation charges upon its line and upon connecting lines over which the freight has been transported has been adjusted, and then collects them, to refuse to grant such a credit to a particular consignee and to require prepayment of freight bills by it while it still continues to extend credit to others similarly situated? In other words, is it a violation of this section for a railroad company to refuse to loan to one consignee without interest the moneys owing to it for transportation charges earned by it and for those paid by it to connecting lines until the consignee's claims that such charges are incorrect have been settled, when it customarily makes such loans to other consignees? This is the question which this case presents, and it is well to perceive clearly the nature of the controversy inherent in it and the amount actually involved before entering upon the discussion of the issue it presents.

[99] The statement of facts, parts of the opinion, and the dissenting opinion of Hook, Circuit Judge, are omitted.

The plaintiff is a commission company dealing in perishable products, such as fruit, vegetables, farm and dairy products, claims for errors in the transportation charges upon which and for damages from the transportation of which frequently arise and are met with great difficulty after the products have been delivered. The plaintiff alleges that it is the custom of the terminal carriers to advance the transportation charges upon such products to connecting lines, to deliver the products to the consignees, "and afterwards to collect the reasonable and proper charges for transportation, and, in case of any question arising as to correctness of any transportation charge upon the line of the terminal or any connecting carrier, such terminal carrier takes the matter up for adjustment and holds the freight bills until an adjustment is made," and that the defendant has refused to follow this custom and has demanded of it prepayment of the transportation charges on the freight consigned to it, and has refused to accept the freight without such prepayment, although it follows the custom in the treatment of its competitors similarly situated. It further alleges that the sum paid by it to the defendant for its transportation charges and those of connecting lines has amounted to several thousand dollars per month. * * *

Prior to the enactment of the Act of February 24, 1887, to regulate commerce among the states, interstate railway traffic was regulated by the principles of the common law, and under those principles common carriers had the right to require the prepayment of charges for freight of one or more persons or corporations, and to give credit for such charges to other persons or corporations similarly situated. Interstate Commerce Commission v. Baltimore & Ohio R. R. Co., 145 U. S. 263, 275, 12 S. Ct. 844, 36 L. Ed. 699; Southern Indiana Express Co. v. United States Express Co. (C. C.) 88 F. 659, 662; Randall v. Railway Company, 108 N. C. 612, 13 S. E. 137.

That act left common carriers free to exercise to their full extent all the rights and privileges they had under the common law, so far as these rights and privileges and their exercise were not rendered unlawful by the provisions of that act. That act did not make all preferences, advantages, prejudices, or disadvantages unlawful, but those only which are "undue and unreasonable." * * *

General statements that there must be no difference in charges not based on difference in service, that rates must be equal to all under like conditions, and that unjust and unreasonable discrimination is forbidden may be found in the opinions of the courts and of the Interstate Commerce Commission in cases in which they were discussing radical differences in the direct charges for transportation under like conditions (Western Union Telegraph Co. v. Call Publishing Co., 181 U. S. 92, 100, 21 S. Ct. 561, 45 L. Ed. 765; Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 184, 16 S. Ct. 700, 40 L. Ed. 935; United States v. Vacuum

Oil Co. [D. C.] 153 F. 598, 606, 607; Hays v. Pennsylvania Co. [C. C.] 12 F. 309; Tift v. Southern Railway Co. [C. C.] 123 F. 789, 791; Scofield et al. v. Lake Shore & Michigan Southern Ry Co., 2 Interst. Com. R. 67; Daniels v. Chicago, Rock Island & Pacific Ry. Co., 6 Interst. Com. R. 458; Page v. Delaware, Lackawanna & W. R. R. Co. 6 Interst. Com. R. 548; St. Louis Hay & Grain Co. v. Mobile & Ohio R. R. Co., 11 Interst. Com. R. 90, 101), and in cases in which the carriers absolutely refused to carry the property tendered on any terms, as in Crescent Liquor Company v. Platt (C. C.) 148 F. 894, 903, or to furnish cars at proper times and places where the rates were the same, as in Castle v. Baltimore & Ohio R. R. Co., 8 Interst. Com. R. 333, 344. Opinions of state courts may also be cited under statutes which depart from the language and the true interpretation of the interstate commerce act, and require certain carriers to grant "equal terms, facilities, accommodations and usages," and forbid them from "granting any terms, credit, privileges, advantages, usages or facilities" to one that are not granted to all (Burns' Ann. St. Indiana 1901, § 3312b), which hold that every person or corporation is lawfully entitled to every privilege and courtesy extended to any other similarly situated, so that under these statutes and decisions no carrier may waive any right or extend any courtesy to any person or corporation without becoming legally bound to do likewise to every other person or corporation under similar conditions, and under this statute of Indiana there is even a decision that if a corporation customarily waives its right to prepayment of freight, pays charges of connecting carriers, and grants credit, it is required by that statute to do so for all. Adams Express Company v. State, 161 Ind. 328, 67 N. E. 1033, 1039.

But such are not the terms and such is not the meaning or the effect of the interstate commerce act. The true interpretation of that act is illustrated by the decisions which have been reviewed. It was expressed by Judge Jackson, afterwards Mr. Justice Jackson of the Supreme Court, in Interstate Commerce Commission v. Baltimore & Ohio R. R. Co. (C. C.) 43 F. 37, in these words, which have been subsequently three times affirmed and adopted by the Supreme Court of the United States as the true interpretation of this law:

"Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits." * * *

The question, therefore, is, Did the defendant subject the plaintiff to any undue or unreasonable prejudice or disadvantage by requiring

it to prepay the charges on its freight while the carrier customarily transported freight for others similarly situated without such prepayment? The defendant had the right under the common law to demand prepayment of its charges of the plaintiff and to grant credit to others for similar charges. It had the same right in this regard that every merchant, every man, and every corporation has to grant credit to one or to all but one, and to refuse it to others or to him. There was nothing unjust or morally wrong in the exercise of this right, because the plaintiff had no moral right to the extension of credit, and justice did not require that the defendant should grant to the plaintiff the same credit that it extended to others.

The Interstate Commerce Act did not expressly deprive the defendant of this right or make its exercise unlawful; so far as its express provisions are concerned, it left the right and its exercise among those which the Supreme Court declared that carriers were free to exercise and to manage upon "the same principles which are regarded as sound, and adopted in other trades and pursuits."

The refusal to extend credit to a purchaser of goods, or of transportation, of financial responsibility, credit, and reputation equal to those of others to whom such credit is extended does not in the nature of things subject him to an undue or unreasonable prejudice or disadvantage, while a requirement that such a vendor shall extend equal credit to all purchasers of equal financial responsibility, credit, and reputation, would subject him to unreasonable and undue disadvantage. Reason, sound business principles, and the practice of the business world give the option to extend credit to the seller of his property, or his services, and to the loaner of his money, and not to the purchaser or borrower. There are other considerations besides financial responsibility, credit, and reputation, which condition the rational extension of credit, such as the experience of the seller or the loaner, the habits of the purchaser or the borrower, his fairness and promptness.

The plaintiff avers that the defendant customarily gives credit to all other responsible and reputable business houses, and that it is a house of that character. * * *

It is said * * * that the fact that a custom and usage exists not to require the prepayment of such charges renders the requirement of prepayment by the plaintiff, while others are given credit under like circumstances, the imposition of an undue and unreasonable disadvantage and prejudice upon it. But since the requirement of the prepayment of the charges for freight by the plaintiff while others similarly situated are granted credit for these charges subjects the plaintiff to exactly the same degree of prejudice and disadvantage in the absence of such a custom and usage as it does in its presence, the existence of the custom or usage cannot make that prejudice or disadvantage undue or unreasonable if it would not be so if the custom or usage did not exist. * * *

An attempt has been made in argument to distinguish these and other cases in which the requirement of prepayment of charges for transportation by one while no such requirement was made of others has been held to create no undue preference or disadvantage from the case in hand, upon the ground that those were actions by railroad companies while this is an action by a shipper, or by a consignee of a shipper; but an undue or unreasonable prejudice or disadvantage inflicted upon a railroad company falls under the ban of the law as completely as an undue prejudice or disadvantage imposed upon a shipper or a consignee, and it is more deleterious by as much as all the shippers or consignees over the lines of that carrier affected by it are more numerous than a single shipper or consignee, and by as much as the charges for the transportation of their freight are greater than his. Injury to a class by a violation of the interstate commerce act is far more damaging than to a single member of a class. Crescent Liquor Co. v. Platt (C. C.) 148 F. 894, 901. * * *

Finally, the question at issue in this case in the presence of a custom and usage not to demand prepayment of transportation charges, in the presence of a motive and purpose by the defendant to harass and oppress the plaintiff by the demand of such prepayment, and in the presence of the subjection of the plaintiff in that case to very much more aggravated prejudice and disadvantage than those alleged in the action under consideration, was presented, decided, and the considered opinion of this court upon it was delivered by Judge Thayer in 1894 in these words:

"* * * This common-law right of requiring payment in advance of some customers, and of extending credit to others, has not been taken away by the interstate commerce law, unless it is taken away indirectly by the inhibition contained in the third section of the act, which declares that an interstate carrier shall not 'subject any particular person, company, corporation or locality * * * to any undue or unreasonable * * * disadvantage in any respect whatever.' This prohibition is very broad, it is true, but it is materially qualified and restricted by the words 'undue or unreasonable.' One person or corporation may be lawfully subjected to some disadvantage in comparison with others, provided it is not an undue or unreasonable disadvantage. In view of the fact that all persons and corporations are entitled at common law to determine for themselves, and on considerations that are satisfactory to themselves, for whom they will render services on credit, we are not prepared to hold that an interstate carrier subjects another carrier to an unreasonable or undue disadvantage because it exacts of that carrier the prepayment of freight on all property received from it at a given station, while it does not require charges to be paid in advance on freight received from other individuals and corporations at such station. So far as we are aware, no complaint had been made of abuses of this character at the time the interstate commerce law was enacted, and it may be

inferred that the particular wrong complained of was not within the special contemplation of Congress. * * *" Little Rock & Memphis R. Co. v. St. Louis S. W. R. Co., 63 F. 777, 11 C. C. A. 419 (26 L. R. A. 192). * * *

Our conclusion in this case is that the requirement by the plaintiff of the prepayment of charges by the defendant for the transportation of its freight, while no such requirement was made of others similarly situated, while there existed a custom or usage for the carrier to advance the charges of connecting carriers, to deliver the freight to the consignees, to hold bills for freight until claims arising out of errors in transportation charges were adjusted, and then to collect them, did not subject the plaintiff to undue or unreasonable prejudice or disadvantage or give to others similarly situated any undue or unreasonable preference or advantage within the meaning of section 3 of the Interstate Commerce Law, and the judgment below must be affirmed.

It is so ordered.

HOCKING VALLEY RY. CO. v. UNITED STATES.

(Circuit Court of Appeals of the United States, Sixth Circuit, 1914. 210 F. 735, 127 C. C. A. 285.)

DENISON, Circuit Judge.[1] The railway company was indicted for giving special concessions to the Sunday Creek Company, one of its coal shippers, in violation of the Interstate Commerce Act and the Elkins Act. After demurrers to all the counts had been overruled, and after certain counts of the indictment had been dismissed, there remained ten, and to each of these counts the defendant, by leave of the court, pleaded nolo contendere. The defendant was thereupon by the court found guilty upon each of these counts, a motion in arrest of judgment was overruled, and the defendant was fined $42,000.

The railway company assigns as error that the indictment was fatally insufficient, so that there was nothing to support the judgment.

The whole question involved is whether the giving of credit by a railway company to a shipper, under the conditions and circumstances here existing, constitutes a violation of section 6 of the Act of 1887 to regulate commerce, as amended June 29, 1906 (34 Stat. 586, 587), taken in connection with the Elkins Act of February 19, 1903, as amended June 29, 1906 (34 Stat. 587, 588). The specific portions thought applicable are those providing that the schedules giving tariff rates shall also state all privileges allowed which in any wise affect the tariff rate; that the carrier shall not collect or receive a greater or less or different compensation than the tariff rates, and shall not extend to any shipper any privilege in the transportation of property not specified

[1] Parts of the opinion are omitted.

in the tariff; that the willful failure by a carrier strictly to observe such tariff shall be a misdemeanor; and that it shall be unlawful for the carrier to give any concession or discrimination in respect to the transportation of property whereby it is transported at a less rate than that named in the tariff, or whereby any other advantage is given or discrimination is practiced, and that the carrier, giving such discrimination, is guilty of a misdemeanor. While carrying at a less or different rate is not in terms declared an offense or penalized, the same result follows from the fact that such carrying, willfully done, would be that failure "strictly to observe" such tariff which is expressly, by a later clause, made a misdemeanor. So we think it clear that a prosecution will lie for the offense of "carrying at a less or different rate." The two specific questions presented, then, by this record are whether extending to the shipper, who is to prepay his freight, such credit as was here given, is collecting a less or a different rate than the tariff, and whether such conduct amounts to granting a concession whereby any advantage is given or discrimination practiced. * * *

The ten counts are divisible into three groups. Counts 4, 5, and 6 undertook, particularly, to allege the acceptance of a "less or different compensation" and the extension of a "privilege in regard to transportation" not specified in the tariffs on file. They cover, respectively, the shipments for the months of March, April, and May, 1909. The second group—counts 17, 18, 19, and 20—cover the respective shipments for the months of August, September, October, November, 1909, and allege discrimination during these months in favor of the Sunday Creek Company and against other coal shippers in like situation. The third group does not require separate consideration, because the counts of this group only allege individual instances of discrimination included within the monthly totals covered by the counts of the second group.

The sixth count will serve to illustrate the first group. It alleges that during May, 1909, the railway company received from the Sunday Creek Company and shipped 11 cars of coal destined to points on other roads and beyond the state line; that these were all treated as "prepaid freight," the total charges to destination being payable by the Sunday Creek Company to the railway company; that the total of freight charges to destination for such shipments, at tariff rates, was about $600; that during the same period, and for prepaid freights on cars of coal destined to points within the state, the Sunday Creek Company incurred an obligation of $24,600; that at the regular monthly accounting and settlement between the railway and the shipper, had on June 28, 1909, for the May shipments, the total indebtedness of $25,200 was settled by paying the odd $200 in cash and by giving the Sunday Creek Company's note at four months with 5 per cent. interest for $25,000; that the railway company neither made any demand for, nor collected in cash, this $25,000, but that the note therefor was

given and received in accordance with an arrangement antedating the shipments; that the note was not paid but was renewed from time to time, interest being paid until April 1, 1910, when it was merged into three-year debenture bonds.

Count 17, which may be taken as typical of the second group, alleged facts similar to count 4, and, further, that other shippers, in all respects similarly situated, were required, at the time of the shipments, to give bond that the freights would be paid, and were also required to make payment in cash promptly after the monthly settlement.

As to the first group—counts 4, 5, and 6—it is argued that a payment after four months, and with legal interest, is the same thing as cash, and that a solvent shipper who receives such credit does not thereby get a "less or different rate." It is further urged that the phrase "privilege in the transportation," used in section 6, refers to something which is directly connected with, or attendant upon, the physical transportation, and does not extend to the method of making freight payments. If there is merit in either of these contentions (which we do not intend to intimate), they do not require decision now. The conviction was general, the sentence was general, and was less than the maximum possible under three counts; in other words, the sentence would be sufficiently supported by three counts. If therefor the four discrimination counts—17, 18, 19, and 20—are good, as we think they are, there is no reason to consider any others. Claassen v. U. S., 142 U. S. 140, 146, 12 S. Ct. 169, 35 L. Ed. 966; Hardesty v. U. S. (C. C. A. 6) 168 F. 25, 26, 93 C. C. A. 417; Bennett v. U. S. (C. C. A. 6) 194 F. 630, 633, 114 C. C. A. 402.

Upon the broad and underlying question whether it is such discrimination as is forbidden by the Elkins Act, in force in 1909, for the carrier to insist that shippers generally pay cash while it gives long credit to another similar shipper, and gives such credit pursuant to a previous contract—upon this broad question, we have no doubt. Such conduct, by its very terms, is discrimination. Shippers are not treated alike. Giving to one shipper four months' time in which to raise the money, even if interest is added, while the same privilege is denied to others, is plainly a "concession or discrimination." It also must be considered a concession or discrimination "in respect to transportation"; it cannot be thought that these two words in this clause of the Elkins Act pertain only to a facility of transportation; they are used in immediate connection with "rebate," and so the clause must be intended to reach and affect the subject of freight payments. Whether, by this concession, it results that the property is "transported at a less rate than that named in the tariffs" is not important because the statutory condemnation extends also to concessions "whereby any other advantage is given or discrimination is practiced." Such a discrimination might or might not be of pecuniary value to the freight payer. It is conceivable that a shipper, with sufficient working capital upon

which he could not otherwise earn 5 per cent., would save money by paying cash; but it is clear that such a system of freight credits amounts to loaning money to the shipper, and is equivalent to providing for him working capital. To say that this cannot be considered a concession, or, when unfairly practiced, a discrimination is, we think, to deny to these words their plain meaning. * * *

Not only is the conclusion that the described practice does constitute that discrimination against which this provision is directed the natural inference from the words of the statute, but the general purpose of the law and of the amendments here to be enforced, as repeatedly declared by the Supreme Court, indicates the same broad interpretation; if, indeed, there is in the word "discrimination" ambiguity to be construed. * * *

Against this natural and broad interpretation of the prohibition of "discrimination," defendant urges that the giving of credit for freights in the discretion of the carrier was a very common practice; that the practice had been judicially sustained and declared not to be discrimination; that the practice and these decisions must have been known to Congress when making amendments to the law; that no amendment was expressly directed against the practice; and hence that the word must still receive its judicially-established construction. This contention requires study of the decisions mentioned. They are three: The opinion of Judge Thayer, for the Eighth Circuit Court of Appeals, in Little Rock Co. v. St. Louis Co., 63 F. 775, 11 C. C. A. 417, 26 L. R. A. 192; the opinion of the Fifth Circuit Court of Appeals, by Judge McCormick, in Gulf Co. v. Miami Co., 86 F. 407, 30 C. C. A. 142, and Judge Sanborn's opinion (8th C. C. A., 168 F. 161, 94 C. C. A. 217, 21 L. R. A. [N. S.] 982, 16 Ann. Cas. 613) in Gamble-Robinson Co. v. Chicago Co.

The Little Rock Case was a civil action by one railroad against another, complaining because the defendant required plaintiff to prepay freight charges on the freight which it, as an initial carrier, delivered to defendant for further transportation, while defendant did not make the same requirement from the other connecting initial carriers. The common-law right of the carrier to demand cash payment or to give credit for freights was declared; and the case was seen to depend wholly on the provision in the third section of the act declaring that a carrier should not subject any particular person to any undue or unreasonable disadvantage. * * * Obviously, this holding cannot be applied to a statute, which prohibits absolutely any disadvantage, without regard to its undue or unreasonable quality.

The Gulf-Miami Case presents, so far as this point is concerned, a situation like, but converse to, that of the Little Rock Case. Plaintiff was the connecting and continuing carrier and complained because defendants, initial carriers, delivered traffic to plaintiff's competitors without requiring payment of the freight then accrued, while insisting on

such requirement against plaintiff. The substance of the decision is that the court could not, on the facts of that case, say that this conduct constituted the "unjust discrimination" prohibited by the then existing language of the Interstate Commerce Act. * * *

The Gamble-Robinson Case was based upon transactions occurring on December 15, 1906. The Elkins Act and section 6 of the Interstate Commerce Act were, at that date, in the same form involved in the instant case; the so-called Hepburn Act having been approved June 29, 1906. Nevertheless, for some reason which the whole record would doubtless disclose, Judge Sanborn considered only section 4 of the act, directed against "undue or unreasonable preference or advantage," and, speaking of the Interstate Commerce Act, expressly says (168 F. 164, 94 C. C. A. 220, 21 L. R. A. [N. S.] 982, 16 Ann. Cas. 613):

"That act did not make all preferences, advantages, prejudices, or disadvantages unlawful, but those only which are 'undue and unreasonable.'"

And in that connection he refers (168 F. 165, 94 C. C. A. 221, 21 L. R. A. [N. S.] 982, 16 Ann. Cas. 613) to decisions of the Supreme Court as upholding practices which, "though clearly discriminatory, were not undue or unreasonable," and which, although creating "clear inequality and discrimination, did not give * * * an undue or unreasonable * * * disadvantage." The decision reached by a majority of the court in the Gamble-Robinson Case was that the refusal of credit there involved (while others, generally, were given credit) could not be said to be that "unjust discrimination" which alone was forbidden. From this decision, Judge Hook forcefully dissented; but, giving full force to the majority opinion, we cannot see its application to the Elkins Act; indeed, its implications are that under that statute the practices involved in the instant case would have been condemned.

We do not overlook the contention that sections 2 and 3 of the Interstate Commerce Act still retain their reference to "unjust discrimination" and "undue or unreasonable prejudice or disadvantage" (though these sections must now be read in connection with section 6, as amended in 1906); but this does not detract from the inferences necessarily arising from the language of the Elkins Act. While this act related to interstate commerce, it was independent in form from the Interstate Commerce Act. It was "An act to further regulate commerce." It purported to cover, generally and perhaps exclusively, the subject of penalties, and it cannot be restricted by narrower language allowed to remain without change in the act of 1887. The Elkins Act not only dropped the express words of limitation; it added a broad and sweeping "whereby" clause.

Nor do we overlook the contention that the word "discrimination" inherently implies something unjust or unreasonable. In a certain sense, this is true, as is especially pointed out in Judge Kohlsaat's opinion in U. S. v. Wells Fargo Co. (C. C.) 161 F. 606, 610. That differentiation between shippers which was so trifling in amount and inopera-

tive in character that it did not give one a real and substantial advantage over another, and, to that extent, indicate that it was unfair and undue, might not be within any fair definition of a penalized discrimination. This is all that the Supreme Court necessarily means in its reference to the purpose of the Elkins law to prevent "all acts of undue discrimination." U. S. v. Wells Fargo Co., 212 U. S. 522, 531, 29 S. Ct. 315, 53 L. Ed. 635. By omitting the limiting words "undue and unreasonable," in its denouncement of discrimination, the Elkins Act has avoided the contention that such a limitation was too vague to be the basis of criminal prosecutions in which, upon the same facts, one jury might acquit and another might convict. If the court can say, as matter of law, that the distinction made is or might be [2] material and substantial, giving to the favored one a real advantage, which others did not get, then it becomes the forbidden discrimination; if the facts do not justify this declaration, but the acts can, at most, have only negligible results or are on debatable ground, then it may well be that the principle referred to in U. S. v. Brewer, 139 U. S. 278, 288, 11 S. Ct. 538, 35 L. Ed. 190 (and see Tozer v. U. S. [Brewer, J.] 52 F. 917, and L. & N. Ry. Co. v. Com., 99 Ky. 132, 35 S. W. 129, 33 L. R. A. 209, 59 Am. St. Rep. 457) would bar a prosecution. In many such cases there will be individual circumstances, such as lack of pecuniary responsibility or the previous unsatisfactory conduct of the shipper (as in the Gamble-Robinson Case) which would prevent an arbitrary inference of real discrimination; for this cannot rightfully be predicated on mere difference. Unless the difference is found in the two cases in the same environments, it is not, necessarily, discrimination.

Our conclusion here is not affected by these queries as to just how far the thought of unreasonableness still inheres in the proper definition of "discrimination" under the Elkins Act. In the instant case, the four months' credit given to one favored shipper, and then extended for longer periods, was a material and substantial distinction. It was of that character which might permit the favored shipper to continue in business and drive all others out of business. It is obvious that if continued it might rapidly accumulate into a very large sum. It cannot be thought so free from objectionable quality as not to be clearly within that general prohibition from which the express modification has been dropped. We do not say that all credit or forbearance is discrimination. A practice by which those shippers or consignees who had established their financial credit and satisfactory business habits were

[2] At this point the court added the following footnote:

"The courts are not concerned with the question as to whether, in a particular case, there had been any discrimination against shippers or harm to other dealers. The statute is general and applies not only to those particular instances in which the carrier did use its power to the prejudice of the shipper, but to all shipments which, however innocent in themselves, come within the scope and probability of the evil to be prevented." D., L. & W. R. R. v. U. S., 231 U. S. 363, 34 S. Ct. 65, 58 L. Ed. 269 (1913).

suffered to delay payment until convenient, but frequent, settlement periods, while others were required to pay cash on delivery, might not be of itself forbidden. Delays caused by inability to collect or an extension of time given as the best means of treating a past-due and doubtful freight account, might be justified. These thoughts do not reach a case where it was agreed before shipment that the favored shipper should have the incidental delays and forbearance customarily given to all shippers, and should then, in addition, receive a considerable further extension of credit while cash payment was then to be collected from all others.

Being thus satisfied of what we may call the prima facie wrongfulness of the practice here pursued, it remains to inquire whether any one of the special reasons urged by defendant why this prosecution will not lie is convincing. * * *

Considering, as we do, only the discrimination counts, we are not concerned with the controversy whether the notes should be considered as having been taken in satisfaction and payment of the existing indebtedness—that is, practically in the place of cash and in payment for the freight bills—or whether they should be treated as collateral to the continuing and undischarged indebtedness. If this controversy has any substance, it must be in the construction of section 6. When we are considering a discrimination which consisted in giving to one and in not giving to another a four months' credit, and when the credit so given was not recalled or canceled, but was in fact continued for the whole period (and much longer), it is quite immaterial whether the carrier had the legal right during the four months' period to disregard the credit arrangement and demand immediate payment. Whatever its right, it did not do so, and the discrimination continued in its active and operative effect.

We have not considered the assignments of error in their order, or mentioned all of the points urged in argument against the judgment; but those not mentioned do not seem to us as forceful as these we have discussed.

The judgment is affirmed.[3]

[3] Certiorari denied 234 U. S. 757, 34 S. Ct. 675, 58 L. Ed. 1579 (1914). See People ex rel. Western Union Tel. Co. v. Public Service Commission, 192 App. Div. 748, 183 N. Y. S. 659 (1920), refusal of one telegraph company to extend credit to another, and comment thereon in 20 Col. Law Rev. 801, reversed in 230 N. Y. 95, 129 N. E. 220, 12 A. L. R. 960 (1920). For another case, involving state law, see Wadley S. R. Co. v. State, 137 Ga. 497, 73 S. E. 741 (1911).

INTERSTATE COMMERCE COMMISSION v. CHICAGO GREAT WESTERN RY. CO. et al.

(Supreme Court of the United States, 1908. 209 U. S. 108, 28 S. Ct. 493, 52 L. Ed. 705.)

Appeal from the Circuit Court of the United States for the Northern District of Illinois to review a decree dismissing proceedings begun by the Interstate Commerce Commission against a railway company, charging discrimination in rates.

Statement by Mr. Justice BREWER:

Certain proceedings were had before the Interstate Commerce Commission. They were commenced by the filing of a petition by the Chicago Live Stock Exchange in April, 1902, charging the defendants, who are now the appellees, with the violation of §§ 1 and 3 of the interstate commerce act of February 4, 1887. 24 Stat. at L. 379, c. 104, U. S. Comp. Stat. 1901, p. 3154. The specific offense stated was that the defendants were charging higher rates of freight upon live stock shipped from Missouri river points, and other points similarly situated, to Chicago, than upon dressed meats and the prepared products known as packing-house products. It was contended that this higher rate of freight was an unlawful discrimination against shippers of live stock to Chicago, and gave to shippers of packing-house products an undue and unreasonable preference and advantage over the former; that it subjected the Chicago Live Stock Exchange and its members, who were engaged in the business of selling live stock on commission, as well as the owners of live stock and the shippers thereof, to an unreasonable prejudice and disadvantage. The several defendants, with one or two exceptions, answered, denying the allegations of the complaint. After a hearing, the Interstate Commerce Commission, on January 7, 1905, filed its report and opinion, including findings of fact, and made an order, which is the foundation of this suit. The order is in these words: * * *

It is ordered that, in accordance with said report and opinion, the present relation of rates maintained and enforced by defendants [naming them all, eighteen in number], whereby their rates for transportation are higher upon live cattle and live hogs than upon the dressed or prepared products of cattle and hogs in shipments thereof, * * * constitutes wrongful prejudice and discrimination, in violation of the provisions of the act to regulate commerce. * * *

The defendants not complying with this order, the Interstate Commerce Commission caused this suit to be commenced in the circuit court of the United States for the northern district of Illinois, seeking to compel compliance. The defendants answered, admitting service of the order and refusal to comply therewith, denying that it was legal or binding, but, on the contrary, claiming that it was in violation of their rights. After the filing of the petition to enforce the order of

the Commission, and the answers thereto, and in August, 1905, the Commission also commenced an original proceeding under and by virtue of the act of February 19, 1903 (32 Stat. at L. 847, c. 708, U. S. Comp. Stat. Supp. 1907, p. 880), known as the Elkins Act, charging substantially the same discrimination. These cases were consolidated and heard before the circuit court, an enormous volume of additional testimony being taken, and on November 20, 1905, that court announced its opinion, stated its findings of fact and conclusions of law, and ordered that the bill should be dismissed. A decree accordingly was so entered. 141 F. 1003. * * *

Mr. Justice BREWER delivered the opinion of the court.[4] * * *

The complainant, before the interstate commerce action, was an incorporated association. The purposes for which it was organized were, as stated in its charter, "to establish and maintain a commercial exchange; to promote uniformity in the customs and usages of merchants; to provide for the speedy adjustment of all business disputes between its members; to facilitate the receiving and distributing of live stock, as well as to provide for and maintain a rigid inspection thereof, thereby guarding against the sale or use of unsound or unhealthy meats; and generally to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits." Its members were, as found by the Commerce Commission, "engaged in the purchase, shipment, and sale of live stock for themselves and upon commission." It was such an association, with members engaged in the business named, that initiated these proceedings and in whose behalf they were primarily prosecuted. While it may be that the proceedings are not to be narrowly limited to an inquiry whether this particular complainant has been in any way injured by the action of the railroad companies, yet that question must be regarded as the one which was the special object of inquiry and consideration. It is true that the Commission subsequently commenced, under the Elkins Act, an independent suit in its own name, but it was practically to enforce the award made by the Commission after its inquiry into the controversy between the live-stock Exchange and the railroad companies.

It must be remembered that railroads are the private property of their owners; that while, from the public character of the work in which they are engaged, the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet, in no proper sense, is the public a general manager. As said in Interstate Commerce Commission v. Alabama Midland R. Co., 168 U. S. 144, 172, 42 L. Ed. 414, 425, 18 S. Ct. 45, 51, quoting from the opinion in 5 Interst. Com. Rep. 697, 21 C. C. A. 59, 41 U. S. App. 466, 74 F. 723:

"Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discrimi-

[4] Parts of the statement of facts and parts of the opinion are omitted.

nate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law,—free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits."

It follows that railroad companies may contract with shippers for a single transportation or for successive transportations, subject though it may be to a change of rates in the manner provided in the Interstate Commerce Act (Armour Packing Co. v. United States, 209 U. S. 56, 52 L. Ed. 681, 28 S. Ct. 428), and also that, in fixing their own rates, they may take into account competition with other carriers, provided only that the competition is genuine, and not a pretense. * * *

It must also be remembered that there is no presumption of wrong arising from a change of rate by a carrier. The presumption of honest intent and right conduct attends the action of carriers as well as it does the action of other corporations or individuals in their transactions in life. * * *

The Commerce Commission did not find whether the rates were reasonable or unreasonable per se. * * * On the other hand, the circuit court found specifically that the live-stock rates were reasonable, and also that the rates for carrying packers' products and dressed meats were remunerative. See findings 1 and 7. Obviously, shippers had, in the rates considered separately, no ground of challenge. But the burden of complaint is not that any rates, taken by themselves, were too high, but that the difference between those on live stock and those on dressed meats and packers' products worked an unjust discrimination.

It is insisted that "the making of the live-stock rate higher than the product rate is violative of the almost universal rule that the rates on raw material shall not be higher than on the manufactured product." This may be conceded, but that the rule is not universal the proposition itself recognizes, and the findings of the court give satisfactory reasons for the exception here shown. See findings 2, 3, and 9. The cost of carriage, the risk of injury, the larger amount which the companies are called upon to pay out in damages, make sufficient explanation. They do away with the idea that, in the relation established between the two kinds of charges, any undue or unreasonable preference was intended or secured.

Finding No. 6 is very persuasive. It reads:

"Sixth. That the present rates on live stock have not materially affected any of the markets, prices, or shipments; that they are reasonably fair to Chicago and to the shippers; that the shipments of live stock from points between Chicago and the Missouri river and St. Paul are as great in proportion to the volume of business as before the present rates were made; that the majority of the live stock comes to

Chicago from points as near as 150 miles this side of the Missouri river and St. Paul, and that the lower rate given to the packers does not seem to directly influence or injure the shippers of live stock."

If the rates complained of have not materially affected any of the markets, prices, or shipments; if they are reasonably fair to Chicago and the shippers; if the shipments of live stock from the West to Chicago are as great in proportion to the bulk of the business as before the present rates were made; and the lower rate given to the packers does not directly influence or injure the shippers of live stock—it is difficult to see what foundation there can be for the claim of an undue and unreasonable preference. It would seem a fair inference from the findings that the real complaint was that the railroad companies did not so fix their rates as to help the Chicago packing industry; that they recognized the fact that along the Missouri river had been put up large packing houses, and, without any intent to injure Chicago, had fixed reasonable rates for the carrying of live stock to such packing houses and also to Chicago; that those packing houses, being nearer to the cattle fields, were able to engage in the packing industry as conveniently and successfully as the packing houses in Chicago. If we were at liberty to consider the mere question of sentiment, certainly to place packing houses close to the cattle fields, thus avoiding the necessity of long transportation of the living animals—a transportation which cannot be accomplished without more or less suffering to them—and to induce transportation to those nearer packing houses, would deserve to be commended rather than condemned.

With reference to competition, we have referred to the cases in this court in which that matter has been considered. According to the fourth finding, the rates in question given to the packers at the Missouri river and St. Paul were the result of competition. Without recapitulating all the facts disclosed in that finding, it is enough to say that the Chicago Great Western Railway Company, which had the longest line from Chicago to Missouri river points, made a reduction in the rates, and did this, as its president testified, "for the purpose of securing a greater proportion of the traffic in the products of live stock than it had been previously able to obtain." That is one of the facts inducing competition, and one of the results expected to flow from a reduction of rates. It certainly of itself deserves no condemnation. In order to secure to themselves what was likely to be transferred to the Great Western by virtue of its reduction of rates, the other companies also made a reduction, and, as shown by the fifth finding, the competition was not the result of agreement, but was an "actual, genuine competition." It may be true, as contended by counsel for the appellant, that even a genuine competition which results in a change of rates does not necessarily determine the question whether the rates as fixed work an undue preference or create an unlawful discrimination. Those rates fixed may make a preference or discrimination irrespective of the motives which caused the railway

companies to adopt them, and yet the fact of a genuine competition does not make against the contention that the rates were intended to work injustice. An honest and fair motive was the cause of the change in rates—honest and fair on the part of the Great Western in its effort to secure more business, and equally honest and fair on the part of the other railway companies in the effort to retain as much of the business as was possible. In other words, this competition eliminates from the case an intent to do an unlawful act, and leaves for consideration only the question whether the rates as established do work an undue preference or discrimination; and, as the findings of the court show that the result of the new rates has not been to change the volume of traffic going to Chicago, or materially affect the business of the original complainant, it would seem necessarily to result that the charge of an unlawful discrimination is not proved. In short, there was no intent on the part of the railway companies to do a wrongful act, and the act itself did not work any substantial injury to the rights of the complainant.

We have not attempted to review in detail the great mass of testimony, amounting to two enormous printed volumes. It is enough to say that an examination of it clearly shows sufficient reasons for the findings of fact made by the Circuit Court.

In short, the findings of the Circuit Court were warranted by the testimony, and those findings make it clear that there was no unlawful discrimination.

The decree of the Circuit Court is affirmed.[5]

Mr. Justice MOODY did not hear the argument nor take part in the decision in this case.

LUNDQUIST et al. v. GRAND TRUNK WESTERN RY. CO. et al.

(Circuit Court of the United States, 1901. 121 F. 915.)

KOHLSAAT, District Judge.[6] This matter comes on for hearing upon complainants' motion for a preliminary injunction upon bill and affidavits. Complainants are known as forwarding agents or intercepting carriers. They solicit the shipment of less than carload lots of merchandise between Chicago and New York, combine these ship-

[5] See Penn Refining Co. v. Western N. Y. & P. R. Co., 208 U. S. 208, 28 S. Ct. 268, 52 L. Ed. 456 (1908). The Shreveport Rate Case (Houston, E. & W. T. Ry. v. United States, 234 U. S. 342, 34 S. Ct. 833, 58 L. Ed. 1341 (1914), aside from its importance on the matter of development of congressional power over intrastate commerce because of its relationship to interstate commerce, furnishes an excellent illustration of preferential treatment of one locality over another by reason of discriminatory rates. The case and its antecedents are discussed in an article, "The Evolution of Federal Regulation of Intrastate Rates," by Coleman, 28 Harv. Law Rev. 34. And see the Wisconsin Rate Cases (Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co., 257 U. S. 563, 42 S. Ct. 232, 66 L. Ed. 371, 22 A. L. R. 1086 [1922]).

[6] Part of the opinion is omitted.

ments into carloads, and have for the profits of their business the difference between the carload and less than carload rates of defendant railroad companies between those points. The bill sets forth the rule adopted by defendants with reference to the handling of mixed carloads of freight, designated as rule 10, and the note thereto, which reads as follows:

"Note.—The foregoing rule will apply only on freight from one shipper or owner, and will not cover L. C. L. shipments of property from two or more shippers combined into carloads by forwarding agents claiming to act as shippers. The term 'forwarding agents' shall be construed to mean agents of the carriers, and also agents of the actual shippers of the property, or any party interested in the combination of L. C. L. shipments of articles from several shippers into carloads at points of origin."

The bill alleges that defendants have proceeded to enforce the above provision of the note to rule 10 against complainants, that the said action of defendants amounts to an illegal discrimination against complainants in favor of carload shipments by the owner of all the goods contained in said carload, that such unlawful discrimination will work an irreparable injury to complainants' business unless an immediate injunction be issued, and that said discrimination is illegal, because in contravention of the Interstate Commerce Act.

Under the common law, the discrimination alleged herein was permitted to common carriers, inasmuch as the latter were not under any obligation to treat all shippers alike. The carrier was only required to make reasonable carrying charges to all. That, then, is the present law, except in so far as it may have been modified by the Interstate Commerce Act. (U. S. Comp. St. § 8563 et seq.) * * *

The provision of the act which bears directly upon the particular case now before me is fairly comprehended within the clause of section 2 which prohibits discrimination in charges for doing "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." Have defendants so discriminated against complainants? Is the service demanded by complainants a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions to those presented by the case of a single owner of freight offered for carload shipment? The margin between the freight charged on a carload shipment and that charged upon the same goods shipped in less than carload lots is so considerable that the forwarding agent is enabled to offer to shippers controlling inducements to permit their goods to be shipped through the agency of such forwarding agents, and at the same time leave the latter a substantial balance as profits. Thus the railroad company is made to transport freight which would in ordinary course come to it at the less than carload rates for a rate appreciably less than that paid by the actual owners to the forwarding agent, and the difference is absorbed by the latter.

This condition of affairs, defendants claim, is unjust to them, and urge, among others, the following reasons: (1) That they are thereby placed in a position where they are liable to be imposed upon as to classification and rates; (2) that they are deprived of their less than carload business to such an extent that it will eventually be entirely eliminated; (3) that they are thus compelled to enable the forwarding agent or intercepting carrier to do what they are by the Interstate Commerce Act expressly forbidden to do (i. e. discriminate between shippers); (4) that they are exposed to the expense and annoyance of a multiplicity of suits by the various beneficial owners, without the additional compensation provided for in their less than carload rates.

I do not think the first point well taken. There can be no more difficulty in avoiding imposition where the shipper is a forwarding agent transporting in his name the goods of numerous owners, than where the shipper is the actual owner of the goods. As business is now conducted, a single owner may handle almost every variety of freight.

The second objection is entitled to consideration if the less than carload rates as constituted are just and reasonable. There is nothing in this record establishing the contrary. For the purposes of this hearing, their reasonableness must be assumed. It would be a novel proposition to hold that defendants are required to furnish facilities for undermining their own business. It may well be that, if railroads were to handle nothing but carload lots, they would find it necessary to materially change their rates. There is in this objection a strong appeal to one's sense of justice, but I do not deem it necessary to dispose of the case upon this ground.

The third objection is also entitled to consideration. The difference between the carload and less than carload rates placed at the disposal of the forwarding agent may easily be so manipulated by him as to defeat the spirit of the Interstate Commerce Act. He is not subject to the provisions of that act. Manifestly, he may evade the very provisions of the act which he is claiming the defendants are defeating in this case. He can offer different rates to different shippers, with no other limit than business necessity. Not only this, but he can give his principals lower rates than those given by defendants to their less than carload shippers. The logical outcome of such a condition would be, according to the inexorable rules of commerce, that defendants would be obliged either to do an injustice to their shippers of less than carload lots, or reduce all their rates to a carload basis. It seems to me that the two last-named objections go far toward the demonstration of the equity of defendants' position.

Coming now to the fourth objection, the plain proposition is this: Is the service demanded by complainants, all the circumstances and conditions considered, a like and contemporaneous service in the transportation of a like kind of traffic under similar circumstances and conditions to those offered by defendants to an owner of goods, as

distinguished from a forwarding agent representing several owners? It must be admitted that the carrier is, in the case of numerous beneficial owners, subjected to an additional liability, which it is entitled to provide against by an increased rate. There is some uncertainty as to whether or not the carrier could, in cases like the one before the court, be held liable to the beneficial owner upon the contract of the forwarding agent, but there is no doubt but that it can be pursued in tort. It is, of course, impossible to determine the actual extent of the liability thus assumed; but it is appreciable, and quite sufficient, in my judgment, when taken with the foregoing, to differentiate it from the carload service furnished to owners, as distinguished from forwarding agents representing different owners, and therefore the case at bar does not come within the terms of the Interstate Commerce Act relied upon by complainants. In England this increased liability has been ignored in suits brought under the Railway Causes Act. That act is much more explicit in its terms than the Interstate Commerce Act. The peculiar language of the former is that "all tolls shall be charged equal to all persons and after the same rate." But even were this not the case, it is not probable that our courts would feel bound to follow the English decisions. The conditions surrounding the operation and management of railroads covering such a small territory as that of England are so different from those existing in this country, and the demands upon the carrier service are so divergent, that English decisions should not be allowed to control. The trend of the American decisions and the official utterances of the Interstate Commerce Commission all recognize the principle that the particular facts of each case must have great weight in the application of the provisions of the Interstate Commerce Act.

Upon this view of the case, the complainants are compelled to justify their bill under the law as it stood before the passage of the Interstate Commerce Act. This, as before stated, cannot be done, in view of the federal decisions, notably that in the Express Cases, 117 U. S. 1, 6 S. Ct. 542, 628, 29 L. Ed. 791.

This is a pioneer case upon the issue raised by complainants, and little aid can be obtained from authoritative sources; but, upon the whole case, considering all the conditions, I am clearly of the opinion that complainants' contention cannot be sustained, and that a preliminary injunction herein should be denied. In view of this conclusion, it becomes unnecessary to pass upon the other questions raised.[7]

[7] In California Commercial Ass'n v. Wells, Fargo Co., 14 Interst. Com. Com'n R. 422 (1908), the Interstate Commerce Commission had before it a case similar to Lundquist v. Grand Trunk Ry. Co. The Commission, two members dissenting, pointed out that the Lundquist Case was the only one in the United States in which the question had been passed on; and, deeming that case to have been incorrectly decided under the Interstate Commerce Act (U. S. Comp. St. § 8563 et seq.), refused to follow it. In another case immediately thereafter (Export Shipping Co. v. Wabash R. Co. et al., 14 Interst. Com. Com'n R. 437 [1908]), the Commission reaffirmed its own position in the earlier case, stated that "a carrier may not properly look beyond the transportation to the

WIGHT v. UNITED STATES.

(Supreme Court of the United States, 1897. 167 U. S. 512, 17 S. Ct. 822, 42 L. Ed. 258.)

In Error to the District Court of the United States for the Western District of Pennsylvania.

Section 2 of the Interstate Commerce Act reads:

"That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful." 24 Stat. 379.

Section 10 of the act, as amended by the Act of March 2, 1889 (25 Stat. 855), makes the violation of any of the provisions of the act a misdemeanor and subject to punishment. On October 8, 1894, an indictment was found in the District Court of the United States for the Western District of Pennsylvania charging the defendant with a violation of said section 2. The trial resulted in a verdict and judgment against him, to reverse which this writ of error was sued out.

In their brief his counsel make this statement of facts:

"The undisputed facts proved in evidence are as follows: F. H. Bruening was engaged during the year 1892 in the business of a wholesale dealer in beer in the city of Pittsburg. He purchased his beer in Cincinnati, in carload lots, from the Moerlein Brewing Company, of that city. Bruening's place of business was situated on the track of the Pittsburg, Cincinnati & St. Louis Railroad Company, known as the 'Panhandle,' and had a siding connection with that road, so that Mr. Bruening could ship his beer from Cincinnati over the

ownership of a shipment as a basis for determining the applicability of its rates," and held that the complainant was entitled to reparation to an amount equal to the difference between the carload and less than carload rates. An order was entered to that effect. Again there was a dissenting opinion in which two members joined. In an action in equity in the Circuit court to enjoin the enforcement of the order, the court adopted the reasoning and conclusions expressed in the dissenting opinion and granted an injunction suspending the operation of the order. Delaware, L. & W. R. Co. v. Interstate Commerce Commission (C. C.) 166 F. 499 (1908). On appeal the judgment of the Circuit Court was reversed and remanded with directions to dismiss the bill. Interstate Commerce Commission v. Delaware, L. & W. R. Co., 220 U. S. 235, 31 S. Ct. 392, 55 L. Ed. 448 (1911). Thus is sustained the view of the Commission as opposed to that in the Lundquist Case.

Panhandle Railroad, and have it delivered and unloaded directly into his warehouse. The rate by the Panhandle Railroad for this service from Cincinnati to the warehouse was fifteen cents per hundred pounds. The station of the Baltimore & Ohio Railroad Company in Pittsburg was at some distance from Bruening's warehouse, and there was no track connection between the Baltimore & Ohio Railroad and the warehouse, so that if Bruening shipped his beer from Cincinnati by the Baltimore & Ohio route, it was necessary to haul it in wagons from the Baltimore & Ohio station to the warehouse. The rate charged by the Baltimore & Ohio route between Cincinnati and Pittsburg on beer in carloads was likewise fifteen cents per hundred pounds.

"In the month of June, 1892, agents of the Baltimore & Ohio Railroad Company, subordinate to the plaintiff in error, made an arrangement with Mr. Bruening by which it was agreed that, if Bruening would ship his beer via the Baltimore & Ohio route from Cincinnati to Pittsburg, the railroad company would make the same delivery at the door of his warehouse that was made by the Panhandle Railroad; that is to say, the railroad company would haul the beer from its station to Bruening's warehouse without extra charge. When, afterwards, it was found that the cost to the railroad company for this hauling would be 3½ cents per hundred pounds, Bruening offered to do the hauling himself for that price, and his offer was accepted. This arrangement was reported to the plaintiff in error by his subordinates, approved by him, and continued in effect during the months of June, July, August, and September, 1892. During these months, Bruening made large shipments of beer in carloads via the Baltimore & Ohio route, paid the charge of fifteen cents per hundred pounds on delivery, hauled the beer from the station to his warehouse, and at the end of each month presented and collected a bill for three and one-half cents per hundred pounds for the hauling. At the trial there was no question made of the good faith of the arrangement with Bruening. It was not questioned that the three and one-half cents was the fair cost of the hauling; that the sole object of the arrangement was to make the same delivery which was made by the Panhandle Railroad, and at the same charge of fifteen cents per hundred pounds.

"During the continuance of this arrangement with Bruening, as shown in the evidence, the Kaufman Brewing Company, of Cincinnati, made several shipments of beer in carloads by the Baltimore & Ohio route, on bills of lading in the form shown at pages 73, 74, and 75 of the record. Each of these shipments was consigned to the 'Kaufman Brewing Company, care of, or notify, Henry Wolf, Pittsburg, Pa., to order of shipper,' and was taken at the fifth-class rate of fifteen cents per hundred pounds, as shown on the face of the bill. Henry Wolf was a wholesale dealer in beer in Pittsburg, whose warehouse was near the station of the Baltimore & Ohio Rail-

road Company, but was not connected by track with any railroad. The bills of lading for the Kaufman Brewing Company's shipments were transmitted through bank, with draft attached, and Mr. Wolf testified that, after he received notice from the railroad company of the arrival of each shipment, he went to the bank and paid the draft, received the bill of lading, and, on presenting it and paying fifteen cents per hundred pounds, received the beer, which he hauled to his warehouse at his own expense."

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

Accepting the statement of facts made by the defendant as correct (and there is nothing in the statement which makes to his prejudice, or omitted from that statement which would be to his advantage), we are of opinion that the verdict and judgment were right, and must be sustained. It is unnecessary to consider all the instructions given and those refused, or determine whether in those given there may or may not be some language open to criticism. In its general charge the court narrowed the case to the facts which, as stated by counsel, are undisputed, and correctly stated the law applicable to those facts. Indeed, while the question of guilt or innocence was submitted to the jury and passed upon by them, it is one rather of law, than of fact; and, if the court properly stated the law applicable to the facts, then the verdict was right and ought to be sustained. With reference to all other matters, it is enough to say that our attention is called to no errors in the admission of testimony; and we see nothing in the instructions asked and given or asked and refused which could injuriously affect the rights of the defendant, or limit the specific interpretation by the court of the rules of law applicable to those facts.

It will be observed that, in order to induce Mr. Bruening to transfer his transportation from a competing road to its own line, the Baltimore & Ohio Railroad Company, through the defendant, in the first place, made an arrangement by which, for 15 cents per hundredweight, it would bring the beer from Cincinnati, and deliver it at his warehouse; that afterwards this arrangement was changed, and it delivered the beer to Mr. Bruening at its depot, and allowed him 3½ cents per hundred for carting it to his warehouse. As Mr. Bruening had the benefit of a siding connection with the competing road, and could get the beer delivered over that road at his warehouse for 15 cents, it apparently could not induce him to transfer his business from the other road to its own without extending to him this rebate. During all this time it was carrying beer for Mr. Wolf from the same place of shipment (Cincinnati) to the same depot in Pittsburg, and charging him 15 cents therefor. Mr. Wolf had no siding connection with the rival road, and therefore had to pay for his cartage, by whichever road it was carried. His warehouse was, in a direct line, 140 yards from the depot, while Mr. Bruening's was 172 yards, though the latter generally carted the beer by a longer route, on account of

the steepness of the ascent. Now, it is contended by the defendant that it was necessary for the Baltimore & Ohio Company to offer this inducement to Mr. Bruening in order to get his business, and not necessary to make the like offer to Mr. Wolf, because he would have to go to the expense of carting, by whichever road he transported; that therefore the traffic was not "under substantially similar circumstances and conditions," within the terms of section 2. We are unable to concur in this view. Whatever the Baltimore & Ohio Company might lawfully do to draw business from a competing line, whatever inducements it might offer to the customers of that competing line to induce them to change their carrier, is not a question involved in this case. The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road, and to forbid it by any device to enforce higher charges against one than another. Counsel insists that the purpose of the section was not to prohibit a carrier from rendering more service to one shipper than to another for the same charge, but only that for the same service the charge should be equal, and that the effect of this arrangement was simply the rendering to Mr. Bruening of a little greater service for the 15 cents than it did to Mr. Wolf. They say that the section contains no prohibition of extra service or extra privileges to one shipper over that rendered to another. They ask whether, if one shipper has a siding connection with the road of a carrier, it cannot run the cars containing such shipper's freight onto that siding, and thus to his warehouse, at the same rate that it runs cars to its own depot, and there delivers goods to other shippers who are not so fortunate in the matter of sidings. But the service performed in transporting from Cincinnati to the depot at Pittsburg was precisely alike for each. The one shipper paid 15 cents a hundred; the other, in fact, but 11½ cents. It is true, he formally paid 15 cents, but he received a rebate of 3½ cents; and regard must always be had to the substance, and not to the form. Indeed, the section itself forbids the carrier, "directly or indirectly by any special rate, rebate, drawback or other device," to charge, demand, collect, or receive from any person or persons a greater or less compensation, etc. And section 6 of the act, as amended in 1889, throws light upon the intent of the statute; for it requires the common carrier, in publishing schedules, to "state separately the terminal charges, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges." It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor.

It may be that the phrase, "under substantially similar circumstances

and conditions," found in section 4 of the act, and where the matter of the long and short haul is considered, may have a broader meaning or a wider reach than the same phrase found in section 2. It will be time enough to determine that question when it is presented. For this case it is enough to hold that that phrase, as found in section 2, refers to the matter of carriage, and does not include competition.

We see no error in the record, and the judgment of the District Court is affirmed.[8]

Mr. Justice WHITE concurs in the judgment.

UNITED STATES OF AMERICA v. ATCHISON, T. & S. F. RY. CO. et al.

(Supreme Court of the United States, 1914. 234 U. S. 476, 34 S. Ct. 986, 58 L. Ed. 1408.)

Two appeals from the United States Commerce Court to review an interlocutory order and final decree enjoining the enforcement of an order of the Interstate Commerce Commission based upon the long and short haul clause of the act to regulate commerce.

Mr. Chief Justice WHITE delivered the opinion of the court:[9]

We shall seek to confine our statement to matters which are essential to the decision of the case. The provisions of section 4 of the act to regulate commerce (24 Stat. at L. 380, c. 104, U. S. Comp. Stat. 1901, p. 3155), dealing with what is known as the long and short haul clause, the power of carriers because of dissimilarity of circumstances and conditions to deviate from the exactions of such clause, and the authority of the Interstate Commerce Commission in relation to such subjects, were materially amended by the Act of June 18, 1910, c. 309, 36 Stat. at L. 547, U. S. Comp. Stat. Supp. 1911, p. 1288. Following the form prescribed by the Commission after the amendment in question, the seventeen carriers who are appellees on this record made to the Interstate Commerce Commission their "application for relief from provisions of fourth section of amended commerce act in connection with the following tariffs." The tariffs annexed to the applications covered the whole territory from the Atlantic seaboard

[8] For a case dealing with the practice of railway carriers to absorb switching charges within city limits, see Seaboard Air Line Ry. Co. v. United States, 254 U. S. 57, 41 S. Ct. 24, 65 L. Ed. 129 (1920). And see United States v. Baltimore & O. R. Co., 231 U. S. 274, 34 S. Ct. 75, 58 L. Ed. 218 (1913), free delivery within lighterage zone.

On "Accepting Rate Concessions under the Elkins Act," see a note in 20 Harv. Law Rev. 635; and see Armour Packing Co. v. United States, 209 U. S. 56, 28 S. Ct. 428, 52 L. Ed. 681 (1908), and Lehigh Coal & Navigation Co. v. United States, 250 U. S. 556, 40 S. Ct. 24, 63 L. Ed. 1138 (1919), and comment thereon in 33 Harv. Law Rev. 606.

[9] Only so much of the opinion is printed as has to do with the meaning of the statute.

to the Pacific coast and the Gulf of Mexico, including all interior points, and embracing practically the entire country, and the petition asked the Interstate Commerce Commission for authority to continue all rates shown on the tariffs from the Atlantic seaboard to the Pacific coast, and from the Pacific coast to the Atlantic seaboard, and to and from interior points lower than rates concurrently in effect from and to intermediate points. It was stated in the petition: "This application is based upon the desire of the interested carriers to continue the present method of making rates lower at the more distant points than at the intermediate points; such lower rates being necessary by reason of competition of various water carriers and of carriers partly by water and partly by rail operating from Pacific coast ports to Atlantic seaboard ports; competition of various water carriers operating to foreign countries from Pacific coast ports; and competition of the products of foreign countries with the products of the Pacific coast; competition of the products of Pacific coast territory with the products of other sections of the country; competition of Canadian rail carriers not subject to the Interstate Commerce Act; competition of the products of Canada moving by Canadian carriers with the products of the United States; rates established via the shorter or more direct routes, but applied also via the longer or more circuitous routes." After full hearing the Commission refused to grant unqualifiedly the prayer of the petition, but entered an order permitting in some respects a charge of a lower rate for the longer haul to the Pacific coast than was asked for intermediate points provided a proportionate relation was maintained between the lower rate for the longer haul to the Pacific coast and the higher rate to the intermediate points, the proportion to be upon the basis of percentages which were fixed. For the purposes of the order in question the Commission in substance adopted a division of the entire territory into separate zones, which division had been resorted to by the carriers for the purposes of the establishment of the rates in relation to which the petition was filed. Refusing to comply with this order the carriers commenced proceedings in the commerce court praying a decree enjoining the enforcement of the fourth section as amended on the ground of its repugnancy to the Constitution of the United States, and of the order as being in any event violative of the amended section as properly construed. An interlocutory injunction was ordered. The defendants moved to dismiss, and, on the overruling of the motions, appealed from the interlocutory order, the case being No. 136. Subsequently, upon the election of the defendants to plead no further, a final decree was entered and appealed from, that appeal being No. 162.

It suffices at this moment to say that all the contentions which the assignments of error involve and every argument advanced to refute such contentions, including every argument urged to uphold, on the one hand, or to overthrow, on the other, the action of the Com-

mission, as well as every reason relied upon to challenge the action of the court or to sustain its judgment, are all reducible to the following propositions:

(a) The absolute want of power of the court below to deal with the subject involved in the complaint because controversies concerning the fourth section of the act to regulate commerce of the nature here presented were, by an express statutory provision, excluded from the cognizance of the court below. (b) That even if this be not the case, the action of the Commission which was complained of was purely negative, and therefore not within the cognizance of the court, because not inherently justiciable. (c) That, correctly interpreting the fourth section, the order made by the Commission was absolutely void because wholly beyond the scope of any power conferred by the fourth section as amended. (d) That even if, in some respects, the order of the Commission was within the reach of its statutory power, there was intermingled in the order such an exertion of authority not delegated as to cause the whole order to be void. (e) That the order of the Commission was void even if the fourth section be interpreted as conferring the authority which the Commission exerted, since, under that assumption, the fourth section as amended was repugnant to the Constitution.

All the propositions, even including the jurisdictional ones, are concerned with and depend upon the construction of the fourth section as amended, and we proceed to consider and pass upon that subject and every other question in the case under four separate headings: (1) The meaning of the statute; (2) its constitutionality; (3) the jurisdiction of the court; (4) the validity of the order in the light of the statute as interpreted.

1. The meaning of the statute.

We reproduce the section as originally adopted and as amended, passing a line through the words omitted by the amendment, and printing in italics those which were added by the amendment, thus at a glance enabling the section to be read as it was before and as it now stands after amendment.

"Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, ~~under substantially similar circumstances and conditions,~~ for a shorter than for a longer distance over the same line *or route* in the same direction, the shorter being included within the longer distance, *or to charge any greater compensation as a through route than the aggregate of the intermediate rates, subject to the provisions of this act;* but this shall not be construed as authorizing any common carrier within the terms of this act to charge ~~and~~ *or* receive as great compensation for a shorter as for a longer distance: Provided, however, that upon application to the *Interstate Commerce* Commission ~~appointed under the provisions of this Act,~~

such common carrier may in special cases, after investigation ~~by the Commission,~~ be authorized *by the Commission* to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section ~~of this Act:~~ *Provided, further, that no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission.*

"Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."

Before considering the amended text we state briefly some of the more important requirements of the section before amendment and the underlying conceptions of private right, of public duty and policy which it embodied, because to do so will go a long way to remove any doubt as to the amended text, and will moreover serve to demonstrate the intent of the legislative mind in enacting the amendment.

Almost immediately after the adoption of the act to regulate commerce in 1887, the Interstate Commerce Commission, in considering the meaning of the law and the scope of the duties imposed on the Commission in enforcing it, reached the conclusion that the words "under substantially similar circumstances and conditions" of the fourth section dominated the long and short haul clause and empowered carriers to primarily determine the existence of the required dissimilarity of circumstances and conditions, and consequently to exact in the event of such difference a lesser charge for the longer than was exacted for the shorter haul, and that competition which materially affected the rate of carriage to a particular point was a dissimilar circumstance and condition within the meaning of the act.[10]

[10] "That competition is one of the most obvious and effective circumstances that make the conditions under which a long and short haul is performed substantially dissimilar, and as such must have been in the contemplation of congress in the passage of the act to regulate commerce, has been held by many of the circuit courts. It is sufficient to cite a few of the number: Ex parte Koehler, 31 F. 319 (1887); Missouri Pac. Ry. Co. v. Texas & P. R. Co., 31 F. 862 (1887); Interstate Commerce Commission v. Atchison, T. & S. F. R. Co., 50 F. 306 (1892); Interstate Commerce Commission v. New Orleans & T. P. R. Co., 56 F. 943 (1893); Behlmer v. Railroad Co., 71 F. 835 (1896); Interstate Commerce Commission v. Louisville & N. R. Co., 73 F. 409 (1896).

"In construing statutory provisions forbidding railway companies from giving any undue or unreasonable preference or advantage to or in favor of any

We say primarily, because of course it was further recognized that the authority existing in carriers to the end just stated was subject to the supervision and control of the Interstate Commerce Commission in the exertion of the powers conferred upon it by the statute, and especially in view of the authority stated in the fourth section. In

particular person or company, or any particular description of traffic, in any respect whatever, the English courts have held, after full consideration, that competition between rival lines is a fact to be considered, and that a preference or advantage thence arising is not necessarily undue or unreasonable. Denaby Colliery Co. v. Manchester, S. & L. Ry. Co., 11 App. Cas. 97 (1885); Phipps v. Railway, [1892] 2 Q. B. Div. 229.

"But the question whether competition, as affecting rates, is an element for the commission and the courts to consider in applying the provisions of the act to regulate commerce, is not an open question in this court [citing and quoting from Interstate Commerce Commission v. Baltimore & O. R. Co., 145 U. S. 263, 12 S. Ct. 844, 36 L. Ed. 699 (1892), and Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 16 S. Ct. 666, 40 L. Ed. 940 (1896)].

"To prevent misapprehension, it should be stated that the conclusion to which we are led by these cases, that, in applying the provisions of the third and fourth sections of the act, which make it unlawful for common carriers to make or give any undue or unreasonable preference or advantage to any particular person or locality, or to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, competition which affects rates is one of the matters to be considered, is not applicable to the second section of the act.

"As we have shown in the recent case of Wight v. U. S., 167 U. S. 512, 17 S. Ct. 822 (1897), the purpose of the second section is to enforce equality between shippers over the same line, and to prohibit any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor; and we there held that the phrase, 'under substantially similar circumstances and conditions,' as used in the second section, refers to the matter of carriage, and does not include competition between rival routes.

"This view is not open to the criticism that different meanings are attributed to the same words when found in different sections of the act; for what we hold is that, as the purposes of the several sections are different, the phrase under consideration must be read, in the second section, as restricted to the case of shippers over the same road, thus leaving no room for the operation of competition, but that in the other sections, which cover the entire tract in interstate and foreign commerce, a meaning must be given to the phrase wide enough to include all the facts that have a legitimate bearing on the situation, among which we find the fact of competition when it affects rates.

"In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration, in determining the questions of 'undue or unreasonable' preference or advantage,' or what are 'substantially similar circumstances and conditions.' The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the commission or the courts from taking that matter into consideration." Shiras, J., in Interstate Commerce Commission v. Alabama Midland Ry. Co., 168 U. S. 144, 18 S. Ct. 45, 42 L. Ed. 414 (1897).

For a history of the long and short haul clause and the proceedings under it, see Eliot Jones, Principles of Railway Transportation, c. IX.

considering the act comprehensively it was pointed out that the generic provisions against preference and discrimination expressed in the second and third sections of the act were all-embracing, and were therefore operative upon the fourth section as well as upon all other provisions of the act. But it was pointed out that where, within the purview of the fourth section, it had lawfully resulted that the lesser rate was charged for a longer than was exacted for a shorter haul, such exaction, being authorized, could not be a preference or discrimination and therefore illegal. Re Louisville & N. R. Co., 1 I. C. C. Rep. 31, 1 Inters. Com. Rep. 278. These comprehensive views announced at the inception as a matter of administrative construction were subsequently sustained by many decisions of this court, and to the leading of such cases we refer in the margin.[11] We observe, moreover, that in addition it came to be settled that where competitive conditions authorized carriers to lower their rates to a particular place, the right to meet the competition by lowering rates to such place was not confined to shipments made from the point of origin of the competition, but empowered all carriers, in the interest of freedom of commerce and to afford enlarged opportunity to shippers, to accept, if they chose to do so, shipments to such competitive points at lower rates than their general tariff rates: a right which came aptly to be described as "market competition" because the practice served to enlarge markets and develop the freedom of traffic and intercourse. It is to be observed, however, that the right thus conceded was not absolute, because its exercise was only permitted provided the rates were not so lowered as to be nonremunerative, and thereby cast an unnecessary burden upon other shippers. East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. Ed. 719, 21 S. Ct. 516. As the statute as thus construed imposed no obligation to carry to the competitive point at a rate which was less than a reasonable one, it is obvious that the statute regarded the rights of private ownership, and sought to impose no duty conflicting therewith. It is also equally clear that in permitting the carrier to judge primarily of the competitive conditions, and to meet them at election, the statute lodged in the carrier the right to exercise a primary judgment concerning a matter of public concern broader than the mere question of the duty of a carrier to carry for a reasonable rate on the one hand, and of the right of the shipper, on the other, to compel carriage at such rate, since the power

11 The cases referred to are: Interstate Commerce Commission v. Baltimore & O. R. Co., 145 U. S. 263, 36 L. Ed. 699, 4 Inters. Com. Rep. 92, 12 S. Ct. 844 (1892); Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. Ed. 935, 5 Inters. Com. Rep. 391, 16 S. Ct. 700 (1896); Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. Ed. 940, 5 Inters. Com. Rep. 405, 16 S. Ct. 666 (1896); Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209 (1900); East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. Ed. 719, 21 S. Ct. 516 (1901).

of primary judgment which the statute conferred concerned in a broad sense the general public interest with reference to both persons and places—considerations all of which, therefore, in their ultimate aspects, came within the competency of legislative regulation. It was apparent that the power thus conferred was primary, not absolute, since its exertion by the carrier was made by the statute the subject both of administrative control and ultimate judicial review. And the establishment of such control in and of itself serves to make manifest the public nature of the attributes conferred upon the carrier by the original fourth section. Indeed, that in so far as the statute empowered the carrier to judge as to the dissimilarity of circumstances and conditions for the purpose of relief from the long and short haul clause, it but gave the carrier the power to exert a judgment as to things public, was long since pointed out by this court. Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 218, 40 L. Ed. 940, 947, 5 Inters. Com. Rep. 405, 16 S. Ct. 666.

With the light afforded by the statements just made we come to consider the amendment. It is certain that the fundamental change which it makes is the omission of the substantially similar circumstances and conditions clause, thereby leaving the long and short haul clause in a sense unqualified except in so far as the section gives the right to the carrier to apply to the Commission for authority "to charge less for longer than for shorter distances for the transportation of persons or property," and gives the Commission authority from time to time "to prescribe the extent to which such designated common carrier may be relieved from the operation of this section."

From the failure to insert any word in the amendment tending to exclude the operation of competition as adequate under proper circumstances to justify the awarding of relief from the long and short haul clause, and there being nothing which minimizes or changes the application of the preference and discrimination clauses of the second and third sections, it follows that in substance the amendment intrinsically states no new rule or principle, but simply shifts the powers conferred by the section as it originally stood; that is, it takes from the carriers the deposit of public power previously lodged in them and vests it in the Commission as a primary instead of a reviewing function. In other words, the elements of judgment, or, so to speak, the system of law by which judgment is to be controlled, remains unchanged, but a different tribunal is created for the enforcement of the existing law. This being true, as we think it plainly is, the situation under the amendment is this: Power in the carrier primarily to meet competitive conditions in any point of view by charging a lesser rate for a longer than for a shorter haul has ceased to exist, because to do so, in the absence of some authority, would not only be inimical to the provision of the fourth section, but would be in conflict with the preference and discrimination clauses of the second and

third sections. But while the public power, so to speak, previously lodged in the carrier, is thus withdrawn and reposed in the Commission, the right of carriers to seek and obtain under authorized circumstances the sanction of the Commission to charge a lower rate for a longer than for a shorter haul because of competition or for other adequate reasons is expressly preserved, and, if not, is, in any event, by necessary implication, granted. And as a correlative the authority of the Commission to grant on request the right sought is made by the statute to depend upon the facts established and the judgment of that body, in the exercise of a sound legal discretion, as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned, and in view of the preference and discrimination clauses of the second and third sections. * * *[12]

UNITED STATES OF AMERICA et al. v. LOUISVILLE & N. R. CO.

(Supreme Court of the United States, 1914. 235 U. S. 314, 35 S. Ct. 113, 59 L. Ed. 245.)

Appeal from the United States Commerce Court to review a decree enjoining the enforcement of an order of the Interstate Commerce Commission forbidding carriers to grant a reshipping privilege.

Mr. Chief Justice WHITE delivered the opinion of the court:

This case involves a controversy as to the legality of a reshipping privilege permitted at Nashville by the carriers who are parties to the record, described by the court below as follows:

"On grain, grain products, and hay shipped to Nashville by rail from or through Ohio or Mississippi river crossing points such as Louisville, Evansville, Hickman, Paducah, Cairo, etc., the L. & N. and N. C. & St. L. charge the full local freight rate from said crossing points to Nashville. These shipments may then be stopped at Nashville for a period not exceeding six months, during which time they may be rebilled or reshipped to destination in southeastern and Carolina territory; and on such reshipments so rebilled the freight charges into and out of Nashville are readjusted so that the total transportation charge on any one shipment from any given Ohio or Mississippi river crossing via Nashville, to any given destination in said territory, shall exactly correspond with the transportation charge legally assessable on that shipment had it been billed and moved through from its point of origin at the said Ohio or Mississippi river crossing points to its final destination without having been stopped in transit at Nashville." 197 F. 59.

[12] As to the basis for an action for violation of the long and short haul clause, see Davis v. Portland Seed Co., 264 U. S. 403, 44 S. Ct. 380, 68 L. Ed. 762 (1923).

We adopt the history of the litigation in so far as it relates to the privilege in question contained in the brief on the part of the United States.

"1. In 1908 certain Georgia grain dealers complained to the Interstate Commerce Commission of various traffic practices at Nashville; after taking voluminous proof, the Commission, on June 24, 1909, held the reshipping privilege illegal and ordered it stopped. 16 Inters. Com. Rep. 590, 595.

"2. The Commission, on its own motion, postponed the effective date of the order, so that it might institute a country-wide investigation of the practices involved; and on May 3, 1910, the Commission, after a hearing at which about 150 shippers and carriers were represented by counsel, reported that its former order abolishing the reshipping privilege in toto was too strict, and remitted the matter to the carriers and shippers to frame regulations that would prevent any rebating under the privilege (18 Inters. Com. Rep. 280), and, pursuant thereto, new and satisfactory regulations were adopted to safeguard the reshipping privilege (21 Inters. Com. Rep. 183, 188)."

The previous order of June 24, 1909, which had abolished the reshipping privilege at Nashville, was vacated and the Commission thereafter again considered the controversy between the grain dealers of Georgia and the Nashville dealers and carriers.

"3. * * * On June 9, 1911, the Commission delivered a supplemental report, holding that the action of the carriers in granting the reshipping privilege to Nashville, while refusing it to Atlanta, etc., was an undue and unreasonable preference to Nashville, in violation of section 3 of the Interstate Commerce Act. 21 Inters. Com. Rep. 186. The Commission entered an order in accordance therewith.

"4. The Nashville Board of Trade, the L. & N. R. R. Co., and the N. C. & St. L. R. R. Co. thereupon sued in the commerce court to enjoin the enforcement of the order; the two suits were consolidated." The record evidence before the Commission was introduced and some additional testimony was taken.

The commerce court, finding that there was no conflicting or disputed evidence concerning the origin and character of the reshipping privilege, concluded that whether such privilege was an undue preference was not a matter of fact, but a question of law, upon which it was its duty to reach an independent conclusion. The court, therefore, among other considerations, because the privilege was of long standing and was justified by water competition at Nashville, declared it to be not unlawful and not preferential. A peremptory injunction was allowed, restraining the enforcement of the order of the Commission. And the correctness of this action is the question here for decision.

In view of the doctrine announced in Interstate Commerce Commission v. Illinois C. R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155; Interstate Commerce Commission v. Delaware, L. & W. R. Co., 220 U. S. 235, 55 L. Ed. 448, 31 S. Ct. 392; Interstate Commerce

Commission v. Louisville & N. R. Co., 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185, it plainly results that the court below, in substituting its judgment as to the existence of preference for that of the Commission, on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted an authority not conferred upon it by the statute. It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which, from its peculiar character, would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case, preference or discrimination existed. East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 23–29, 45 L. Ed. 719, 727–729, 21 S. Ct. 516. And the amendments by which it came to pass that the findings of the Commission were made not merely prima facie but conclusively correct in case of judicial review, except to the extent pointed out in the Illinois Central and other cases supra, show the progressive evolution of the legislative purpose and the inevitable conflict which exists between giving that purpose effect and upholding the view of the statute taken by the court below. It cannot be otherwise, since if the view of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action.

While these conclusions demonstrate the error in the action of the court below, that result does not authorize us to reverse and give effect to the order of the Commission without going further, since it must be determined whether the action of the Commission was repugnant to the Constitution, in excess of the powers which that body possessed, or, what is equivalent thereto, was wholly unsustained by proof,—questions which the court below failed to pass upon because of the erroneous conception in which it indulged concerning its own powers. But if it were essential for us to consider these questions, we should be confronted with a grave situation arising from the serious doubt which would exist whether it would be possible for us to do so in view of the manner in which the Commission had discharged its functions, and whether that method had not, in and of itself, amounted to a denial of a hearing, and thus resulted in want of due process of law. See Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S. 91, 57 L. Ed. 433, 33 S. Ct. 185, and the paragraph from the answer of the Commission, filed in the court below, which is in the margin.[13]

[13] The paragraph referred to is as follows:

"That in said investigation, and in arriving at its decision therein, this respondent, as in duty bound under the law, weighed and considered all the facts and arguments presented by the petitioners herein, by other carriers, and all other parties to said proceeding; that in forming its opinion and arriving at its conclusion this respondent, exercising its administrative functions and powers, considered all pertinent facts and matters set forth in many reports and statistics on file with said respondent, together with other facts coming to the knowledge of this respondent in the performance of its duties and functions prescribed and set forth in the acts to regulate com-

We pass this subject by, however, because its consideration is not essential to determine whether the Commission was right in prohibiting a continuance of the rebilling privilege, since we are of opinion that even if the allowance of such rebilling privilege when originally made was authorized by the statute, and was therefore not a preference, the right to continue it had been expressly prohibited by statute until, on application made to the Commission, its consent to that end was given. The express or implied statutory recognition of the authority on the part of carriers to primarily determine for themselves the existence of substantially similar circumstances and conditions as a basis of charging a higher rate for a shorter than for a longer distance within the purview of the fourth section of the act to regulate commerce, and the right to make a rate accordingly, to continue in force until, on complaint, it was corrected in the manner pointed out by statute, ceased to exist after the adoption of the amendment to section 4 (24 Stat. at L. 380, c. 104) by the Act of June 18, 1910 (chapter 309, 36 Stat. at L. 547, Comp. Stat. 1913, § 8566). This results from the fact that by the amendment in question the original power to determine the existence of the conditions justifying the greater charge for a shorter than was exacted from a longer distance was taken from the carriers and primarily vested in the Interstate Commerce Commission, and for the purpose of making the prohibitions efficacious it was enacted that after a time fixed no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted. Intermountain Rate Cases (United States v. Atchison, T. & S. F. R. Co.) 234 U. S. 476, 58 L. Ed. 1408, 34 S. Ct. 986. If, then, it be that the rebilling privilege which is here in question, disregarding immaterial considerations of form, and looking at the substance of things, was, when originally established, an exertion of the authority conferred or recognized by the fourth section of the act, as there is no pretense that permission for its continuance had been applied

merce and the amendments thereto pertaining to the privileges of rebilling and reshipping; that from said reports and tariffs it appears that said rebilling and reshipping privileges exist at many interior points where no water competition obtains; it is therefore not competent, nor is it relevant, for said petitioners to allege that any particular fact or facts before this respondent in said proceeding are uncontradicted or conclusive in favor of the petitioners' contention; nor can the petitioners by judicial proceeding ascertain each and all the facts, circumstances, and conditions in regard to said transportation that were necessarily and properly considered by, and which aided this respondent in arriving at, its conclusions that said practice of rebilling and reshipping said products from Nashville was unduly and unreasonably discriminatory. This respondent denies that there is, or can be, under the law, any complete record of all the evidence, facts, and circumstances before the Commission in determining that this, or any other practice by carriers, is unduly and unjustly discriminatory as between localities or persons, and respondent is advised and so alleges that the determination of said question, as to whether said admitted discrimination is undue and contrary to the provisions of said act to regulate commerce, is one wholly and exclusively within the jurisdiction of this respondent."

for as required by the amendment, and the statutory period for which it could be lawfully continued without such permission had expired, it follows that its continued operation was manifestly unlawful, and error was committed in permitting its continuance under the shelter of the injunction awarded by the court below. To determine whether the fourth section is applicable requires a very brief consideration of the uncontroverted situation from which the rebilling privilege arose and upon the existence of which it depended. It is undoubted that for many years the Ohio river was a basing point for rates, and traffic moving from the producing regions of the northwest to the consuming regions in the southeast bore rates from Ohio river points to destination, which, because of competition, were lower from Ohio river points to the farther points of consumption than were charged from intermediate (nearer) points between the Ohio river and such points of consumption. This lesser charge for the longer than for the shorter distance as to the traffic in question was typically illustrative of the condition contemplated by the fourth section of the act to regulate commerce. As to Nashville, however, this idiosyncrasy arose: The carriers from the Ohio river to Nashville, instead of giving the lesser rate for the longer distance from the Ohio river to Nashville than was asked for intermediate points, maintained a local and proportionate rate for grain and other northwestern products from the Ohio river to Nashville, although giving a lower rate for the longer haul from the Ohio river to points in the south or southeast territory beyond Nashville. Upon the basis, however, that there was water competition between the Ohio river and Nashville, if not for other reasons, as to which we think it is not relevant to inquire, there was granted by the carriers to shippers of grain at Nashville the rebilling privilege which we have at the outset described. That is to say, shippers of grain at Nashville, on establishing the receipt at Nashville of grain from Ohio river points equal in quantity to grain proposed to be shipped, received an allowance on the local rate from Nashville to the point of destination which made the rate on the shipment equivalent to what it would have been had the grain originally moved from the Ohio river point to its ultimate point of destination, and not stopped at Nashville at all. We quote a clear illustration of the operation of the privilege taken from the argument at bar of one of the carriers:

"For example, the local rate on grain from Evansville, on the Ohio river, to Nashville, is 10 cents per 100 pounds, and the local rate from Nashville to Atlanta is 17 cents per 100 pounds. The joint rate from Evansville to Atlanta is 24 cents per 100 pounds, or 3 cents less than the sum of the locals. Under the reshipping practice the joint rate of 24 cents is protected when the shipment has been stopped in transit at Nashville. The local rate of 10 cents from Evansville to Nashville having been paid at the time of the shipment into Nashville, an adjustment of the total transportation charge is made when the reshipment to Atlanta occurs, so that the shipper in the end pays upon the ship-

ment the joint rate instead of the combination of local rates into and out of Nashville."

When the result of this allowance is understood, there seems to be no room for serious controversy that the right to continue the privilege is controlled by the fourth section of the act. The actual shipment from Nashville must either be considered as a movement from Nashville, irrespective of the rate which would have been applicable on a through shipment from an Ohio river point to the same point of destination, or it must be treated by a fiction as one moving from an Ohio river point to the same destination. If the first, then clearly the allowance made of a rate from Nashville to the point of destination was a lesser charge for the longer distance hauled as to such grain than was charged for the shorter distance as to any other grain moving from Nashville to intermediate points, or from such points to places further on, and came clearly within the grasp of the fourth section. If, on the other hand, it be imagined to be a shipment from the Ohio river crossing to the point of destination, upon the theory that the traffic before stoppage at Nashville originated at the Ohio river point, then exactly the same conditions would be reproduced, since the charge as the result of the reduction made was the equivalent of a lesser rate for the longer than for the shorter distance, which, as we have stated, was the prevailing system from Ohio river crossings to points of destination in the southeast.

It is true that in argument it was said that the question here is whether there was a preference or discrimination under the second and third sections of the act, and not an inquiry under the fourth section, and that a distinction between the various sections has been recognized. It has, indeed, been held that the provisions of the second, third, and fourth sections of the act, being in pari materia, required harmonious construction, and therefore they should not be applied so that one section destroyed the others, and consequently that a lesser charge for a longer than for a shorter distance permitted by the fourth section could not, for such reason, be held to be either a preference or discrimination under the second or third sections. Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. Ed. 719, 21 S. Ct. 516. But the rule which requires that a practice which is permitted by one section should not be prohibited upon the theory that it is forbidden by another gives no support to the unwarranted assumption that that may be permitted which is devoid of all sanction, and indeed is in direct conflict with all three of the sections—a result clearly arising in the case before us in consequence of the amendment of section 4. Indeed, when the evil which it may be assumed conduced to the adoption of the amendment of the fourth section and the remedy which that amendment was intended to make effective are taken into view (see Intermountain Rate Cases, supra), it would seem that the case before us cogently demonstrates the applicability of

the amendment to the situation. And it needs no argument to demonstrate that the application of the principle of public policy which the statute embodies is to be determined by the substance of things, and not by names, for if that were not the case, the provisions of the statute would be wholly inefficacious, as names would readily be devised to accomplish such a purpose.

It follows from what we have said that the court below was wrong in enjoining the order of the Commission, and, on the contrary, should have dismissed the complaint. The case will therefore be appropriately remanded to enable a decree to that effect to be entered, without prejudice, however, to the right of the carriers to apply to the Commission to be relieved from the operation of the provisions of the fourth section, if they are so advised.[14]

Reversed.

Mr. Justice PITNEY concurs in the result.

SECTION 4.—DEPENDENT SERVICE

MARKHAM v. BROWN.

(Superior Court of Judicature of New Hampshire, 1837. 8 N. H. 523, 31 Am. Dec. 209.)

Trespass, for breaking and entering the plaintiff's house, in Hanover, being a common inn, and making a noise and disturbance therein, and assaulting and beating the plaintiff at sundry times between the 1st of July, 1835, and the date of the writ, which was October 8, 1835.

Plea, the general issue, with a brief statement that the defendant was the driver of a stagecoach, and entered the plaintiff's house to enquire for passengers, and that the force, if any, was the plaintiff's own assault.

On trial, it appeared that the plaintiff kept an inn at Hanover, to which stagecoaches brought their passengers from various quarters, and carried them away in different directions. The stagecoaches which had come to the house previous to the time when defendant's line was started, in April, 1835, put up there by contract with the plaintiff, and had their teams and drivers kept by him. Brown commenced running a stagecoach, as driver and proprietor, in that month, from Hanover to Claremont (which was in opposition to some of the lines previously running to the plaintiff's), without any contract with the plaintiff, boarding himself and keeping his teams elsewhere, but leaving

14 For a case involving the meaning and application of the "aggregate of intermediates" clause of section 4 of the Interstate Commerce Act (U. S. Comp. St. § 8566), see Patterson v. Louisville & N. R. Co., 46 S. Ct. 8, 70 L. Ed. — (1925).

passengers at, and receiving them from, the plaintiff's hotel. Frequent altercations had happened between the defendant and the other drivers, in the plaintiff's house, until the plaintiff, who appeared to be in the interest of the other drivers, had forbidden him to come to his house. Afterwards, in October, 1835, the defendant went into a parlor in the plaintiff's house, in which some of his guests had been put who had recently arrived in other coaches, and an altercation ensued between the defendant and Philbrick, another driver, who had also gone there to solicit passengers, which ended in an affray and assault and battery. Evidence was offered by the plaintiff to show that Brown commenced the affray, but the defendant introduced evidence to show that Philbrick began it.

Upon this the plaintiff went in and ordered Brown to leave the house. There was evidence that the defendant refused to leave the room, claimed a right to be there, and to go into any part of the house where he chose, and that, while plaintiff stooped to pick up a stick of wood, defendant seized and held him. Other witnesses stated that the plaintiff went into the room with a club, and that all the defendant did was to ward off the blow; that he told the plaintiff if he would lay down the club he would go out, and did go as soon as the plaintiff desisted. There was no proof that any of the persons in the room which Brown entered had engaged a passage in Brown's coach, or desired him to come there. But he was conversing with a lady, to engage her as a passenger, at the time of the affray between him and Philbrick, and took three or four passengers from the plaintiff's at that time. The court instructed the jury that in order to maintain his action the plaintiff must show the defendant's entry into his house to have been unlawful.

That the defendant, being the driver of a stagecoach, had a right to enter the plaintiff's inn, without his consent, and against his prohibition, and to go into the common rooms in the house where guests were put, who were likely to desire a passage in his coach, to solicit them to go with him, though not requested by such guests. That if Brown, by an abuse of this right, had previously caused disturbances in the house, and had in consequence been forbidden by the plaintiff to enter, his entry afterwards, for the purpose of obtaining passengers, would, notwithstanding, be lawful, though followed by other disturbances in the house caused by Brown, and that such disturbances would not make his entry unlawful from the beginning. That if, after Brown had entered the house for the purpose aforesaid, and after being forbidden as aforesaid, an assault and battery ensued between Brown and a third person, received as a guest into the plaintiff's house, and lawfully there, whether such assault and battery were caused by the fault of such third person, or of Brown, or of both, if not made on the plaintiff himself, this would not make the entry of Brown a trespass ab initio, but would authorize the plaintiff to turn both out of the house. That the only question for the jury was, whether Brown had committed an assault

on the plaintiff not justified in self defense; and that if he had not, the plaintiff had failed to maintain his action.

The jury found a verdict for the defendant; and the plaintiff moved for a new trial.

PARKER, J. An innkeeper holds out his house as a public place to which travellers may resort, and of course surrenders some of the rights which he would otherwise have over it. Holding it out as a place of accommodation for travellers, he cannot prohibit persons who come under that character, in a proper manner, and at suitable times, from entering, so long as he has the means of accommodation for them.

But he is not obliged to make his house a common receptacle for all comers, whatever may be their character or condition. He is not obliged to receive one who is not able to pay for his entertainment (3 Barn. & Ald. 283, Thompson v. Lacy); and there are considerations of greater importance than this. He is indictable if he usually harbor thieves (1 Hawk. c. 78, § 1; Bac. Ab., Inns., etc.), and he is answerable for the safe-keeping of the goods of his guests (Story on Bailment, 307), and is not bound to admit one whose notorious character as a thief furnishes good reason to suppose that he will purloin the goods of his guests, or his own.

So he is liable if his house is disorderly (1 Hawk. 451), and cannot be held to wait until an affray is begun before he interpose, but may exclude common brawlers, and any one who comes with intent to commit an assault or make an affray.

So he may prohibit the entry of one whose misconduct in other particulars, or whose filthy condition, would subject his guests to annoyance.

He has a right to prohibit common drunkards and idle persons from entering, and to require them, and others before mentioned, to depart, if they have already entered.

And any person entering, not for a lawful purpose, but to do an unlawful act—as to commit an assault upon one lawfully there—must be deemed a trespasser in entering for such unlawful purpose.

As he is bound to admit travellers, under certain limitations, he may likewise be held, under proper limitations, to admit those who have business with them as such. This may be considered as derived from the right of the traveller. It is conceded that he may be bound to permit the entry of persons who have been sent for by the guest. But we think the rule is not to be limited, in all cases, to this. There may be such connection between travellers and those engaged in their conveyance, that the latter, although not specially sent for, may have a right to enter a common inn; or such that the landlord, if he give a general license to some of those whose business is connected with his guests, in their characters as travellers, cannot lawfully exclude others, pursuing the same business, and who enter for a similar object.

There seems to be no good reason why the landlord should have the power to discriminate in such cases, and to say that one shall be admitted

1. must accept all people who apply as guests
2. must accept all people who have business with guests.

and another excluded, so long as each has the same connection with his guests—the same lawful purpose—comes in a like suitable condition, and with as proper a demeanor; any more than he has the right to admit one traveller and exclude another, merely because it is his pleasure.

If one comes to injure his house, or if his business operates directly as an injury, that may alter the case—but that has not been alleged here. And perhaps there may be cases in which he may have a right to exclude all but travellers and those who have been sent for by them. It is not necessary to settle that at this time.

In the present case it appeared that stagecoaches brought their passengers to the plaintiff's inn from various quarters, and carried them away in different directions. It is understood that Hanover was not a place where the lines of stages or conveyances terminated, and where passengers were left to seek their own conveyance onward, as is often the case in the larger cities; but that the line of stages extended through the place in such manner that travellers might reasonably expect conveyances onward would be tendered for their use.

The drivers of some of the coaches were accustomed to resort to the plaintiff's inn, and boarded there.

Under these circumstances, we see no objection to the first part of the charge to the jury. The defendant had clearly a right to establish a line of stagecoaches, and to go to the plaintiff's inn with travellers, and he might of course lawfully enter it for the purpose of leaving their baggage and receiving his fare.

And we are of opinion that, so long as others were permitted to do the same, the defendant had an equal and lawful right, notwithstanding any prohibition by the plaintiff, to enter the plaintiff's inn for the purpose of tendering his coach for the use of travellers, and soliciting them to take passage with him; and for that purpose to go into the common public rooms of the inn, where guests were usually placed to await the departure of the stages, although he was not requested by such guests; provided there was a reasonable expectation that passengers might be there, and he came at a suitable time, in a proper manner, demeaned himself peaceably, and remained no longer than was necessary, and was doing no injury to the plaintiff.

But the jury should have been instructed that the defendant might forfeit this right by his misconduct, so that the plaintiff might require him to depart, and expel him; and if, by reason of several instances of misconduct, it appeared to be necessary for the protection of his guests or of himself, the plaintiff might prohibit the defendant from entering again, until the ground of apprehension was removed. Thus if affrays or quarrels were caused through his fault, or he was noisy, disturbing the guests in the house—interfered with its due regulation, intruded into the private rooms, remained longer than was necessary, after being requested to depart, or otherwise abused his right, as by improper importunity to guests to induce them to take passage with him—the plain-

17 N.E. 89.

tiff would have a right to reform that, and, if necessary, to forbid the defendant to enter, and treat him as a trespasser if he disregarded the prohibition.

So, if, after a lawful entry of the defendant, he committed an assault upon the plaintiff, or any trespass upon his property; the plaintiff might treat him as having entered for the unlawful purpose, and as a trespasser ab initio. 8 Co. (Dub. Ed.) 291; 10 Johns. 373; 12 Johns. 408; 11 East, 402; 5 Taunt. 198.

Perhaps a trespass upon the person or property of a guest might come within the same rule—but this is not clear, and need not now be settled.

If others were guilty of an assault upon the defendant, or of misconduct towards him, that would not justify him in making an assault, except in self-defense, nor furnish an excuse for improper conduct on his part; but, if he behaved himself with propriety, the misconduct of the drivers of other lines towards him would furnish no ground for his exclusion, unless it was at the time of a disturbance, and for the purpose of restoring quiet to the house.

As the jury were not correctly instructed upon these points there must be a

New trial.[15]

GRISWOLD v. WEBB.

(Supreme Court of Rhode Island, 1889. 16 R. I. 649, 19 A. 143, 7 L. R. A. 302.)

STINESS, J. The plaintiff is owner of Commercial Wharf, in Newport, a part of which is leased to the Newport & Wickford Railroad & Steam-Boat Company as a terminus. To preserve order upon the wharf, stands are let for hackney carriages, and the following rules are prescribed for its use: "Rules for Hackmen and Others. (1) Drivers of hackney carriages shall remain on or near their carriages, except when carrying baggage to or from them. (2) No one shall occupy a hack-stand or express stand except the licensee or his employés. (3) No hackney carriage or express wagon shall stand on the space to the eastward of the restaurant building, or on the roadways, except on licensed hack-stands, even though ordered in advance by a passenger." East of the restaurant building is a plank walk for passengers, and east of the walk a space is reserved for private carriages. The rest of the wharf is used for sidewalks, roadways, and buildings. The defendant,

15 "However it may be with a guest at an inn, we do not think that passengers in a railroad depot have such possession of a right in the premises as will give to carriers of baggage, soliciting their patronage, an implied license to enter, irrevocable by the railroad company." W. Allen, J., in Old Colony Railroad v. Tripp, 147 Mass. 35, 17 N. E. 89, 9 Am. St. Rep. 661 (1888). State v. Steele, 106 N. C. 766, 11 S. E. 478, 8 L. R. A. 516, 19 Am. St. Rep. 573 (1890), is an interesting case of a criminal action against the manager of a hotel for ejecting an agent of a livery stable keeper.

driver of a hackney carriage in Newport, went to the wharf, on the day in question, for a lady who was to arrive in the boat, as he had been ordered to do by the passenger, or some one in her behalf. He backed his hack as near as he could to the space reserved for private carriages, when he was ordered to leave the wharf by the superintendent, upon the ground that he had no right to be there, having no license from the owner. The plaintiff claimed that the wheels of the defendant's carriage were backed on to the plank walk, but, upon all the testimony, we are not satisfied this was so, or, if so, that it was anything more than accidental. At any rate, the order to leave the wharf was not put upon this ground, but because he had no right there. Upon receiving the order to leave, the defendant stated, both to the plaintiff and to the superintendent of the wharf, that he had been ordered there for a passenger, and he refused to leave. The plaintiff then called a policeman, who moved the carriage to another place in the roadway, where the defendant remained until the boat arrived, when he took his passenger and drove away. The passenger was an infirm lady, who had been accustomed to ride with the defendant, and one who was obliged to use a stool, which he had with him, to aid her in getting into the carriage. The plaintiff sues in trespass, and the defendant justifies under a right as servant of the passenger. The question is whether the defendant had the right to enter and remain upon the wharf to take the passenger, notwithstanding the rules and the order to leave. We understand the rules to forbid an unlicensed hackney carriage to stand upon the wharf at all; for none are allowed to stand in the roadways, except on the licensed stands, and none are allowed to occupy a stand without a license. But the wharf is leased to a common carrier of passengers, with a provision that the space east of the restaurant shall be reserved for the use of private carriages of passengers arriving at the wharf.

The question of right, therefore, is the same as it would be between passengers and a company which owns its terminus. While such ownership carries with it a right of control, in most respects the same as in private property, a railroad station or steamboat wharf is, to some extent, a public place. The public have the right to come and go there for the purpose of travel; for taking and leaving passengers; and for other matters growing out of the business of the company as a common carrier. But the company has the right to say that no business of any other character shall be carried on within the limits of its property. It has the right to say that no one shall come there to solicit trade, simply because it may be convenient for travellers, and so to say that none, except those whom it permits, shall solicit in the business of hacking or expressing. When notice of such prohibition has been given, the license which otherwise might be implied is at an end, and it is the duty of persons engaged in any such business to heed the notice and to retire from the premises. Barney v. Steamboat Co., 67 N. Y. 301; Com. v. Power, 7 Metc. (Mass.) 596, 41 Am. Dec. 465.

But, while this is so, the company cannot deprive a passenger of the ordinary rights and privileges of a traveler, among which is the privilege of being transported from the terminus in a reasonably convenient and usual way. A company cannot compel a passenger to take one of certain carriages, or none at all; nor impose unreasonable restrictions, which will amount to that. If a passenger orders a carriage to take him from the terminus, such carriage is, pro hac vice, a private carriage; not in the sense that the passenger has a special property in it, so as to be liable for the driver's negligence, but in the sense that it is not "standing for hire." Masterson v. Short, 33 How. Prac. (N. Y.) 481. The driver is not engaged in his vocation of soliciting patronage, but is waiting to take one with whom a contract has already been made. No question is made that a passenger may have his own carriage enter the premises of a carrier to take him away; but to say that one who is not so fortunate as to own a carriage shall not be allowed to call the one he wants, because it is a hackney carriage, would be a discrimination intolerable in this country. Yet this is really the plaintiff's claim. Every passenger has the right, upon the premises of the carrier, to reasonable and usual facilities for arrival and departure; and, so far as this includes the right to be taken to and from a station or wharf, it is immaterial whether he goes in a private or a hired carriage. Decisions upon this question have not been numerous, and we know of but one directly in point, although in others there are dicta which indicate what is understood to be the law. Summitt v. State, 8 Lea (Tenn.) 413, 41 Am. Rep. 637, was a conviction of the defendant, a watchman in a depot, for assault in ejecting a hackman therefrom. The company had forbidden hackmen to enter the building. Notwithstanding this rule, the right of a hackman to go into a part of the depot to obtain the baggage of a passenger, whose check he had, was not controverted. The prosecutor, having the check of a passenger, was in another part of the depot; but it was held that the defendant was not justified in ejecting him altogether from the station, and the conviction was sustained. Tobin v. Railroad Co., 59 Me. 183, was an action for damages by a hackman who was injured by stepping on a defective platform when leaving a passenger at the station. The court say: "The hackman, conveying passengers to a railroad depot for transportation, and aiding them to alight upon the platform of the corporation, is as rightfully upon the same as the passengers alighting." In this case it was not claimed that any rules had been violated. The recent case of Railroad Co. v. Tripp, 147 Mass. 35, 17 N. E. 89, was an action of trespass against an expressman who solicited patronage in the plaintiff's station, contrary to its rules. W. Allen, J., says: "Passengers taking and leaving the cars at the station, and persons setting down passengers or delivering merchandise or baggage for transportation from the station, or taking up passengers or receiving merchandise that had been transported to the station, had a right to use the station buildings and grounds, superior to the right of the plaintiff to exclusive occupancy.

All such persons had business with the plaintiff, which it was bound to attend to in the place and manner which it had provided for all who had like business with it." A statute of Massachusetts prescribes that railroad corporations shall give to all persons equal facilities for the use of its depot. The court held that this statute applied only to the relations between common carriers and their patrons, or those who had the right to use the station. It did not give the defendant the right to go there to solicit business because another had the right. See, also, Harris v. Stevens, 31 Vt. 79. In Markham v. Brown, 8 N. H. 523, an action of trespass, brought by an innkeeper against a stage driver, the court say the defendant had clearly a right "to go to the plaintiff's inn with travelers, and he might of course lawfully enter it for the purpose of leaving their baggage and receiving his fare." The case most nearly in support of the plaintiff's contention of those we have seen is Barker v. Railroad Co., 18 C. B. 46, where it was held that an omnibus proprietor, carrying passengers to and from a station, could not maintain an action for a refusal to allow him to drive his vehicle into the station yard. As the proprietor was not using or seeking to use the railway, it was considered that the company owed him no duty. Jervis, C. J., said a passenger would, no doubt, have a right of action, if unduly obstructed, but a violation of duty to him would not give an action to the plaintiff. It is to be observed that the recent English cases are mainly controlled by statute (17 & 18 Vict. c. 31), to which the Massachusetts statute is similar. They relate chiefly to the question whether a prohibition to one, to ply for passengers within a station, when the same right is granted to another, is an undue preference, under the statute. It is generally held that it is not. See In re Beadell, 2 C. B. (N. S.) 509; In re Painter, Id. 702; Hole v. Digby, 27 Wkly. Rep. 884. In the latter case it seems to be conceded that one going, bona fide, to meet a passenger, would not be guilty of trespass. In Re Marriott, 1 C. B. (N. S.) 499, the defendant company was ordered to admit the complainant's omnibus into the station to receive and set down passengers and goods, as other public vehicles were admitted. Upon the question before us, we do not think these cases are in conflict with the views we have above expressed. The case at bar differs from Barker v. Railroad Co., supra, in this: that here the hackney driver is not plaintiff, seeking to recover damages for the revocation of a license to go upon the wharf or for a breach of duty to another, but the defendant against an alleged trespass, who relied upon his right as servant of the other to justify his being there. We think the justification is sufficient. It is substantially given by the terms of the lease to the steam-boat company. This does not deprive the owner of the general control of his wharf, nor interfere with his reasonable rules for its management. It simply secures to a passenger the common privilege of a passenger, and enables the hackney driver to shield himself from an apparent violation of the rules only when he is acting, bona fide, as the servant of such passenger. This qualification guards the owner

from an incursion of unlicensed drivers under a mere pretense of serving passengers, and also confines the right of soliciting business on his premises to those whom he may permit. We give judgment for the defendant for his costs.

CRAVENS et al. v. RODGERS et al.

(Supreme Court of Missouri, 1890. 101 Mo. 247, 14 S. W. 106.)

BRACE, J. This is an action to enjoin defendants from using a platform at a railroad depot. Plaintiffs allege in their petition that, as owners, they are engaged in operating a bus, hack, and carriage line between the city of Gallatin and the depot of the Chicago, Rock Island & Pacific Railroad, distant about a half mile from said city, and that defendants also own and operate a similar line between said city and said depot. "That one Scott T. Haynes, on or about the ——— day of November, 1883, while he was engaged in operating the said line now owned and operated by said plaintiffs, made and constructed, by and with the consent of the Chicago, Rock Island & Pacific Railroad Company (which said railroad company, plaintiffs aver, is a corporation duly organized and existing under the laws of the state of Missouri, which on said day last aforesaid operated and controlled, and now operates and controls, the railroad on which said depot is situated), a platform of wood and stone, at great expense to him (the said Scott T. Haynes), beginning about ten feet west of the west end of said depot, extending west about thirty feet along and adjoining to the platform constructed and maintained by the said railroad company for the accommodation of passengers, and south about twenty-three feet from the said platform so constructed by the said railroad company. That the said platform constructed by the said Haynes aforesaid was made upon the ground of the said railroad company, with their full knowledge and express consent, for the especial use of him (the said Haynes), and none other, in order that his teams and vehicles might have a place on which to back up to or approach the said platform at the said depot for the reception of passengers and baggage, free of mud and a heavy grade. That the Said Haynes continued to use and enjoy the platform by him constructed as aforesaid from and after the date of its construction, in pursuance of the license, permission, and consent of the said Chicago, Rock Island & Pacific Railroad Company, till on or about the 3d day of March, 1885, when he (the said Haynes) sold and transferred his bus, hack, and carriage line with all its privileges and immunities, embracing the privilege and license to use and occupy and enjoy said platform, constructed by him as aforesaid, to plaintiffs herein. That the defendants, without the consent, and against the will and wish, of plaintiffs, have driven upon, and used and occupied, said platform constructed by said Haynes as aforesaid, and thereby have prevented plaintiffs from reaching the main platform at said depot, except at a

The R. R. property is private property and the R.R can regulate it, and no person has a right to use it for any and all purposes

place where the grade is heavy, and the mud often deep. That by so doing the defendants have deprived, and continue to deprive, plaintiffs of the free use of their property, purchased from the said Haynes as aforesaid, and have thereby greatly damaged plaintiffs in the lawful exercise of their business. The defendants threaten to continue to use and occupy said platform constructed by said Haynes, although often requested by plaintiffs not to do so." The material part of the answer is as follows: "Come now the defendants, and for answer to plaintiffs' petition herein deny each and every allegation contained therein, except such as hereinafter expressly admitted. Further answering, defendants admit, as alleged in plaintiffs' petition, that plaintiffs and defendants, at the time alleged in said petition, were, and have ever since been, the owners of competing hack lines, running between the town of Gallatin, Daviess county, Mo., and what is known as the 'Rock Island Depot,' about one-half mile northwest of said town of Gallatin. That the platform set forth in plaintiffs' petition is so located at said depot that, if said plaintiffs are given the sole use and occupancy thereof, it would give the plaintiffs such an advantage over these defendants as ultimately to destroy their business. That the passengers getting off of the trains stopping at said depot are compelled to pass by and in front of the hacks and carriages of the plaintiffs before reaching the carriages and hacks of these defendants; thereby giving plaintiffs the first opportunity to solicit the patronage of said passengers so alighting from said trains. That the space so occupied by the said platform erected by the said Haynes, and to the use and possession of which these plaintiffs claim the exclusive right, extends along and adjoining that part of the elevated platform erected by the railroad company where all passenger trains stop and receive and discharge passengers and baggage, the most usual place at which said trains take on and discharge passengers and baggage being at or near the east end of the platform, to which plaintiffs claim the exclusive right; and defendants are forced, with their hacks and conveyances, to take a position to the west of said platform, and about 50 feet away from the point where the passengers and baggage are usually received and discharged by said railway, where the grade is steep, and where the mud at different seasons of the year is deep and miry, making approach to the railroad platform inaccessible. That by reason of said exclusive use and enjoyment of said platform by plaintiffs they have and enjoy greater privileges and advantages than these defendants in soliciting the carrying of passengers and baggage to and from the several passenger and accommodation trains run and operated on said road; whereas they have the right to equal advantages and privileges to those enjoyed by plaintiffs, and all others engaged in like business." The reply was a general denial.

The evidence tended to prove that the platform or approach to the depot platform in question was built by Haynes in 1882, at a cost of about $50, with the verbal consent of the station agent, with the understanding between him and the agent that he (Haynes) was to have the

exclusive use of it for the purpose of driving and backing his teams thereon to receive passengers, and that, when he sold out to plaintiffs, this privilege was included in the transfer. The depot platform for passengers to alight upon extended west of the depot building for some distance. The space immediately in the rear of this west extension of the depot platform, and next to the building, for a distance of about 30 feet, is occupied by this approach, which is 23 feet wide and adjoins the depot platform; leaving a space west of the approach immediately in rear of the depot platform, and 33 feet along it, and about 40 feet from the building, unoccupied. The railroad platform in front of this last space is higher than in front of the approach built by Haynes, the grade to the platform steep, and in wet weather the ground muddy. In dry weather vehicles can be driven or backed up to the platform in this space with some difficulty, and in wet weather it is very hard to do. The weight of the evidence is that vehicles at the platform on the approach in question would have a better chance of obtaining passengers than those at the platform west of it, although there is some evidence tending to show the chances are equal. At the hearing the temporary injunction granted in vacation was dissolved, the plaintiff's bill dismissed, and damages assessed against him on the injunction bond.

The exclusive privilege which the plaintiffs claim under their license from the railroad company's station agent of occupying the space beside the railroad platform of easiest approach thereto, next to the station building, the objective point for the discharge of the railroad passengers, is a valuable one, giving the plaintiffs an advantage in carrying on their business over the defendants, their rivals in the same line of business. The business of both parties is that of common carriers for hire, on the same line, and, by their connection with the railroad, forming one continuous line by which passengers are transported to the same general destination; the railroad company carrying them to its station near the city, and plaintiffs and defendants carrying them to their several destinations in the city. As common carriers, it is the duty of each of the parties to transport all persons who offer to take and pay for passage with them; and they are charged with grave and responsible duties to such persons when they have once taken passage. They must make the trip whether they have one or many passengers. As a corollary of this duty to carry all, there ought to be a corresponding right upon the part of each to have the same facilities afforded them to obtain the passage in their respective vehicles of all such passengers as are brought to the point of connection by the connecting carrier, the railroad company, on the same general route. In this way the enterprise of each is encouraged, competition is stimulated, the price of transportation is kept within reasonable bounds, the safest, best, and most comfortable means of conveyance, a rapid passage, and polite and agreeable service are apt to be secured to the traveling public. On the other hand, if better facilities are afforded to one carrier than another by the connecting carrier, competition is discouraged, a monopoly created, and the

traveling public are apt to receive a slow, uncomfortable, slovenly, negligent, and expensive service. Monopolies are obnoxious to the spirit of our laws, and ought to be discouraged. This is the spirit of our constitutional provision which prohibits "discrimination in charges, or facilities in transportation, * * * between transportation companies and individuals, or in favor of either." Article 12, § 23. And in this case we do not think the railroad company could give the plaintiffs the exclusive privilege of approach to nearly one-half of its platform, and that the most desirable and advantageous half for procuring passengers, and thereby deny it to the defendants, both being there for the same purpose, and in the same business, of forwarding the railroad's passengers to their places of destination from the point where the railroad company landed them.

Waiving the question of the station agent's authority in the premises, and making no point on the entire failure of the evidence to show that the defendants had ever used, or threatened to use, this platform or approach constructed by Haynes, we think the judgment is right upon the merits of the controversy. The judgment is affirmed.[16] All concur, except BARCLAY, J., absent.

DONOVAN et al. v. PENNSYLVANIA CO.

(Supreme Court of the United States, 1905. 199 U. S. 279, 26 S. Ct. 91, 50 L. Ed. 192.)

On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a decree which affirmed a decree of the Circuit Court for the Northern District of Illinois, Northern Division, enjoining cabmen from entering a railway station and grounds to solicit custom, and from congregating upon the sidewalk in front of the station so as to interfere with the ingress and egress of passengers and employees.

Mr. Justice HARLAN delivered the opinion of the court:[17]

This suit involves some questions as to the relative rights of the parties in the use of a railroad passenger station and depot grounds, and in the use of the public sidewalk and street adjacent to such station and grounds. * * *

[16] Accord: McConnell v. Pedigo & Hays, 92 Ky. 465, 18 S. W. 15 (1892); Kalamazoo Hack & Bus Co. v. Sootsma, 84 Mich. 194, 47 N. W. 667, 10 L. R. A. 819, 22 Am. St. Rep. 693 (1890). But see Dingman v. Duluth S. S. & A. R. Co., 164 Mich. 328, 130 N. W. 24, 32 L. R. A. (N. S.) 1181 (1911). See Kansas City Terminal Ry. Co. v. James, 298 Mo. 497, 251 S. W. 53 (1923), and a note, "The Validity of Grants of Exclusive Privileges by Transportation companies to Dependent Services," collecting the cases, 23 Col. Law Rev. 761. See, also, Philadelphia & Camden Ferry Co. v. Johnson, 94 N. J. Eq. 296, 121 A. 900 (1923), and comment thereon in a note, "Regulation of Terminal Facilities by a Common Carrier," 37 Harv. Law Rev. 377.

[17] Parts of the opinion are omitted.

Upon the pleadings two principal inquiries arise: First, whether the Pennsylvania Company, having made an arrangement with the Parmelee Transfer Company to furnish, at its passenger station, from time to time, all vehicles necessary for the accommodation of passengers arriving there on its trains or on the trains of other railroad companies, may legally exclude from its depot grounds or passenger station all hackmen or expressmen coming to either for the purpose only of soliciting for themselves the custom or patronage of passengers. Second, whether, in virtue of its ownership of the passenger station and depot grounds in question, the railroad company is entitled, in prosecuting its business, to any greater privileges in respect of the use of the sidewalk and street in front of the main entrance to such station than belonged to the defendants in the prosecution of their business.

Much has been said in argument as to the functions and duties of railroad companies. Under the decisions of this court there can be no doubt as to the nature of those functions or duties.[18] * * *

Necessarily, the same principles apply in reference to the use of the company's station house and depot grounds; for they are held in the same right as are its road, its locomotives, and other property or appliances employed in the transportation of passengers and freight, and must be devoted primarily to public use to the extent necessary for the public objects intended to be accomplished by the construction and maintenance of the railroad as a highway.

It by no means follows, however, that the company may not establish such reasonable rules, in respect of the use of its property, as the public convenience and its interests may suggest, provided only that such rules are consistent with the ends for which the corporation was created, and not inconsistent with public regulations legally established for the conduct of its business. Although its functions are public in their nature, the company holds the legal title to the property which it has undertaken to employ in the discharge of those functions. And, as incident to ownership, it may use the property for the purposes of making profit for itself; such use, however, being always subject to the condition that the property must be devoted primarily to public objects, without discrimination among passengers and shippers, and not be so managed as to defeat these objects. It is required, under all circumstances, to do what may be reasonably necessary and suitable for the accommodation of passengers and shippers. But it is under no obligation to refrain from using its property to the best advantage of the public and of itself. It is not bound to so use its property that others, having no business with it, may make profit to themselves. Its property is to be deemed, in every legal sense, private property as

18 At this point the court cited, inter alia, the following cases, and quoted from several of them: New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 12 L. Ed. 465 (1848); Cherokee Nation v. Southern Kansas R. Co., 135 U. S. 641, 10 S. Ct. 965, 34 L. Ed. 295 (1890).

between it and those of the general public who have no occasion to use it for purposes of transportation.[19] * * *

Applying these principles to the case before us, it would seem to be clear that the Pennsylvania Company had the right—if it was not its legal duty—to erect and maintain a passenger station and depot buildings in Chicago for the accommodation of passengers and shippers as well as for its own benefit; and that it was its duty to manage that station so as to subserve, primarily, the convenience, comfort, and safety of passengers and the wants of shippers. It was therefore its duty to see to it that passengers were not annoyed, disturbed, or obstructed in the use either of its station house or of the grounds over which such passengers, whether arriving or departing, would pass. It was to that end—primarily, as we may assume from the record—that the Pennsylvania Company made an arrangement with a single company to supply all vehicles necessary for passengers. We cannot say that that arrangement was either unnecessary, unreasonable, or arbitrary; on the contrary, it is easy to see how, in a great city, and in a constantly crowded railway station, such an arrangement might promote the comfort and convenience of passengers arriving and departing, as well as the efficient conduct of the company's business. The record does not show that the arrangement referred to was inadequate for the accommodation of passengers. But if inadequate, or if the transfer company was allowed to charge exorbitant prices, it was for passengers to complain of neglect of duty by the railroad company, and for the constituted authorities to take steps to compel the company to perform its public functions with due regard to the rights of passengers. The question of any failure of the company to properly care for the convenience of passengers was not one that, in any legal aspect, concerned the defendants as licensed hackmen and cabmen. It was not for them to vindicate the rights of passengers. They only sought to use the property of the railroad company to make profit in the prosecution of their particular business. A hackman, in nowise connected with the railroad company, cannot, of right and against the objections of the company, go upon its grounds or into its station or cars for the purpose simply of soliciting the custom of passengers; but, of course, a passenger, upon arriving at the station, in whatever vehicle, is entitled to have such facilities for his entering the company's depot as may be necessary.[20]

Here the defendants press the suggestion that they are entitled to the same rights as were accorded by special arrangement to the Parmelee Transfer Company. They insist, in effect, that, as carriers of passengers, they are entitled to transact their business at any place which, un-

[19] As to the nature of the property interest, the court quoted from Western Union Teleg. Co. v. Pennsylvania R. Co., 195 U. S. 540, 25 S. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517 (1904); Philadelphia & R. R. Co. v. Hummell, 44 Pa. 375, 84 Am. Dec. 457 (1863); and Pittsburgh, Ft. W. & C. R. Co. v. Bingham, 29 Ohio St. 370 (1876).

[20] See a query as to the soundness of such a view, citing authorities, in a note, "Regulation of Terminal Facilities by a Common Carrier," 37 Harv. Law Rev. 377 (379).

der the authority of law, is devoted primarily to public uses,—certainly, at any place open to another carrier engaged in the same kind of business. But this contention, when applied to the present case, cannot be sustained. The railroad company was not bound to accord this particular privilege to the defendants simply because it had accorded a like privilege to the Parmelee Transfer Company; for it had no contractual relations with the defendants, and owed them, as hackmen, no duty to aid them in their special calling. The defendants did not have, or profess to have, any business of their own with the company. In meeting their obligations to the public, whatever the nature of those obligations, the defendants could use any property owned by them, but they could not, of right, use the property of others against their consent. In maintaining a highway, under the authority of the state, the first and paramount obligation of the railroad company was, as we have already said, to consult the comfort and convenience of the public who used that highway. To that end it could use all suitable means that were not forbidden by law. In its discretion it could accept the aid or stipulate for the services of others. But, after providing fully for the wants of passengers and shippers, it did not undertake, expressly or by implication, to so use its property as to benefit those who had no business or connection with it. It is true that by its arrangement with the railroad company the Parmelee Company was given an opportunity to control, to a great extent, the business of carrying passengers from the Union Passengers' Depot to other railway stations and to hotels or private houses in Chicago. But in a real, substantial, legal sense, that arrangement cannot be regarded as a monopoly in the odious sense of that word, nor does it involve an improper use by the railroad company of its property. That arrangement is to be deemed, not unreasonably, a means devised for the convenience of passengers and of the railroad company, and as involving such use by the company of its property as is consistent with the proper performance of its public duties and its ownership of the property in question. If the company, by such use of its property, also derived pecuniary profit for itself, that was a matter of no concern to the defendants, and gave them no ground of complaint.

This question is not controlled by any statute of Illinois. * * * It does not appear that the state has undertaken by any statute to compel the railroad company to share the use of its depot grounds and station with hackmen and cabmen seeking to use them only to solicit custom for themselves. Whether such a statute would be valid, we need not now consider or determine. * * *

In Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co., 139 U. S. 79, 87, 35 L. Ed. 97, 100, 11 S. Ct. 490, one of the questions was as to the validity of a contract between a railroad company and the Pullman Company, whereby the latter was given the exclusive right for fifteen years to furnish drawing room and sleeping cars to be used by the former, and whereby, also, the railroad company stipulated that

during that term it would not contract to give a like privilege to other sleeping-car companies. That contract was assailed as one in restraint of trade and as being against public policy. This court said: "The authorities cited in support of this contention have no application to such a contract as the one before us. The defendant was under a duty arising from the public nature of its employment to furnish for the use of passengers on its lines such accommodations as were reasonably required by the existing conditions of passenger traffic. Its duty as a carrier of passengers was to make suitable provisions for their comfort and safety. Instead of furnishing its own drawing room and sleeping cars, as it might have done, it employed the plaintiff, whose special business was to provide cars of that character, to supply as many as were necessary to meet the requirements of travel. It thus used the instrumentality of another corporation in order that it might properly discharge its duty to the public. So long as the defendant's lines were supplied with the requisite number of drawing room and sleeping cars, it was a matter of indifference to the public who owned them. Express Cases, 117 U. S. 1, 29 L. Ed. 791, 6 S. Ct. 542, 628."

The views we have expressed find more or less support in numerous adjudged cases, some of which are cited in the margin.[21] There are cases to the contrary, but, in our opinion, the better view—the one sustained by the clear weight of authority and by sound reason and public policy—is that which we have expressed.

The defendants cite, as supporting their contention, Pennsylvania Co. v. Chicago, 181 Ill. 289, 53 L. R. A. 223, 54 N. E. 825. But that case did not involve any question as to the right of licensed cabmen to enter the station house of a railroad company, against its objection, solely for the purpose of soliciting the custom of passengers. What appears in the opinion of the majority, and in the particular cases cited by the learned state court, on that point, was, we feel constrained to say, outside of the issues presented, and cannot be deemed authoritative upon the question now being considered. The sole issue in that case

[21] The following cases were cited: Jencks v. Coleman, 2 Sumn. 221, Fed. Cas. No. 7,258 (1835); The D. R. Martin, 11 Blatchf. 233, Fed. Cas. No. 1,030 (1873); Com. v. Power, 7 Metc. 596, 41 Am. Dec. 465 (1844); Barney v. Oyster Bay S. B. Co., 67 N. Y. 301 (1876); Old Colony R. Co. v. Tripp, 147 Mass. 35, 9 Am. St. Rep. 661, 17 N. E. 89 (1888); Com. v. Carey, 147 Mass. 40, note, 17 N. E. 97 (1888); State ex rel. Sheets v. Union Depot Co., 71 Ohio St. 379, 68 L. R. A. 792, 73 N. E. 633 (1905); Norfolk & W. R. Co. v. Old Dominion Baggage Transfer Co., 99 Va. 111, 50 L. R. A. 722, 37 S. E. 784 (1901); Fluker v. Georgia R. & Bkg. Co., 81 Ga. 461, 2 L. R. A. 843, 12 Am. St. Rep. 328, 8 S. E. 529 (1889); Griswold v. Webb, 16 R. I. 649, 7 L. R. A. 302, 19 A. 143 (1889); Summitt v. State, 8 Lea, 413, 41 Am. Rep. 637 (1881); New York, N. H. & H. R. Co. v. Scovill, 71 Conn. 136, 42 L. R. A. 157, 71 Am. St. Rep. 159, 41 A. 246 (1898); Kates v. Alabama Baggage & Cab Co., 107 Ga. 636, 46 L. R. A. 431, 34 S. E. 372 (1899); Godbout v. St. Paul Union Depot Co., 79 Minn. 188, 47 L. R. A. 532, 81 N. W. 835 (1900); Boston & A. R. Co. v. Brown, 177 Mass. 65, 52 L. R. A. 418, 58 N. E. 189 (1900); Boston & M. R. Co. v. Sullivan, 177 Mass. 230, 83 Am. St. Rep. 275, 58 N. E. 689 (1900); New York, N. H. & H. R. Co. v. Bork, 23 R. I. 218, 49 A. 965 (1901); St. Louis Drayage Co. v. Louisville & N. R. Co., 5 Inters. Com. Rep. 137, 65 F. 39 (1894); Hedding v. Gallagher, 72 N. H. 377, 64 L. R. A. 811, 57 A. 225 (1903).

was as to the validity of certain ordinances of the city of Chicago relating to the use by hackmen of the public street and sidewalk in front of the company's station—a question wholly different from the one relating to the special arrangement between the railroad company and the Parmelee Transfer Company. If the question had been before the state court, and it had adjudged that a railroad corporation could not grant to one person or company the exclusive right within its station to solicit the custom of passengers (the subject not being covered by any valid statute), then it would have been necessary to consider whether the subject was not one of general law, in respect of which the courts of the United States were entitled to exercise their independent judgment, in light of the settled principles that must always control the determination of the legal rights of parties. No such question is now presented.

The next question to be examined is that which involves the respective rights of the parties in the use of the public street and sidewalk in front of the company's passenger station.

We have seen that the original temporary restraining order of the circuit court was, in general terms, to the effect that the defendants desist from congregating upon the sidewalk in front of, adjacent to, or about the entrance to the company's passenger station, and from soliciting the custom of passengers for cabs, etc., until the further order of the court; and that this order was so modified in the circuit court of appeals as to restrain only such congregating by defendants upon the sidewalk as would interfere with the ingress and egress of passengers and employees. We take it that the final decree recognized the right of the defendants in prosecuting their business to congregate, in reasonable numbers, upon the sidewalks in front of, adjacent to, or about the entrance of the company's station, and from there soliciting the custom of passengers, providing such use of the sidewalks did not obstruct the ingress and egress of passengers and employees.

As the railroad company did not appeal from the final decree of the circuit court, it cannot, upon this appeal, complain of any of its provisions. The defendants did appeal, and they object to the decree relating to the use of the sidewalk and street in front of the main entrance to the passenger depot.

That the railroad company, by its agents and employees, are entitled, in prosecuting its business, to use, in all appropriate ways, the sidewalk and street in front of its station and depot grounds, cannot be doubted—that right being appurtenant to the lands upon which its station house and depot grounds stand. Passengers may, therefore, in their own right, as well as in right of the company, use the sidewalk in order to gain access to the depot grounds and station, or to reach the public street when leaving the station. * * *

But the right of the railroad company, as abutting owner, and the rights of passengers, are not, in their nature, paramount to the rights of others of the general public to use the sidewalk in question in

legitimate ways and for legitimate purposes. Licensed hackmen and cabmen, unless forbidden by valid local regulations, may, within reasonable limits, use a public sidewalk in prosecuting their calling, provided such use is not materially obstructive in its nature; that is, of such exclusive character as, in a substantial sense, to prevent others from also using it upon equal terms, for legitimate purposes. Generally speaking, public sidewalks and streets are for use by all, upon equal terms, for any purpose consistent with the object for which such sidewalks and streets are established; subject, of course, to such valid regulations as may be prescribed by the constituted authorities for the public convenience; this, to the end that, as far as possible, the rights of all may be conserved without undue discrimination. * * *

Perceiving nothing in the above provisions[22] inconsistent with any right secured by the Constitution of the United States, we accept the decision of the state court as authoritative upon this point. When, therefore, licensed hackmen and cabmen, at appropriate times, placed their vehicles in the public street, next to the sidewalk, in front of the company's passenger house, they did not violate the regulations established by the city council. Nor, so far as the plaintiff is concerned, did they violate such regulations, when, leaving their vehicles in the public street, at the appointed places, they stood near by them for a reasonable time upon the sidewalk, awaiting the coming of passengers from the station house. What they could not legally do—what the final decree properly forbade them to do—was to congregate upon the sidewalk in front of, adjacent to, or about the passenger house, so as to interfere with the ingress and egress of passengers. Of course, any use of the sidewalk in whatever way that would unnecessarily or unduly obstruct and interfere with passengers in their going or coming would be inconsistent with the rights of such passengers as well as an infringement of the right of the company, as abutting property owner, to have, by its agents and employees, for the purposes of its business, reasonable access to and from the sidewalk and the public street.

It only remains to inquire as to the competency of a court of equity to give the railroad company the relief it sought. The defendants insist that equity cannot properly interfere. But the inadequacy of a legal remedy in such a case as this one is quite apparent. According to the record the attempt of the defendants, despite the objections of the company, to use its station house and depot grounds for the purpose of meeting passengers and soliciting their patronage, was of constant, daily, almost hourly occurrence. The case was one of a continuing trespass, involving injury of a permanent nature. A suit at law could only have determined the particular wrong occurring on a particular occasion, and would not reach other wrongs of like character that would occur almost every hour of each day, as passengers arrived at the station of the company. The same state of things existed in reference to such use of the sidewalk in front of the passenger station as unduly

[22] The provisions of an ordinance of the city council of Chicago are omitted.

interfered with the rights of passengers arriving and departing. Only a court of equity was competent to meet such an unusual emergency, and by a comprehensive decree determine finally and once for all the entire controversy between the parties, thus avoiding a multiplicity of suits, and conserving the public interests. No remedy at law would be so complete or efficacious as a suit in equity in such a case as this one. * * *

The decree of the Circuit Court of Appeals is affirmed.[23]

MEMPHIS & L. R. R. CO. v. SOUTHERN EXP. CO.[24]

ST. LOUIS, I. M. & S. RY. CO. v. SAME.

MISSOURI, K. & T. RY. CO. v. DINSMORE.

(Supreme Court of the United States, 1886. 117 U. S. 1, 6 S. Ct. 542, 628, 29 L. Ed. 791.)

WAITE, C. J.[25] These suits present substantially the same questions, and may properly be considered together. They were each brought by an express company against a railway company to restrain the railway company from interfering with or disturbing in any manner the facilities theretofore afforded the express company for doing its business on the railway of the railway company. * * *

The railroad company at first answered the bill, and testimony was taken, but before a final hearing the answer was withdrawn and a demurrer substituted.

In each of the cases a preliminary injunction was granted, and from that time until now the express companies have occupied the roads the same as before the suits, but in connection with the railroad companies, as carriers of express matter, or with some other express company to which the privilege of doing an express business over the line had been granted by the railroad company.

[23] For other cases, in addition to those cited in footnote 5, see a note, "The Validity of Grants of Exclusive Privileges by Transportation Companies to Dependent Services," 23 Col. Law Rev. 761. For a discussion of the theories underlying these cases, see State v. Union Depot Co., 71 Ohio St. 379, 73 N. E. 633, 68 L. R. A. 792, 2 Ann. Cas. 186 (1905); and a note, "Regulation of Terminal Facilities by a Common Carrier," 37 Harv. Law Rev. 377, citing Marriot v. London & S. W. Ry. Co., 1 C. B. N. S. 499 (1857), as "a striking example of confusion in methods of approach." And see an article, "Scope of Rule against Unjust Discrimination by Public Servants," by Benjamin M. Kline, 67 Univ. of Pa. Law Rev. 109. In Williams v. Arkansas, 217 U. S. 79, 30 S. Ct. 493, 54 L. Ed. 673, 18 Ann. Cas. 865 (1910), a state statute is sustained, prohibiting drumming and soliciting business or patronage upon railway trains and premises of common carriers.

[24] These cases are commonly known and cited as the Express Cases.

[25] Parts of the opinion, and the dissenting opinions of Miller, J., and Field, J., are omitted.

R.R. is not a Common Carrier
If a Common Carrier.
R.R. has got to furnish people with
express service.

A large amount of testimony was taken, and on the final hearing a decree was entered in each of the cases, one of which is as follows:

"(1) That the express business, as fully described and shown in the record, is a branch of the carrying trade that has by the necessities of commerce and the usages of those engaged in transportation become known and recognized so as to require the court to take notice of the same as distinct from the ordinary transportation of the large mass of freight usually carried on steamboats and railroads. * * *

"(6) That on and subsequent to the 1st day of May, 1877, the said defendant afforded to the said plaintiff all the facilities needed by it for the conduct of its express business over the defendant's lines, and such as are specifically in the bill herein set forth; that thereafter the defendant notified the plaintiff that such facilities would be withdrawn; and that it was the intention and purpose of the defendant to exclude the plaintiff's company from its lines on and after the 21st day of June, 1880; that such intention and purpose were restrained by the preliminary injunction order of the court, which said injunction order was afterwards modified, as appears in the record.

"(7) That it is the duty of the defendant to afford to the plaintiff all express facilities, and to the same extent and upon the same trains that said defendant may accord to itself, or to any other company or corporation engaged in the conduct of an express business on the defendant's lines, and to afford the same facilities to the plaintiff on all its passenger trains. * * *

"(9) That it is and was the duty of said defendant to afford, and to have afforded, such facilities to the plaintiff as herein specified, for a just and reasonable compensation.

"(10) Whereas it is alleged by complainant that since the commencement of this suit and the service of the preliminary order of injunction herein the defendant has, in violation of said injunction and of the rights of complainant, made unjust discriminations against complainant, and has charged complainant unjust and unreasonable rates for carrying express matter; therefore it is ordered that complainant have leave hereafter to apply for an investigation of these and similar allegations, and for such order with respect thereto as the facts, when ascertained, may justify, and for the appointment of a master to take proof and report thereon.

"(11) That the defendant, its officers, agents, servants, and employes, and all persons acting under their authority, be, and they hereby are, permanently and perpetually enjoined and restrained from interfering with or disturbing in any manner the enjoyment by the plaintiff of the facilities provided for in this decree, to be accorded to it by the said defendant upon its lines of railway, or such as have been heretofore accorded to it for the transaction of the business of the plaintiff, and of the express business of the public confided to its care; and from interfering with any of the express matter or messengers of the plaintiff;

and from excluding or ejecting any of its express matter or messengers from the depots, trains, cars, or lines of the said defendant, as the same are by this decree directed to be permitted to be enjoyed and occupied by the said plaintiff; and from refusing to receive and transport in like manner as the said defendant is now transporting, or as it may hereafter transport, for itself or for any other express company, over its lines of railway, the express matter and messengers of the said plaintiff; and from interfering with or disturbing the business of the said plaintiff in any way or manner whatsoever; the said plaintiff paying for the services performed for it by the defendant monthly, as herein prescribed, at a rate not exceeding fifty per centum more than its prescribed rates for the transportation of ordinary freight, and not exceeding the rate at which it may itself transport express matter on its own account, or for any other express or other corporation or for private individuals, reserving to either party the right at any time hereafter to apply to this court according to the rules in equity proceedings for a modification of this decree as to the measure of compensation herein prescribed. * * *"

The decrees in the other cases differ from this only in matters of detail. The cases are now here for review on these appeals.

The evidence shows that the express business was first organized in the United States about the year 1839. The case of New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, grew out of a loss by the burning of the steamboat Lexington, on Long Island Sound, in January, 1840, of $18,000 in gold and silver coin, while in charge of William F. Harnden, an express carrier, for transportation from New York to Boston. * * *

Such was the beginning of the express business which now has grown to an enormous size, and is carried on all over the United States and in Canada, and has been extended to Europe and the West Indies. It has become a public necessity, and ranks in importance with the mails and with the telegraph. It employs for the purposes of transportation all the important railroads in the United States, and a new road is rarely opened to the public without being equipped in some form with express facilities. It is used in almost every conceivable way, and for almost every conceivable purpose, by the people and by the government. All have become accustomed to it, and it cannot be taken away without breaking up many of the long-settled habits of business, and interfering materially with the conveniences of social life. In this connection it is to be kept in mind that neither of the railroad companies involved in these suits is attempting to deprive the general public of the advantages of an express business over its road. The controversy, in each case, is not with the public, but with a single express company. And the real question is not whether the railroad companies are authorized by law to do an express business themselves; nor whether they must carry express matter for the public on their passenger trains, in the immediate charge of some person specially appointed for that purpose;

nor whether they shall carry express freights for express companies as they carry like freights for the general public—but whether it is their duty to furnish the Adams Company or the Southern Company facilities for doing an express business upon their roads the same in all respects as those they provide for themselves or afford to any other express company.

When the business began railroads were in their infancy. They were few in number, and for comparatively short distances. There has never been a time, however, since the express business was started that it has not been encouraged by the railroad companies; and it is no doubt true, as alleged in each of the bills filed in these cases, that "no railroad company in the United States * * * has ever refused to transport express matter for the public, upon the application of some express company, of some form of legal constitution. Every railway company * * * has recognized the right of the public to demand transportation by the railway facilities which the public has permitted to be created of that class of matter which is known as 'express matter.'" Express companies have undoubtedly invested their capital and built up their business in the hope and expectation of securing, and keeping for themselves, such railway facilities as they needed, and railroad companies have likewise relied upon the express business as one of their important sources of income. But it is neither averred in the bills, nor shown by the testimony, that any railroad company in the United States has ever held itself out as a common carrier of express companies; that is to say, as a common carrier of common carriers. On the contrary, it has been shown, and in fact it was conceded upon the argument, that down to the time of bringing these suits no railroad company had taken an express company on its road for business except under some special contract, verbal or written, and generally written, in which the rights and duties of the respective parties were carefully fixed and defined. These contracts, as is seen by those in these records, vary necessarily in their details, according to the varying circumstances of each particular case, and according to the judgment and discretion of the parties immediately concerned. It also appears that, with very few exceptions, only one express company has been allowed by a railroad company to do business on its road at the same time. In some of the states statutes have been passed which either in express terms, or by judicial interpretation, require railroad companies to furnish equal facilities to all express companies (Gen. Laws N. H. c. 163, § 2; Rev. St. Me. 494, § 134); but these are of comparatively recent origin, and thus far seem not to have been generally adopted.[26] * * *

The reason is obvious why special contracts in reference to this business are necessary. The transportation required is of a kind which must, if possible, be had for the most part on passenger trains. It requires not only speed, but reasonable certainty as to the quantity that

[26] See McDuffee v. Portland & R. R. R., 52 N. H. 430, 13 Am. Rep. 72 (1873), for the same result at common law.

will be carried at one time. As the things carried are to be kept in the personal custody of the messenger or other employe of the express company, it is important that a certain amount of car space should be specially set apart for the business, and that this should, as far as practicable, be put in the exclusive possession of the expressman in charge. As the business to be done is "express", it implies access to the train for loading at the latest, and for unloading at the earliest, convenient moment. All this is entirely inconsistent with the idea of an express business on passenger trains free to all express carriers. Railroad companies are by law carriers of both persons and property. Passenger trains have from the beginning been provided for the transportation primarily of passengers and their baggage. This must be done with reasonable promptness and with reasonable comfort to the passenger. The express business on passenger trains is in a degree subordinate to the passenger business, and it is consequently the duty of a railroad company in arranging for the express to see that there is as little interference as possible with the wants of passengers. This implies a special understanding and agreement as to the amount of car space that will be afforded, and the conditions on which it is to be occupied, the particular trains that can be used, the places at which they shall stop, the price to be paid, and all the varying details of a business which is to be adjusted between two public servants, so that each can perform in the best manner its own particular duties. All this must necessarily be a matter of bargain, and it by no means follows that because a railroad company can serve one express company in one way it can as well serve another company in the same way, and still perform its other obligations to the public in a satisfactory manner. The car space that can be given to the express business on a passenger train is, to a certain extent, limited, and, as has been seen, that which is allotted to a particular carrier must be, in a measure, under his exclusive control. No express company can do a successful business unless it is at all times reasonably sure of the means it requires for transportation. On important lines one company will at times fill all the space the railroad company can well allow for the business. If this space had to be divided among several companies, there might be occasions when the public would be put to inconvenience by delays which could otherwise be avoided. So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security.

The inconvenience that would come from allowing more than one express company on a railroad at the same time was apparently so

well understood both by the express companies and the railroad companies that the three principal express companies, the Adams, the American, and the United States, almost immediately on their organization, now more than 30 years ago, by agreement divided the territory in the United States traversed by railroads among themselves, and since that time each has confined its own operations to the particular roads which, under this division, have been set apart for its special use. No one of these companies has ever interfered with the other, and each has worked its allotted territory, always extending its lines in the agreed directions as circumstances would permit. At the beginning of the late civil war the Adams Company gave up its territory in the southern states to the Southern Company, and since then the Adams and the Southern have occupied, under arrangements between themselves, that part of the ground originally assigned to the Adams alone. In this way these three or four important and influential companies were able substantially to control, from 1854 until about the time of the bringing of these suits, all the railway express business in the United States except upon the Pacific roads and in certain comparatively limited localities. In fact, as is stated in the argument for the express companies, the Adams was occupying when these suits were brought 155 railroads, with a mileage of 21,216 miles; the American 200 roads, with a mileage of 28,000 miles; and the Southern 95 roads, with a mileage of 10,000 miles. Through their business arrangements with each other, and with other connecting lines, they have been able for a long time to receive and contract for the delivery of any package committed to their charge at almost any place of importance in the United States and in Canada, and even at some places in Europe and the West Indies. They have invested millions of dollars in their business, and have secured public confidence to such a degree that they are trusted unhesitatingly by all who need their services. The good will of their business is of very great value if they can keep their present facilities for transportation. The longer their lines and the more favorable their connections the greater will be their own profits and the better their means of serving the public. In making their investments and in extending their business they have undoubtedly relied on securing and keeping favorable railroad transportation, and in this they were encouraged by the apparent willingness of railroad companies to accommodate them; but the fact still remains that they have never been allowed to do business on any road except under a special contract, and that as a rule only one express company has been admitted on a road at the same time.

The territory traversed by the railroads involved in the present suits is part of that allotted in the division between the express companies to the Adams and Southern Companies, and in due time after the roads were built these companies contracted with the railroad companies for the privileges of an express business. The contracts were all in writing, in which the rights of the respective parties were clearly

defined, and there is now no dispute about what they were. Each contract contained a provision for its termination by either party on notice. That notice has been given in all the cases by the railroad companies, and the express companies now sue for relief. Clearly this cannot be afforded by keeping the contracts in force, for both parties have agreed that they may be terminated at any time by either party on notice; nor by making new contracts, because this is not within the scope of judicial power.

The exact question, then, is whether these express companies can now demand as a right what they have heretofore had only as by permission. That depends, as is conceded, on whether all railroad companies are now by law charged with the duty of carrying all express companies in the way that express carriers when taken are usually carried, just as they are with the duty of carrying all passengers and freights when offered in the way that passengers and freight are carried. The contracts which these companies once had are now out of the way, and the companies at this time possess no other rights than such as belong to any other company or person wishing to do an express business upon these roads. If they are entitled to the relief they ask, it is because it is the duty of the railroad companies to furnish express facilities to all alike who demand them.

The Constitutions and the laws of the states in which the roads are situated place the companies that own and operate them on the footing of common carriers, but there is nothing which in positive terms requires a railroad company to carry all express companies in the way that under some circumstances they may be able without inconvenience to carry one company. In Kansas the Missouri, Kansas & Texas Company must furnish sufficient accommodations for the transportation of all such express freight as may be offered, and in each of the states of Missouri, Arkansas, and Kansas railroad companies are probably prohibited from making unreasonable discriminations in their business as carriers; but this is all. Such being the case, the right of the express companies to a decree depends upon their showing the existence of a usage, having the force of law in the express business, which requires railroad companies to carry all express companies on their passenger trains as express carriers are usually carried. It is not enough to establish a usage to carry some express company, or to furnish the public in some way with the advantages of an express business over the road. The question is not whether these railroad companies must furnish the general public with reasonable express facilities, but whether they must carry these particular express carriers for the purpose of enabling them to do an express business over the lines.

In all these voluminous records there is not a syllable of evidence to show a usage for the carriage of express companies on the passenger trains of railroads unless specially contracted for. While it has uniformly been the habit of railroad companies to arrange, at the earliest practicable moment, to take one express company on some or all their

passenger trains, or to provide some other way of doing an express business on their lines, it has never been the practice to grant such a privilege to more than one company at the same time, unless a statute or some special circumstances made it necessary or desirable. The express companies that bring these suits are certainly in no situation to claim a usage in their favor on these particular roads, because their entry was originally under special contracts, and no other companies have ever been admitted except by agreement. By the terms of their contracts they agreed that all their contract rights on the roads should be terminated at the will of the railroad company. They were willing to begin and to expand their business upon this understanding and with this uncertainty as to the duration of their privileges. The stoppage of their facilities was one of the risks they assumed when they accepted their contracts, and made their investments under them. If the general public were complaining because the railroad companies refused to carry express matter themselves on their passenger trains, or to allow it to be carried by others, different questions would be presented. As it is, we have only to decide whether these particular express companies must be carried notwithstanding the termination of their special contract rights.

The difficulty in the cases is apparent from the form of the decrees. As express companies had always been carried by railroad companies under special contracts, which established the duty of the railroad company upon the one side and fixed the liability of the express company on the other, the court, in decreeing the carriage, was substantially compelled to make for the parties such a contract for the business as in its opinion they ought to have made for themselves. Having found that the railroad company should furnish the express company with facilities for business, it had to define what those facilities must be, and it did so by declaring that they should be furnished to the same extent and upon the same trains that the company accorded to itself or to any other company engaged in conducting an express business on its line. It then prescribed the time and manner for making the payment for the facilities, and how the payment should be secured, as well as how it should be measured. Thus, by the decrees, these railroad companies are compelled to carry these express companies at these rates, and on these terms, so long as they ask to be carried, no matter what other express companies pay for the same facilities, or what such facilities may, for the time being, be reasonably worth, unless the court sees fit, under the power reserved for that purpose, on the application of either of the parties, to change the measure of compensation. In this way, as it seems to us, "the court has made an arrangement for the business intercourse of these companies such as, in its opinion, they ought to have made for themselves," and that, we said in Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co., 110 U. S. 673, 4 S. Ct. 185, 28 L. Ed. 291, followed at this term in Pullman's Palace Car Co. v. Missouri Pac. Ry. Co., 115 U. S. 587, 6 S. Ct. 194,

29 L. Ed. 499, could not be done. The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from Congress, and to what extent it may come from the states, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power we do not doubt. The Legislature may impose a duty, and when imposed it will, if necessary, be enforced by the courts, but unless a duty has been created either by usage or by contract or by statute the courts cannot be called on to give it effect.

The decree in each of the cases is reversed, and the suit is remanded, with directions to dissolve the injunction; and, after adjusting the accounts between the parties for business done while the injunctions were in force, and, decreeing the payment of any amounts that may be found to be due, to dismiss the bills.

MATTHEWS, J., took no part in the decision of these cases.

SECTION 5.—CONNECTING SERVICE

BENNETT v. DUTTON.

(Superior Court of Judicature of New Hampshire, 1839. 10 N. H. 481.)

Case. The declaration alleged, that the defendant was part owner, and driver, of a public stagecoach, from Nashua to Amherst, and Francestown; that on the 31st of January, 1837, the plaintiff applied to him to be received into his coach, at Nashua, and conveyed from thence to Amherst offering to pay the customary fare; and that the defendant, although there was room in his coach, refused to receive the plaintiff.

It appeared in evidence, that at the time of the grievance alleged, there were two rival lines of daily stages, running between Lowell, in Massachusetts, and Nashua; that Jonathan B. French was the proprietor of one of these lines, and Nelson Tuttle of the other; that Tuttle's line ran no farther than from Lowell to Nashua; that French, and the proprietors of the defendant's line, were interested in a contract for carrying the United States mail from Lowell to Francestown, through Amherst (dividing the mail money in proportion to the length of their respective routes), so as to form one continuous mail route from Lowell to Francestown; that French, and the proprietors of the defendant's line, had agreed to run their respective coaches so as to form a continuous line for passengers, from Lowell, through Amherst, to Francestown, and that their agents and drivers might engage seats for the whole distance, at such rates of fare as they thought expedient; and the amount thus received, in instances where they thought proper

to receive less than the regular fare, was to be divided between said proprietors, in proportion to the length of their respective routes; that it was also agreed that, if the defendant's line brought down to Nashua an extra number of passengers, French should see them through, and be at the expense of furnishing extra coaches and horses, if necessary, to convey them to Lowell; and, on the other hand, if French's line brought up an extra number of passengers from Lowell to Nashua, the proprietors of the defendant's line were to do the same, for the conveyance of such passengers above Nashua; and that it was further agreed (as Tuttle's line ran no farther than from Lowell to Nashua) by the proprietors of the defendant's line that they would not receive into their coaches, at Nashua, passengers for places above Nashua, who came up from Lowell to Nashua, on the same day, in Tuttle's line; the time of starting from Lowell, and arriving at Nashua, being the same in both lines.

One of the requisitions of mail contracts is that each line of stage-coaches running into another, so as to form a continuous mail line, shall give preference to passengers arriving in the line with which it connects, and shall forward them in preference to any others.

There were several other lines which started from Lowell at the same time with the line before mentioned, running to other places, through Nashua; and it was generally the understanding between their respective proprietors that one line should not take, for a part of the distance where the route was the same, passengers who were going on further in another line; though this understanding has been occasionally interrupted.

The plaintiff being at Lowell on the 31st of January, 1837, took passage and was conveyed to Nashua in Tuttle's line; and immediately on his arrival at Nashua applied to be received into the defendant's coach, and tendered the amount of the regular fare. There was room for the plaintiff to be conveyed on to Amherst, but the defendant refused to receive him.

The plaintiff was notified, by the agent for the line of French and the defendant, at Lowell, previous to taking passage in Tuttle's coach for Nashua, that if he wished to go from Nashua to Amherst on that day, in the regular mail line, he must take the mail line at Lowell; and that, if he took passage in Tuttle's line from Lowell to Nashua, he would not be received, at Nashua, into the defendant's coach.

The parties agreed that judgment should be rendered for the plaintiff, for nominal damages, or for the defendant, according to the opinion of this court upon these facts.

PARKER, C. J.[27] It is well settled that, so long as a common carrier has convenient room, he is bound to receive and carry all goods which are offered for transportation, of the sort he is accustomed to carry, if they are brought at a reasonable time, and in a suitable condition.

[27] Part of the opinion is omitted.

Story on Bailment, 328; Riley v. Horne, 5 Bing. R. 217, 15 Eng. C. L. R. 426.

And stagecoaches, which transport goods as well as passengers, are, in respect of such goods, to be deemed common carriers, and responsible accordingly. Story, 325.

Carriers of passengers, for hire, are not responsible, in all particulars, like common carriers of goods. They are not insurers of personal safety against all contingencies except those arising from the acts of God and the public enemy. For an injury happening to the person of a passenger by mere accident, without fault on their part, they are not responsible; but are liable only for want of due care, diligence or skill. This results from the different nature of the case. But in relation to the baggage of their passengers, the better opinion seems to be that they are responsible like other common carriers of goods.

And we are of opinion that the proprietors of a stagecoach, for the regular transportation of passengers, for hire, from place to place, are, as in the case of common carriers of goods, bound to take all passengers who come, so long as they have convenient accommodation for their safe carriage, unless there is a sufficient excuse for a refusal. Jencks v. Coleman, 2 Sumner, 221, Fed. Cas. No. 7,258; 19 Wend. R. 239.

The principle which requires common carriers of goods to take all that are offered, under the limitation before suggested, seems well to apply.

Like innkeepers, carriers of passengers are not bound to receive all comers. Markham v. Brown, 8 N. H. 523, 31 Am. Dec. 209. The character of the applicant, or his condition at the time, may furnish just grounds for his exclusion. And his object at the time may furnish a sufficient excuse for a refusal; as if it be to commit an assault upon another passenger, or to injure the business of the proprietors.

The case shows the defendant to have been a general carrier of passengers, for hire, in his stagecoach, from Nashua to Amherst, at the time of the plaintiff's application. It is admitted there was room in the coach; and there is no evidence that he was an improper person to be admitted, or that he came within any of the reasons of exclusion before suggested.

It has been contended that the defendant was only a special carrier of passengers, and did not hold himself out as a carrier of persons generally; but the facts do not seem to show a holding out for special employment. He was one of the proprietors, and the driver, of a line of stages, from Nashua to Amherst and Francestown. They held themselves out as general passenger carriers between those places. But, by reason of their connection with French's line of stages from Lowell to Nashua, they attempted to make an exception of persons who came from Lowell to Nashua, in Tuttle's stage, on the same day in which they applied for a passage for the north. It is an attempt to limit their responsibility in a particular case or class of cases, on account of their agreement with French.

It is further contended that the defendant and other proprietors had a right to make rules for the regulation of their business, and among them a rule that passengers from Lowell to Amherst and onward should take French's stage at Lowell; and that, by a notice brought home to the individual, the general responsibility of the defendant, if it existed, is limited.

But we are of opinion that the proprietors had no right to limit their general responsibility in this manner. * * *

As there was room in the defendant's coach, he could not have objected to take a passenger from Nashua, who applied there, merely because he belonged to some other town. That would furnish no sufficient reason, and no rule or notice to that effect could limit his duty. And there is as little legal reason to justify a refusal to take a passenger from Nashua, merely because he came to that place in a particular conveyance. The defendant might well have desired that passengers at Lowell should take French's line, because it connected with his. But, if he had himself been the proprietor of the stages from Lowell to Nashua, he could have had no right to refuse to take a passenger from Nashua, merely because he did not see fit to come to that place in his stage. It was not for him to enquire whether the plaintiff came to Nashua from one town or another, or by one conveyance or another. That the plaintiff proposed to travel onward from that place could not injuriously affect the defendant's business; nor was the plaintiff to be punished, because he had come to Nashua in a particular manner.

The defendant had good right, by an agreement with French, to give a preference to the passengers who came in French's stage; and, as they were carriers of the mail on the same route, it seems he was bound so to do, without an agreement. If, after they were accommodated, there was still room, he was bound to carry the plaintiff, without enquiring in what line he came to Nashua.

Judgment for the plaintiff.

UNITED STATES TELEGRAPH CO. v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of New York, 1865. 56 Barb. 46.)

Appeal from a judgment in favor of the plaintiff, rendered at the Onondaga circuit, in September, 1864, on a trial by the court, a jury having been waived.

The action was brought to recover a penalty of $100, pursuant to the provisions of section 11 of "An act to provide for the incorporation and regulation of telegraph companies," as amended by chapter 559 of the Laws of 1855, section 1, which declares it to be "the duty of the owner or the association owning any telegraph line, doing business within this state, to receive despatches from and for other tele-

graph lines and associations, and from and for any individual, and on payment of their usual charges, for individuals for transmitting despatches as established by the rules and regulations of such telegraph lines, to transmit the same with impartiality and good faith, under the penalty of $100 for every neglect or refusal so to do, to be recovered with costs of suit, in the name and for the benefit of the person or persons sending or desiring to send such despatch; provided that nothing contained in this section shall be construed to require any telegraph company or association to receive and transmit despatches from or for any other company or association, owning a line of telegraph parallel with or doing business in competition with the line over which the despatch is required to be sent." Stat. at Large, vol. 3, p. 722. On the trial it appeared, and the court found, that the plaintiff and defendant were incorporated associations, engaged in the business of telegraphing messages over their respective lines; that each party had a line of telegraph from Albany to Buffalo; that from Albany to Syracuse they were parallel and competing lines; and that from Syracuse to Buffalo the line of the plaintiff was a parallel and competing line with the northerly line of the defendant, between those places, running along the direct railroad line from Syracuse to Rochester, and on to Buffalo; that the defendant had a line of telegraph running from Syracuse to Auburn, and thence on to Geneva, Canandaigua, and connecting with its northerly line at Rochester; and that the plaintiff had no line from Syracuse to or towards Auburn, or between that place and Rochester; and that its nearest line to Auburn was the one which ran parallel to the defendant's northerly line, and that its nearest approximation to Auburn was at a point where it passed about eight miles distant therefrom. And the court also found that the defendant used the Auburn line of its telegraph to convey through messages, from Albany to Buffalo, when its convenience required it; that the plaintiff and defendant each had offices at Albany and Syracuse, and that the defendant had an office at Auburn; but that the plaintiff had not; and that between Syracuse and Auburn the plaintiff and defendant had no parallel or competing lines, and that Syracuse was the nearest point, on the line of the plaintiff, to Auburn, from which a message could be dispatched to that place by telegraph; that on the 4th of March, 1864, a message from an individual was delivered to the agent of the plaintiff at its office in Albany, to be transmitted to one "Wm. Baker, Auburn," and was transmitted over the line of the plaintiff to Syracuse, and received there by the agent of the plaintiff. And on the same day the plaintiff delivered to the defendant, at its office in Syracuse, the said message and requested that it should be transmitted to its address at Auburn, and tendered to the defendant the payment of its usual charge for individuals for transmitting the same, and that the defendant neglected and refused to transmit it. The court found, as a conclusion of law, that the

plaintiff was entitled to recover the penalty of $100, and ordered judgment accordingly.

The defendant excepted to the findings that the lines of the defendant between Syracuse and Rochester—the one by the way of Auburn, and the northerly one—were separate lines, and to the finding that the plaintiff and defendant had no parallel or competing lines between Syracuse and Auburn. The other findings of fact were undisputed. And the defendant excepted to the conclusion of law that the plaintiff was entitled to recover.

FOSTER, J.[28] If the line of the plaintiff was a parallel and competing line with the one of the defendant over which the dispatch was required to be sent, the defendant violated no obligation, and the action cannot be maintained. The defendant insists that it had but one line of telegraph between Syracuse and Rochester, or between Albany and Buffalo; and, if this be so, then it must be conceded that the line of the plaintiff was parallel and competing with it.

Of the facts proved there is no dispute, and they are substantially stated in the findings; and the question upon them is, whether two lines of the same company, united at the two ends, and running, the one on nearly a straight line through numerous villages, a distance of 78 miles, and the other running on a different and much more circuitous route, through numerous other villages, for the distance of 104 miles, are, within the meaning of the statute in question, one and the same line, even though the owner of them uses, when occasion requires it, the longer of the two to convey messages from and to points beyond its junctions with the other?

The ordinary use of the northerly or shorter line of the defendant is to transmit through messages to and from points beyond Syracuse and Rochester, and to transmit way messages to and from the several points between those places, where offices are established; while the ordinary use of the Auburn line is to transmit messages to and from points on its own line, and, when occasion requires it, assist the other line in the transmission of messages to and from points beyond its own termini. It seems to me that, in the contemplation of the statute in question, it is a distinct line, and that the section in question was intended to apply to just such a case. Suppose the line in question had run from Syracuse to Auburn, and to Ithaca and Oswego, and thence by the way of the Genesee Valley to Rochester; would any one claim it to be a part of the northerly line of the defendant from Syracuse to Rochester, even though the company used it occasionally for the transmission of messages from and to points beyond those cities? And yet the additional distance over which the message in that case would have to pass on such line would be of no moment whatever. The line being once established, the messages over it would meet with no perceptible delay in the transmission, and no additional expense to the defendant. Upon the principle assumed by the defend-

[28] Part of the opinion is omitted.

ant, if, instead of the line in question extending on to Rochester, it had ended at Auburn, it would be a part of the northerly line.

And the fourth resolution of the defendant, that "The Western Union Telegraph Company will not forward messages taken by the United States Telegraph Company at any point where the Western Union Telegraph Company has an office, destined to any point to which the Western Union lines extend and the lines of the United States Telegraph Company do not," shows that they claim that every part of all their lines constitute only one line, and that a competition with any part of any of them is a competition with every other portion of them.

This claim is in clear conflict with the section in question, which was aimed at the mischief to be produced by such refusal. The object of the statute was to compel companies with extensive lines to receive from other telegraph companies messages which such other companies could transmit no further, and to continue them on to the place of ultimate destination. * * *

But it is claimed that the court below erred in finding that the plaintiff had no parallel or competing line with the defendant's line between Syracuse and Auburn. The proof certainly is clear that the plaintiff had no telegraph line from Syracuse to Auburn in any direction, and no line from Syracuse towards Auburn; and that the only line of telegraph from Syracuse to Auburn was the line of the defendant. And of course this claim of the defendant is made upon the alleged conclusion of law, that inasmuch as the line of the plaintiff competed with that of the defendant east of Syracuse and west of Rochester, and also with the northerly line of the defendant between those places, it necessarily was in competition with the line between Syracuse and Auburn. * * *

To absolve the defendant from the penalty, the refused message must have come from "a company or association owning a line of telegraph parallel with or doing business in competition with the line over which the dispatch is required to be sent." Where was the dispatch required to be sent? Certainly from Syracuse to Auburn, and nowhere else. And there was no parallel line and no competition there.

I am therefore of the opinion that the defendant was bound to receive and transmit the message to Auburn.

The next question is, Could the plaintiff maintain this action, or should it have been prosecuted by the signer of the message?

The section under consideration, when speaking of natural persons alone, calls them "individuals," and, when speaking of corporations alone, styles them "companies" or "associations," and, when alluding to the parties who may maintain the suit, uses the words "person or persons." I have no doubt that the word "person" or "persons," when used in a statute, includes corporations. People v. May, 27 Barb. 238; The State of Indiana v. Woram, 6 Hill, 33, 38, 40 Am. Dec. 378; People v. Utica Ins. Co., 15 John. 381, 382, 8 Am. Dec. 243, and cases

there cited. And the action can be maintained by the party who desires to send the dispatch, and whose desire is not complied with. And, if it be a telegraph company that desires another telegraph company to receive and forward such message, that the company so desiring the telegram to be sent is the proper person to sue for the penalty, in cases of refusal. Thurn v. Alta Telegraph Company, 15 Cal. 472; American Law Reg. vol. 4, p. 210.

But the blank upon which the copy of the telegram sent to the defendant's office was written contained a heading in print of the terms and conditions on which the plaintiff received telegrams to be transmitted, one clause of which was as follows: "Nor shall this company be held liable for any error or neglect by any other company, over whose lines this message may be sent, to reach its destination; and this company is hereby made the agent of the signer of this message to forward it over the lines of other companies when necessary." And the defendant claims that, being such agent, the plaintiff cannot maintain the action, even if without such agency it had a right to do so.

It may be a question of some doubt, but I have come to the conclusion that, notwithstanding the clause in question, the plaintiff is the proper party to sue for the penalty. The clause referred to was doubtless intended to shield the plaintiff from pecuniary responsibility for the misconduct or neglect of other parties, or companies, and had relation only to its personal liability over to the writers of the messages which should be received by it for transmission, and to that alone; with all which the defendant had nothing to do. Its duty was to forward the message, and for the refusal to do so it was subject to the penalty, and, notwithstanding the clause in question, I think the plaintiff was the proper party to bring the action. The plaintiff desired the defendant to forward the message, and tendered the price for so doing. It was the desire of the plaintiff, which was disregarded, and, in my opinion, the judgment was right, and should be affirmed.

MORGAN, J., concurred.

MULLIN, J., concurred, except that he held that the plaintiff was not the proper party to bring the action.

BACON, J., did not sit.

Judgment affirmed.[29]

[29] As to permissible rules and regulations for the connecting service, see Atlantic & Pacific Tel. Co. v. Western Union Tel. Co., 4 Daly (N. Y.) 527 (1873), and United States v. Northern P. R. Co. (C. C.) 120 F. 546 (1903). And see People ex rel. Western Union Tel. Co. v. Public Service Com., 160 App. Div. 144, 145 N. Y. S. 545, affirmed 211 N. Y. 542, 105 N. E. 1095 (1914).

ATCHISON, T. & S. F. R. CO. v. DENVER & N. O. R. CO.

DENVER & N. O. R. CO. v. ATCHISON, T. & S. F. R. CO.

(Supreme Court of the United States, 1884. 110 U. S. 667, 4 S. Ct. 185, 28 L. Ed. 291.)

Cross-Appeals from the Circuit Court of the United States for the District of Colorado.

WAITE, C. J.[30] This is a bill in equity filed by the Denver & New Orleans Railroad Company, a Colorado corporation, owning and operating a railroad in that state between Denver and Pueblo, a distance of about 125 miles, against the Atchison, Topeka & Santa Fé Railroad Company, a Kansas corporation, owning and operating a railroad in that state from the Missouri river, at Kansas City, westerly to the Colorado state line, and also operating from there, under a lease, a road in Colorado from the state line to Pueblo, built by the Pueblo & Arkansas Valley Railroad Company, a Colorado corporation. The two roads so operated by the Atchison, Topeka & Santa Fé Company form a continuous line of communication from Kansas City to Pueblo, about 634 miles. The general purpose of the suit is to compel the Atchison, Topeka & Santa Fé Company to unite with the Denver & New Orleans Company in forming a through line of railroad transportation to and from Denver over the Denver & New Orleans road, with all the privileges as to exchange of business, division of rates, sale of tickets, issue of bills of lading, checking of baggage, and interchange of cars that are or may be customary with connecting roads, or that are or may be granted to the Denver & Rio Grande Railroad Company, another Colorado corporation, also owning and operating a road parallel to that of the Denver & New Orleans Company between Denver and Pueblo, or to any other railroad company competing with the Denver and New Orleans for Denver business.

The facts on which the case depends are these: When the Atchison, Topeka & Santa Fé Company reached Pueblo with its line it had no connection of its own with Denver. The Denver & Rio Grande road was built and running between Denver and Pueblo, but the gauge of its track was different from that of the Atchison, Topeka & Santa Fé. Other companies occupying different routes had, at the time, substantially the control of the transportation of passengers and freight between the Missouri river and Denver. The Atchison, Topeka & Santa Fé Company, being desirous of competing for this business, entered into an arrangement, as early as 1879, with the Denver & Rio Grande Company for the formation of a through line of transportation for that purpose. By this arrangement a third rail was to be put down on the track of the Denver & Rio Grande road, so as to admit of the

[30] Parts of the opinion are omitted.

passage of cars continuously over both roads, and terms were agreed on for doing the business and for the division of rates. The object of the parties was to establish a new line which could be worked with rapidity and economy, in competition with the old ones. In the division of prices the Denver & Rio Grande Company was allowed compensation at the rate of a mile and a half for every mile of actual haul. As the distance from the Missouri river to Pueblo by this route was about the same as to Denver by the other routes, the through rates over this line to and from Denver were usually made about the same as the rates to and from Pueblo. This was necessary to compete successfully with other lines for Denver business. * * *

In 1882 the Denver & New Orleans Company completed its road between Denver and Pueblo, and connected its track with that of the Atchison, Topeka & Santa Fé, in Pueblo, twelve or fifteen hundred feet easterly from the junction of the Denver & Rio Grande, and about three-quarters of a mile from the union depot, at which the Atchison, Topeka & Santa Fé and the Denver & Rio Grande interchange their business, and where each stops its trains regularly to take on and let off passengers and receive and deliver freight. The Denver & New Orleans Company has erected at its junction with the Atchison, Topeka & Santa Fé platforms and other accommodations for the interchange of business, and before this suit was begun the general superintendent of the Denver & New Orleans Company made a request in writing of the general manager of the Atchison, Topeka & Santa Fé as follows: "That through bills of lading be given via your line and ours, and that you allow all freight consigned via Denver & New Orleans Railroad to be delivered this company at point of junction, and on such terms as exist between your road and any other line or lines; that you allow your cars, or cars of any foreign line, destined for points reached by the Denver & New Orleans Railroad, to be delivered to this company and hauled to destination in same manner as interchanged with any other line; that you allow tickets to be placed on sale between points on line of Denver & New Orleans Railroad and those on line of Atchison, Topeka & Santa Fé Railroad, or reached by either line; that a system of through checking of baggage be adopted; that a transfer of United States mail be made at point of junction. In matter of settlements between the two companies for earnings and charges due, we will settle daily on delivery of freight to this line; for mileage due for car service, and for amounts due for tickets interchanged, we agree to settle monthly, or in any other manner adopted by your line, or as is customary between railroads in such settlements." This request was refused, and the Atchison, Topeka & Santa Fé Company continued its through business with the Denver & Rio Grande as before, but declined to receive or deliver freight or passengers at the junction of the Denver & New Orleans road, or to give or take through bills of lading, or to sell or receive through tickets,

or to check baggage over that line. All passengers or freight coming from or destined for that line were taken or delivered at the regular depot of the Atchison, Topeka & Santa Fé Company in Pueblo, and the prices charged were according to the regular rates to and from that point, which were more than the Atchison, Topeka & Santa Fé received on a division of through rates to and from Denver under its arrangement with the Denver & Rio Grande Company.

By the Constitution of Colorado, art. 15, corporations can only be formed in that state under general laws, subject to alteration and repeal, and the law under which the Pueblo & Arkansas Valley Railroad Company was organized, conferred power, among others: "Second, to cross, intersect, or connect its railroad with any other railway; third, to connect at state line with roads of other states and territories; fourth, to receive and convey passengers and property on its railway; fifth, to erect and maintain all necessary and convenient buildings and stations, fixtures and machinery, for the convenience, accommodation, and use of passengers, freights, and business interests, or which may be necessary for the construction and operation of said railway; sixth, to regulate the time and manner in which passengers and property shall be transported, and the compensation to be paid therefor." Gen. Laws Colo. (1877), p. 181.

Sections 4 and 6 of article 15 of the Constitution of Colorado are as follows:

"Sec. 4. All railways shall be public highways, and all railroad companies shall be common carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railroad between any designated points within this state, and to connect at the state line with railroads of other states or territories. Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad."

"Sec. 6. All individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this state, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freights or passengers within the state, and no railroad company, nor any lessee, manager, or employé thereof, shall give any preference to individuals, associations, or corporations in furnishing cars or motive power."

No other provisions of the Constitution or of the statutes of the state have been referred to as affecting the questions here involved.

A large amount of testimony is found in the record as to the custom of connected roads in respect to the interchange of business and the formation of through lines. From this it appears that, while through business is very generally done on through lines formed by an arrangement between connecting roads, no road can make itself a part of such a line, so as to participate in its special advantages, without the consent of the others. Oftentimes new roads, opening up new points, are admitted at once on notice, without a special agreement to that effect,

or in reference to details; still, if objection is made, the new road must be content with the right to do business over the line in such a way as the law allows to others that have no special contract interest in the line itself. The manner in which its business must be done by the line will depend not alone on the connection of its track with that of the line, but upon the duty which the line as a carrier owes to it as a customer. No usage has been established which requires one of the component companies of a connecting through line to grant to a competitor of any of the other companies the same privileges that are accorded to its associates, simply because the tracks of the competing company unite with its own and admit of a free and convenient interchange of business. The line is made up by the contracting companies to do business as carriers for the public; and companies, whose roads do not form part of the line, have no other rights in connection with it than such as belong to the public at large, unless special provision is made therefor by the Legislature or the contracting companies.

Upon this state of facts the circuit court entered a decree requiring the Atchison, Topeka & Santa Fé Company to stop all its passenger trains at the platform built by the Denver & New Orleans Company where the two roads joined, and to remain there long enough to take on and let off passengers with safety, and to receive and deliver express matter and the mails. It also required the Atchison, Topeka & Santa Fé Company to keep an agent there, to sell tickets, check baggage, and bill freight. All freight trains were to be stopped at the same place whenever there was freight to be taken on or delivered, if proper notice was given. While the Atchison, Topeka & Santa Fé Company was not required to issue or recognize through bills of lading embracing the Denver & New Orleans road in the route, or to sell or recognize through tickets of the same character, or to check baggage in connection with that road, it was required to carry freight and passengers going to or coming from that road at the same price it would receive if the passenger or freight were carried to or from the same point upon a through ticket or through bill of lading issued under any arrangement with the Denver & Rio Grande Company or any other competitor of the Denver & New Orleans Company for business. In short, the decree, as entered, establishes, in detail, rules and regulations for the working of the Atchison, Topeka & Santa Fé and Denver & New Orleans roads, in connection with each other as a connecting through line, and, in effect, requires the Atchison, Topeka & Santa Fé Company to place the Denver & New Orleans Company on an equal footing as to the interchange of business with the most favored of the competitors of that company, both as to prices and facilities, except in respect to the issue of through bills of lading, through checks for baggage, through tickets, and, perhaps, the compulsory interchange of cars.

From this decree both companies appealed—the Atchison, Topeka & Santa Fé Company, because the bill was not dismissed; and the Denver

& New Orleans Company because the decree did not fix the rates to be charged by the Atchison, Topeka & Santa Fé Company for freight and passengers transported by it in connection with the Denver & New Orleans, or make a specific division and apportionment of through rates between the two companies, and because it did not require the issue of through tickets and through bills of lading, and the through checking of baggage. The case has been presented by counsel in two aspects: (1) In view of the requirements of the Constitution of Colorado alone; and (2) in view of the constitutional and common-law obligations of railroad companies in Colorado as common carriers.

We will first consider the requirements of the Constitution; and here it may be premised that section 6 of article 15 imposes no greater obligations upon the company than the common law would have imposed without it. Every common carrier must carry for all to the extent of his capacity, without undue or unreasonable discrimination, either in charges or facilities. The Constitution has taken from the Legislature the power of abolishing this rule as applied to railroad companies. So in section 4 there is nothing specially important to the present inquiry except the last sentence: "Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad." Railroad companies are created to serve the public as carriers for hire, and their obligations to the public are such as the law attaches to that service. The only exclusively constitutional question in the case is, therefore, whether the right of one railroad company to connect its road with that of another company, which has been made part of the fundamental law of the state, implies more than a mechanical union of the tracks of the roads so as to admit of the convenient passage of cars from one to the other. The claim on the part of the Denver & New Orleans Company is that the right to connect the roads includes the right of business intercourse between the two companies, such as is customary on roads forming a continuous line, and that if the companies fail or refuse to agree upon the terms of their intercourse a court of equity may, in the absence of statutory regulations, determine what the terms shall be. Such appears to have been the opinion of the circuit court, and accordingly in its decree a compulsory business connection was established between the two companies, and rules were laid down for the government of their conduct towards each other in this new relation. In other words, the court has made an arrangement for the business intercourse of these companies such as, in its opinion, they ought in law to have made for themselves.

There is here no question as to how or where the physical connection of the roads shall be made, for that has already been done at the place, and in the way, decided upon by the Denver & New Orleans Company for itself, and the Atchison, Topeka & Santa Fé Company does not ask to have it changed. The point in dispute upon this branch of the case, therefore, is whether, under the Constitution of

Colorado, the Denver & New Orleans Company has a constitutional right, which a court of chancery can enforce by a decree for specific performance, to form the same business connection, and make the same traffic arrangement, with the Atchison, Topeka & Santa Fé Company as that company grants to, or makes with, any competing company operating a connected road. The right secured by the Constitution is that of a connection of one road with another, and the language used to describe the grant is strikingly like that of section 23 of the charter of the Baltimore & Ohio Railroad Company, given by Maryland on the twenty-eighth of February, 1827 (chapter 123, Md. Laws 1826), which is in these words: "That full right and privilege is hereby reserved to the citizens of this state, or any company hereafter to be incorporated under the authority of this state, to connect with the road hereby provided for, any other railroad leading from the main route, to any other part or parts of the state." At the time this charter was granted the idea prevailed that a railroad could be used like a public highway by all who chose to put carriages thereon, subject only to the payment of tolls and to reasonable regulations as to the manner of doing business (Lake Sup. & M. R. R. Co. v. U. S., 93 U. S. 446); but that the word "connect" as here used, was not supposed to mean anything more than a mechanical union of the tracks is apparent from the fact that when afterwards, on the 9th of March, 1833, authority was given the owners of certain factories to connect roads from their factories with the Washington branch of the Baltimore & Ohio Company, and to erect depots at the junctions, it was in express terms made "the duty of the company to take from and deliver at said depot any produce, merchandise, or manufactures, or other articles whatsoever, which they (the factory owners) may require to be transported on said road." Md. Laws 1832, c. 175, § 16. The charter of the Baltimore & Ohio Company was one of the earliest ever granted in the United States, and while from the beginning it was common in most of the states to provide in some form by charters for a connection of one railroad with another, we have not had our attention called to a single case where, if more than a connection of tracks was required, the additional requirement was not distinctly stated and defined by the Legislature. * * *

To our minds it is clear that the constitutional right in Colorado to connect railroad with railroad does not of itself imply the right of connecting business with business. The railroad companies are not to be connected, but their roads. A connection of roads may make a connection in business convenient and desirable, but the one does not necessarily carry with it the other. The language of the Constitution is that railroads may "intersect, connect with, or cross" each other. This clearly applies to the road as a physical structure, not to the corporation or its business.

This brings us to the consideration of the second branch of the case, to-wit, the relative rights of the two companies at common law,

and under the Constitution, as owners of connected roads, it being conceded that there are no statutory regulations applicable to the subject. The Constitution expressly provides (1) that all shall have equal rights in the transportation of persons and property; (2) that there shall not be any undue or unreasonable discrimination in charges or facilities; and (3) that preferences shall not be given in furnishing cars or motive power. It does not expressly provide (1) that the trains of one connected road shall stop for the exchange of business at the junction with the other; nor (2) that companies owning connected roads shall unite in forming a through line for continuous business, or haul each other's cars; nor (3) that local rates on a through line shall be the same to one connected road not in the line as the through rates are to another which is; nor (4) that if one company refuses to agree with another owning a connected road, to form a through line, or to do a connecting business, a court of chancery may order that such a business be done, and fix the terms. The question then is whether these rights, or any of them, are implied either at common law, or from the Constitution. At common law, a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts [31] to go beyond, he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purposes of the contract, and if he holds himself out as a carrier beyond the line, so that he may be required to carry in that way for all alike, he may, nevertheless, confine himself in carrying to the particular route he chooses to use. He puts himself in no worse position, by extending his route with the help of others, than he would occupy if the means of transportation employed were all his own. He certainly may select his own agencies and his own associates for doing his own work.

The Atchison, Topeka & Santa Fé Company, as the lessee of the Pueblo & Arkansas Valley Railroad, has the statutory right to establish its own stations and to regulate the time and manner in which it will carry persons and property and the price to be paid therefor. As to all these matters, it is undoubtedly subject to the power of legislative regulation, but in the absence of regulation it owes only such duties to the public, or to individuals, associations, or corporations, as the common law, or some custom having the force of law, has established for the government of those in its condition. As has already been shown, the Constitution of Colorado gave to every railroad company in the state the right to a mechanical union of its road with that of any other company in the state, but no more. The Legislature has not seen fit to extend this right, as it undoubtedly may, and consequently the Denver & New Orleans Company comes to the Atchison, Topeka & Santa Fé Company just as any other customer does, and with no

31 See Hood v. New York & N. H. R. Co., 22 Conn. 1 (1852), for suggestion that such a contract is ultra vires, at least in respect of the carrier of passengers.

more rights. It has established its junction and provided itself with the means of transacting its business at that place, but as yet it has no legislative authority to compel the other company to adopt that station or to establish an agency to do business there. So far as statutory regulations are concerned, if it wishes to use the Atchison, Topeka & Santa Fé road for business, it must go to the place where that company takes on and lets off passengers or property for others. It has as a railroad company no statutory or constitutional privileges in this particular over other persons, associations, or corporations. It saw fit to establish its junction at a place away from the station which the Atchison, Topeka & Santa Fé Company had, in the exercise of its legal discretion, located for its own convenience and that of the public. It does not now ask to enter that station with its tracks or to interchange business at that place, but to compel the Atchison, Topeka & Santa Fé Company to stop at its station and transact a connecting business there. No statute requires that connected roads shall adopt joint stations, or that one railroad company shall stop at or make use of the station of another. Each company in the state has the legal right to locate its own stations, and, so far as statutory regulations are concerned, is not required to use any other.

A railroad company is prohibited, both by the common law and by the Constitution of Colorado, from discriminating unreasonably in favor of or against another company seeking to do business on its road; but that does not necessarily imply that it must stop at the junction of one and interchange business there, because it has established joint depot accommodations and provided facilities for doing a connecting business with another company at another place. A station may be established for the special accommodation of a particular customer, but we have never heard it claimed that every other customer could, by a suit in equity, in the absence of a statutory or contract right, compel the company to establish a like station for his special accommodation at some other place. Such matters are, and always have been, proper subjects for legislative consideration, unless prevented by some charter contract; but, as a general rule, remedies for injustice of that kind can only be obtained from the Legislature. A court of chancery is not, any more than is a court of law, clothed with legislative power. It may enforce, in its own appropriate way, the specific performance of an existing legal obligation arising out of contract, law, or usage, but it cannot create the obligation.

In the present case the Atchison, Topeka & Santa Fé and the Denver & Rio Grande companies formed their business connection and established their junction or joint station long before the Denver & New Orleans road was built. The Denver & New Orleans Company saw fit to make its junction with the Atchison, Topeka & Santa Fé Company at a different place. Under these circumstances, to hold that, if the Atchison, Topeka & Santa Fé continued to stop at its old station, after the Denver & New Orleans was built, a refusal to stop

at the junction of the Denver & New Orleans was an unreasonable discrimination as to facilities in favor of the Denver & Rio Grande Company, and against the Denver & New Orleans, would be, in effect, to declare that every railroad company which forces a connection of its road with that of another company has a right, under the Constitution or at the common law, to require the company with which it connects to do a connecting business at the junction, if it does a similar business with any other company under any other circumstances. Such, we think, is not the law. It may be made so by the legislative department of the government, but it does not follow, as a necessary consequence, from the constitutional right of a mechanical union of tracks, or the constitutional prohibition against undue or unreasonable discrimination in facilities.

This necessarily disposes of the question of a continuous business, or a through line for passengers or freight, including through tickets, through bills of lading, through checking of baggage, and the like. Such a business does not necessarily follow from a connection of tracks. The connection may enable the companies to do such a business conveniently when it is established, but it does not of itself establish the business. The Legislature cannot take away the right to a physical union of two roads; but whether a connecting business shall be done over them after the union is made depends on legislative regulations, or contract obligation. An interchange of cars, or the hauling by one company of the cars of the other, implies a stop at the junction to make the exchange or to take the cars. If there need be no stop, there need be no exchange or taking on of cars.

The only remaining questions are as to the obligation of the Atchison, Topeka & Santa Fé Company to carry for the Denver & New Orleans when passengers go to, or freight is delivered at, the regular stations, and the prices to be charged. As to the obligation to carry, there is no dispute, and we do not understand it to be claimed that carriage has ever been refused when applied for at the proper place. The controversy, and the only controversy, is about the place and the price. That the price must be reasonable is conceded, and it is no doubt true that in determining what is reasonable the prices charged for business coming from or going to other roads connecting at Pueblo may be taken into consideration. But the relation of the Denver & New Orleans Company to the Atchison, Topeka & Santa Fé is that of a Pueblo customer, and it does not necessarily follow that the price which the Atchison, Topeka & Santa Fé gets for transportation to and from Pueblo, on a division of through rates among the component companies of a through line to Denver, must settle the Pueblo local rates. It may be that the local rates to and from Pueblo are too high, and that they ought to be reduced, but that is an entirely different question from a division of through rates. There is no complaint of a discrimination against the Denver & New Orleans Company in respect to the regular Pueblo rates; neither is there anything except the through rates to

show that the local rates are too high. The bill does not seek to reduce the local rates, but only to get this company put into the same position as the Denver & Rio Grande on a division of through rates. This cannot be done until it is shown that the relative situations of the two companies with the Atchison, Topeka & Santa Fé, both as to the kind of service and as to the conditions under which it is to be performed, are substantially the same, so that what is reasonable for one must necessarily be reasonable for the other. When a business connection shall be established between the Denver & New Orleans Company and the Atchison, Topeka & Santa Fé at their junction, and a continuous line formed, different questions may arise; but so long as the situation of the parties continues as it is now, we cannot say that, as a matter of law, the prices charged by the Atchison, Topeka & Santa Fé, for the transportation of persons and property coming from or going to the Denver & New Orleans, must necessarily be the same as are fixed for the continuous line over the Denver & Rio Grande. * * *

All the American cases to which our attention has been called by counsel relate either to what amounts to undue discrimination between the customers of a railroad company, or to the power of a court of chancery to interfere, if there is such a discrimination. None of them hold that, in the absence of statutory direction, or a specific contract, a company having the power to locate its own stopping places can be required by a court of equity to stop at another railroad junction and interchange business, or that it must under all circumstances give one connecting road the same facilities and the same rates that it does to another with which it has entered into special contract relations for a continuous through line and arranged facilities accordingly. The cases are all instructive in their analogies, but their facts are different from those we have now to consider. * * *

The real question in the case, as it now comes before us, is whether the relief required is legislative in its character or judicial. We think it is legislative, and that upon the existing facts a court of chancery can afford no remedy.

The decree of the circuit court is reversed, and the cause remanded, with direction to dismiss the bill without prejudice.[32]

[32] See "The Obligations of Public Services to Make Connections," by Bruce Wyman, 22 Harv. Law Rev. 564.

JACOBSON v. WISCONSIN, M. & P. R. CO. et al.

(Supreme Court of Minnesota, 1898. 71 Minn. 519, 74 N. W. 893, 40 L. R. A. 389, 70 Am. St. Rep. 358.)

Application by Jacob F. Jacobson to the railroad and warehouse commission to compel the Wisconsin, Minnesota & Pacific Railroad Company and the Willmar & Sioux Falls Railroad Company to make a connection at a crossing of their roads. An order to that effect was granted, and on appeal affirmed in the district court. Defendants appeal.

CANTY, J.[33] The Willmar & Sioux Falls Railroad extends from Willmar, in this state, in a southwesterly direction, to Sioux Falls, in South Dakota, and is crossed nearly at right angles by the Wisconsin, Minnesota & Pacific Railroad, near Hanley Falls, in this state. The former railroad is a part of the Great Northern system of railroads, and the latter is operated in connection with the Minneapolis & St. Louis Railway, and as a part of the same. The crossing near Hanley Falls is a grade crossing, and there has never been any switch connecting the two railroads at that point. Chapter 10, Gen. Laws 1887, as amended by chapter 91, Laws 1895, provides: "Sec. 3 (A) That all common carriers subject to the provisions of this act shall provide at all points of connection, crossing or intersection at grade where it is practicable and necessary for the interest of traffic, ample facilities by track connections for transferring any cars used in the regular business of their respective lines of road from their lines or tracks to those of any other common carrier whose lines or track may connect with, cross or intersect their own, and shall provide equal and reasonable facilities for the interchange of cars and traffic between their respective lines, and for the receiving, forwarding and delivering of passengers, property and cars to and from their several lines and those of other common carriers connecting therewith." The act further provides that, on the application of any person interested, the state railroad and warehouse commission shall order connections to be made at such crossings, and this is conceded by appellants. The commission did so order in this case after notice, and a hearing had in the manner provided by the statute. Both railroad companies appealed to the district court from the order. On a hearing had in the district court, the order was affirmed, and the connection ordered to be made by a curved switch, 778.6 feet long, and particularly described, just as the commission had ordered. From the judgment of the district court entered thereon, both railroad companies appeal to this court. * * *

The connecting switch will, at the middle of the same, extend outside of the right of way of each and either railroad, and it will be necessary to condemn at that place a narrow strip of land, a few

[33] Parts of the opinion are omitted.

hundred feet long, for the use of the switch. One of the lines of the Great Northern System extends from Duluth, southwest to Willmar. Another extends from St. Paul and Minneapolis, west to Willmar. These two lines pass through large areas of wood land, the timber on which is available for fuel and fence posts. Southwest of Willmar, and for many miles in all directions around Hanley Falls, the country is mostly prairie. Timber is scarce, and great quantities of cordwood and fence posts are brought down on the Willmar & Sioux Falls Railroad from said timbered regions, and distributed along that road. Timber is not as plentiful along the Minneapolis & St. Louis System. For that reason cordwood and fence posts are much dearer at the stations on the Wisconsin, Minnesota & Pacific Railroad, east and west of Hanley Falls, than such wood is at that station and the stations north and south of it on the Willmar & Sioux Falls Railroad. For this reason it is for the benefit of the people in the territory tributary to the Wisconsin, Minnesota & Pacific Railroad, but not tributary to Hanley Falls, that this connection should be made, so as to enable them to have cars of wood transferred at that point from the Willmar & Sioux Falls Railroad to the Wisconsin, Minnesota & Pacific Railroad, and distributed at the stations along the latter road. But this will deprive the Wisconsin, Minnesota & Pacific Railroad Company of the benefit of a much longer haul on dearer wood. The loss of revenue which will result to it by reason thereof is one of the grounds of its complaint here. A large number of cattle are raised in the territory tributary to the Wisconsin, Minnesota & Pacific Railroad west of Hanley Falls. For such of these cattle as are fat enough for beef, Minneapolis and St. Paul are the best market, but, for the stockers and feeders, Sioux City or Omaha is the best market. But there is no way of reaching Sioux City or Omaha with cars of stock shipped from said territory over said last-named road, except by running the cars first to Hopkins, within 8 miles of Minneapolis, and then transferring them to another railroad with which the Minneapolis & St. Louis Railway Company has traffic arrangements, and running the cars over such other road to Sioux City or Omaha. The distance from Hanley Falls to Sioux City by this route is 380 miles, while the distance from Hanley Falls to Sioux City over the Willmar & Sioux Falls Railroad is but 181 miles. Making the connection in question will deprive the Wisconsin, Minnesota & Pacific Railroad Company of the benefit of such longer haul on such stockers and feeders, and the loss of revenue which will result to it by reason thereof is another ground of its complaint.

1. Appellant Wisconsin, Minnesota & Pacific Railroad Company contends that, as the shipping of stock to Sioux City and Omaha is interstate commerce, the state tribunals have no jurisdiction over it, and must not take into consideration the question of the transferring of cars of such stock when determining the necessity of a connection at this crossing. Conceding, without deciding, that the state tribunals

would have no jurisdiction to require the making of this connection for the sole purpose of transferring cars engaged solely in the carrying of interstate commerce, it does not follow that these tribunals may not take into consideration the benefit to such commerce also, when determining the necessity of this connection. The whole traffic to be benefited by the making of the connection may be amply sufficient to justify requiring the same to be made; yet the part of such traffic commencing and ending in the state may not be sufficient when taken alone, and the part which consists of interstate commerce may not be sufficient when taken alone. If appellant's position is correct, neither the state tribunals nor the federal tribunals would have jurisdiction in such a case. Clearly, such is not the law. In such a case jurisdiction is concurrent.[34] If there is some necessity resulting from the benefit which will accrue to exclusively state commerce by reason of the putting in of the connection, this gives the state tribunals jurisdiction (Munn v. Illinois, 94 U. S. 126); and, in disposing of the case, they may take into consideration the whole necessity resulting from the whole benefit which will accrue to all classes of commerce. But, even if this position was not correct, there is, in our opinion, ample evidence in this case of necessity resulting from the benefit which will accrue to exclusively state commerce, when considered alone, to justify the ordering of the connection in question. We will go further. Under the statute, every presumption is in favor of the action of the commission, and the burden was upon appellant to show that such action was contrary to law. See Steenerson v. Railway Co. (Minn.) 72 N. W. 713. Appellant has totally failed to maintain that burden. No evidence was offered by appellant in the district court at all as to the want of necessity for the making of this connection, but it rested its case wholly on the evidence of the witnesses called in behalf of the petitioner. That evidence was not in appellant's favor, and certainly did not show conclusively that there was no necessity for this crossing.

2. Appellant further contends that said act of the Legislature is unconstitutional and void, and the judgment entered in this case is erroneous, because they contravene numerous provisions both of the state and federal Constitutions. Said law and judgment require appellant to exercise the power of eminent domain, construct a railroad track, operate the same, and exchange business with intersecting roads; and it is contended that all of this is outside of and beyond what its charter requires, and that, therefore, the law impairs the obligation of the charter contract between appellant and the state,

[34] For state views on the effect of the Transportation Act of 1920 (U. S. Comp. St. Ann. Supp. 1923, § 10071¼ et seq.) on the power of the states, see Lake Erie, A. & W. R. Co. v. Public U. Com., 109 Ohio St. 103, 141 N. E. 847 (1923), and cases cited therein; also Milhollan v. Great N. Ry. Co. (N. D.) 204 N. W. 994 (1925); and see People v. Public S. Com., 233 N. Y. 113, 135 N. E. 195, 22 A. L. R. 1073 (1922), and a note, "Power of State to Require Interstate Carrier to Make Track Connections with Other Roads," 22 A. L. R. 1078.

deprives appellant of the equal protection of the laws, takes its private property without just compensation, deprives it of the right to contract with reference to its own business, etc. All of these constitutional objections may be considered together. These two railroads are public highways, and all of these objections amount simply to this: It is wholly foreign to the purpose of two public highways of the same character to require them to connect where they cross each other, so that public traffic may pass from the one to the other. And, where a private corporation has been chartered to construct, maintain, and operate such a public highway, with the right to charge reasonable compensation for its services in so doing, it is a violation of its charter to compel it to connect its highway with another intersecting highway of the same character, unless the right to require the connection is expressly reserved in the charter. We cannot so hold. If appellant's position is correct, it has the constitutional right to completely isolate its railroad at any time by cutting it off from all connection with other railroads, unless the right to compel connections is expressly reserved in its charter. Its road commences at the village of Morton, in this state (an unimportant station at the terminus of a branch of the Minneapolis & St. Louis Railway), and extends westerly to Watertown, in South Dakota; so that it may at any time, and in spite of all public authority, be very completely isolated and cut off from all large commercial centers, if appellant sees fit so to cut it off. The Legislature chartered appellant to construct, maintain, and operate a public highway, not a cul-de-sac or something worse, which has no connection with like highways either at its ends or sides. A railroad is an improved highway, on which certain modern appliances are used. It will not, as a general rule, serve fully the purposes for which it was intended, unless the connections between it and other like highways which cross or touch it are improved in like manner, and the same modern appliances are used in passing from one road to the other over those connections.

Again, why is not the doctrine advanced by appellant a two-edged sword? If the Legislature cannot compel the making of such connections, because there is nothing in the charter expressly authorizing or requiring the making of them, why is it not ultra vires under such a charter, and without express legislative authority, to make such connections voluntarily? But who will contend that a railroad company may not, without express authority, and as incidental to its general powers, connect its tracks with the tracks of other railroads that extend to its road at its ends, or intersect it at its sides. Appellant's property is dedicated to public use, "is affected with a public interest," and the Legislature certainly has the power to regulate that use in a reasonable manner, unless appellant's charter expressly protects it from such regulation. See Munn v. Illinois, 94 U. S. 126; State v. Wabash, St. L. & P. Ry. Co., 83 Mo. 144; Allnutt v. Inglis, 12 East, 527; Lord Hale's Treatise "De Jure Maris," 1 Harg. Law Tracts, 6. Ap-

pellant was chartered to serve the public within the scope of its charter powers and franchises, in the best and most efficient manner possible. It was not, as it seems to contend, chartered to obstruct public traffic or serve the public the least that self-interest might dictate. Appellant cannot be allowed to obstruct the course of public traffic under the claim that, by putting in this connection and letting such traffic take its course, appellant will lose a large amount of revenue which it would otherwise earn. If, by reason of putting in the connection, its revenues will be so reduced that it will not, on its whole business, receive a reasonable compensation for its services, its remedy is by a readjustment of the whole or such part of its schedule of rates and fares as, under the circumstances, ought to be readjusted, in order to enable it to earn such reasonable compensation. * * *

The statute provides: "In the event that said railway companies fail to establish through joint rates, or fail to establish and charge reasonable rates for such through shipments, * * * it shall be the duty of the railroad and warehouse commission of this state * * * to establish reasonable joint rates for the shipment of freight and cars over any two or more connecting lines of railroad in this state, and to prescribe the reasonable rules under which any such cars so transferred shall be returned." Laws 1895, p. 214, § 3 (C). Appellant suggests that cases may arise where it would be compelled to deliver its cars to another carrier, who is insolvent, or where the couplings, air brakes, or other appliances of the cars of one of the carriers will not match with those of the other, and where it would be unsafe to haul such other cars. It is only necessary to say that such cases can be disposed of when they arise. There is no suggestion that this is any such a case. Appellant seems to contend that this statute attempts to make the two or more railroad companies partners for the purposes of such a through shipment; that it attempts to compel the making of a joint shipping contract, by which each company will be liable for all the defaults of the others in the through shipment; and that, therefore, the statute is unconstitutional and void. The statute merely provides that, in case all the railroad companies concerned in the through shipment fail to fix a reasonable total sum for the total haul, the commission shall do so for them. There is nothing in this which requires any company to assume any liability beyond its own line for the acts of others in making the haul. * * *

This disposes of the case, and the judgment appealed from is affirmed.[35]

[35] Affirmed 179 U. S. 287, 21 S. Ct. 115, 45 L. Ed. 194 (1900). But see Alabama & V. Ry. Co. et al. v. Jackson & E. Ry. Co., 270 U. S. ——, 46 S. Ct. 535, 70 L. Ed. —— (1926). See Washington ex rel. Oregon R. R. Co. v. Fairchild, 224 U. S. 510, 32 S. Ct. 535, 56 L. Ed. 863 (1912), and note in Ann. Cas. 1915C, 851, as to branch lines connecting nonintersecting railroads. See, also, Milhollan v. Great N. Ry. Co. (N. D.) 204 N. W. 994 (1925), connecting line ordered where railroads were one-half mile apart. For a discussion of the provision in the Interstate Commerce Act about "lateral branches," see United States v. Baltimore & O. R. Co., 226 U. S. 14, 33 S. Ct. 5, 57 L. Ed. 104 (1912).

CHICAGO, MILWAUKEE & ST. P. RY. CO. v. STATE OF IOWA.

(Supreme Court of the United States, 1914. 233 U. S. 334, 34 S. Ct. 592, 58 L. Ed. 988.)

In error to the Supreme Court of the State of Iowa to review a judgment which affirmed a judgment of the Polk County District Court, granting a mandatory injunction to require compliance with an order of a state railroad commission requiring a railway carrier to accept reshipments in the cars of other carriers.

Mr. Justice HUGHES delivered the opinion of the court:

This suit was brought by the state of Iowa to obtain a mandatory injunction requiring the Chicago, Milwaukee & St. Paul Railway Company to comply with an order of the State Railroad Commission promulgated December 22, 1909. The defendant answered, denying the validity of the order, and also filed a cross-petition to set it aside, alleging that it was repugnant to the Constitution of the United States, as an attempt to regulate interstate commerce and to deprive the company of its property without due process of law, and, further, that the Commission was without authority under the laws of the state to make the order. Judgment, sustaining the action of the Commission and directing compliance, was affirmed by the Supreme Court of the state. 152 Iowa, 317, 130 N. W. 802.

It appeared that the railway company, in 1909, had refused to accept shipments of coal in carload lots at Davenport, Iowa, for points in that state when tendered in cars of other railroad companies by which the coal had been brought to Davenport from points in Illinois. The railway company insisted that it was entitled to furnish its own cars. The Clark Coal & Coke Company, operating a branch at Davenport, complained of this rule to the Railroad Commission, stating that it was a departure from the practice which had obtained for several years with respect to such shipments, that the Clark Company paid all charges to Davenport, and on receiving orders from its customers tendered written billing for transportation from Davenport to the designated points, and that it was unreasonable for the railway company to require in such cases that the coal should be unloaded and reloaded in its own cars. A hearing was had before the Commission at which other shippers intervened, adopting the coal company's complaint. The facts were presented in an agreed statement, as follows:

"The Clark Coal & Coke Company of Davenport, Iowa, have been making shipments of coal from points in Illinois to Davenport by the Chicago, Rock Island & Pacific Railway Company and the Chicago, Burlington & Quincy Railroad Company; that said coal is then placed by the railroad bringing it into Iowa on an interchange track at Davenport; that all charges from point of origin in Illinois to Davenport,

Iowa, are paid by the Clark Coal & Coke Company to the railroad company bringing said coal; that thereupon complainant has notified the respondent railway company of the placement of said coal, and that it desired to ship said coal by the respondent railway company to different points on its own line, and tendered a written billing from Davenport to the point so designated; that thereupon respondent railway company has accepted said billing from Davenport to said point, and taken said cars from said interchange track to its own line, and transported the same in accordance with said written billing; that the respondent railway company has changed its method of doing business in the above respects by its printed order, and now refuses to accept said written billing and take said cars from said interchange track and transport them over its own line to the point designated by said billing, unless said coal is loaded in equipment belonging to respondent railway company. Respondent railway company, by its answer to the complaint, alleges that it 'will furnish cars for shipment of coal from Davenport to any point in Iowa, as provided by Iowa Distance Tariff, but will not accept shipments originating at Davenport, billed from Davenport, in the equipment of other carriers,' and its readiness and ability to furnish cars of its own for shipment is not controverted and will therefore be taken to be true. It will thus be observed that before the respondent railway company will take coal for transportation on its own line, in equipment other than its own, it requires that the same shall be unloaded and reloaded into its own cars."

Thereupon, the Commission rendered a decision in favor of the shipper and entered the following order, to which this controversy relates:

"In accordance with the conclusions heretofore expressed, it is therefore ordered by the Board of Railroad Commissioners of Iowa that upon arrival of loaded cars of coal at the city of Davenport, upon any line of railroad, when said cars are placed upon the interchange track at Davenport, as ordered or requested by the owner or consignee of said cars, and the freight paid thereon, and the ordinary billing in use by the respondent railway is tendered to it for a billing of said cars so placed to a point on its own line within the state of Iowa, that the respondent railway company be and is hereby ordered and required to accept said billing, receive said car or cars so billed, and transport them on its own line to the point designated by the owner or consignee in said billing; and that it receive said car or cars in whatever equipment the same may be loaded, without requiring an unloading and reloading into its own equipment, and transport said car or cars over its own line to points within this state, so loaded, without unloading and reloading as above set forth, in the same manner that it receives cars from connecting lines, loaded in its own equipment. It is expressly understood, however, in this order, that no questions in relation to switching charges are determined."

The railway company contended, both before the Commission and in the state court, that the shipments in question were interstate; and it was alleged in its answer that the method of transportation resorted to was a device of shippers to secure, by adding the rate from the initial point in Illinois to Davenport to the rate established by the Iowa distance tariff from Davenport to other points in the state, a lower rate than that applicable to an interstate shipment from the point in Illinois to the point of final destination.

The Railroad Commission held that the transportation desired from Davenport was a purely intrastate service, saying: "Under the admitted facts, the city of Davenport became a distributing point for coal shipped by the consignor. The certainty in regard to the shipments of coal ended at Davenport. The point where the same was to be shipped beyond Davenport, if at all, was determined after the arrival of the coal at Davenport. The coal was under the control of the consignee, and he could sell it in transit or at Davenport, or reconsign it to a point on respondent's railway, or any other railway, at his own discretion." Upon the trial of the present suit in the state court, the state introduced in evidence the proceedings, decision, and order of the Commission, and without further evidence both parties rested. The Supreme Court of the state took the same view of the facts that the Commission had taken, and accordingly held that the shipments were intrastate. The court said that the facts showed that the coal was originally consigned to the coal company in Davenport, that it was there held until sales were made, that the consignee had taken delivery, paying the freight to the initial carrier, and assuming full control. 152 Iowa, 317, 319, 130 N. W. 802.

The record discloses no ground for assailing this finding. It is undoubtedly true that the question whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by mere billing or forms of contract. Railroad Commission v. Worthington, 225 U. S. 101, 56 L. Ed. 1004, 32 S. Ct. 653; Texas & N. O. R. Co. v. Sabine Tram Co., 227 U. S. 111, 57 L. Ed. 442, 33 S. Ct. 229; Railroad Commission v. Texas & P. R. Co., 229 U. S. 336, 57 L. Ed. 1215, 33 S. Ct. 837. But the fact that commodities received on interstate shipments are reshipped by the consignees, in the cars in which they are received, to other points of destination, does not necessarily establish a continuity of movement, or prevent the reshipment to a point within the same state from having an independent and intrastate character. Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. Ed. 540, 27 S. Ct. 360; Railroad Commission v. Worthington, 225 U. S. 101, 109, 56 L. Ed. 1004, 1008, 32 S. Ct. 653; Texas & N. O. R. Co. v. Sabine Tram Co., 227 U. S. 111, 129, 130, 57 L. Ed. 442, 449, 450, 33 S. Ct. 229. The question is with respect to the nature of the actual movement in the particular case; and we are unable to say upon this record that the state court has improperly

characterized the traffic in question here. In the light of its decision, the order of the Commission must be taken as referring solely to intrastate transportation originating at Davenport.

In this view, the validity of the Commission's order is challenged upon the ground that at common law the carrier was entitled to use its own equipment, and that the statute of the state of Iowa as to the receiving of cars from connecting carriers (Code, § 2116) is inapplicable for the reason that, with respect to the transportation in question, the plaintiff in error was the initial carrier. But the obvious answer is that what is required by the law of Iowa has been determined by the Supreme Court of that state. That court, examining the various provisions of the Iowa Code which have relation to the matter, has held that the order was within the authority of the Railroad Commission. 152 Iowa, 317, 320, 321, 130 N. W. 802.

Further, the plaintiff in error insists that the enforcement of the order would deprive it of its liberty to contract, and of its property, without due process of law, and would deny to it the equal protection of the laws, in violation of the Fourteenth Amendment. We find these objections to be without merit. It was competent for the state, acting within its jurisdiction, and not in hostility to any federal regulation of interstate commerce, to compel the carrier to accept cars which were already loaded and in suitable condition for transportation over its line. The requirement was a reasonable one. It cannot be said that the plaintiff in error had a constitutional right to burden trade by insisting that the commodities should be unloaded and reloaded in its own equipment. Upon this point the case of Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. Ed. 194, 21 S. Ct. 115, is decisive. There is no essential difference, so far as the power of the state is concerned, between such an order as we have here and one compelling the carrier to make track connections, and to receive cars from connecting roads, in order that reasonably adequate facilities for traffic may be provided. See also Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 263, 46 L. Ed. 1151, 1156, 22 S. Ct. 900; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 19, 27, 51 L. Ed. 933, 941, 945, 27 S. Ct. 585, 11 Ann. Cas. 398; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. Ed. 472, 30 S. Ct. 330; Grand Trunk R. Co. v. Michigan Railroad Commission, 231 U. S. 457, 468, 58 L. Ed. 310, 34 S. Ct. 152.

It is argued that it was unreasonable to subject the railway company to the expense incident to the use of the cars of another carrier when it was ready to furnish its own. The record affords no sufficient basis for this contention. What the expense referred to would be was not proved, and, in the absence of a suitable disclosure of the pertinent facts, no case was made which would justify the conclusion that, in its practical operation, the regulation would impose any unreasonable burden. On the other hand, the agreed statement makes it evident that

prior to the change which gave rise to this controversy it was the practice of the company to accept such shipments.

Finally, it is said that the order of the Commission interferes with interstate commerce because the cars in question were the vehicles of that commerce, and were brought into the state as such. No question, however, is presented here as between the shippers and the owners of the cars, and no actual interference with interstate commerce is shown. Nor does it appear that any regulation under federal authority has been violated.

The plaintiff in error has failed to establish any ground for invalidating the order of the Commission and the judgment must be affirmed.[36]

Affirmed.

STATE ex rel. GOODWINE v. CADWALLADER.

(Supreme Court of Indiana, 1909. 172 Ind. 619, 87 N. E. 644, 89 N. E. 319.)

Mandamus by the State of Indiana, on the relation of Frank J. Goodwine, against Ira Cadwallader. From a judgment of dismissal, relator appeals.

MYERS, J.[37] Appellant's relator instituted this action in the Warren circuit court January 23, 1907, by a complaint in two paragraphs, and then filed an affidavit for a change of venue from that county, pending which defendant filed a demurrer, for want of facts to constitute a cause of action, to each paragraph of complaint. The venue was

[36] In Chicago, B. & Q. R. Co. v. Curtis, 51 Neb. 442, 71 N. W. 42, 66 Am. St. Rep. 456 (1897), it was held that aside from constitutional or statutory provisions it is the duty of a railroad as a common carrier to receive, and transport over its road, cars of other companies. See that decision for a collection of cases in point. On the question whether one carrier must surrender its cars to a connecting line, see Michigan Central R. Co. v. Michigan Railroad Commission, 236 U. S. 615, 35 S. Ct. 422, 59 L. Ed. 750 (1915), particularly the following statement by Pitney, J.: "At common law a carrier was not bound to carry except on its own line, and probably not required to permit its equipment to be hauled off the line by other carriers. Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co., 110 U. S. 667, 680, 4 S. Ct. 185, 28 L. Ed. 291, 296 (1884); Kentucky & I. Bridge Co. v. Louisville & N. R. Co., 37 F. 567, 620, 2 L. R. A. 289, 2 Interst. Com. R. 351 (1889); Oregon Short Line & U. N. R. Co. v. Northern P. R. Co. (C. C.) 51 F. 465, 472, 475, 4 Interst. Com. R. 249 (1892); affirmed in 61 F. 158, 9 C. C. A. 409, 4 Interst. Com. R. 718, 15 U. S. App. 479 (1894). But in this, as in other respects, the common law is subject to change by legislation; and, so long as the reasonable bounds of regulation in the public interest are not thereby transcended, the carrier's property cannot be deemed to be 'taken' in the constitutional sense. Minneapolis & St. L. R. Co. v. Minnesota, 193 U. S. 53, 63, 24 S. Ct. 396, 48 L. Ed. 614, 618 (1904); Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 19, 27 S. Ct. 585, 51 L. Ed. 933, 941, 11 Ann. Cas. 398 (1907); Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, 470, 34 S. Ct. 152, 58 L. Ed. 310, 318 (1913); Wisconsin, M. & P. R. Co. v. Jacobson and Chicago, M. & St. P. R. Co. v. Iowa, supra." See, also, Galveston, H. & S. A. Ry. Co. v. Jones, 104 Tex. 92, 134 S. W. 328 (1911).

[37] Parts of the opinion are omitted.

changed to Fountain county, where such demurrer was sustained, and exception reserved by relator, and on his motion a third and fourth paragraph of complaint were filed in that court. A demurrer for want of facts, addressed to each additional paragraph of complaint, was sustained and exception reserved, and, refusing to plead further, judgment was rendered that relator take nothing by his complaint, and for costs. Error is assigned as to each of these rulings.

Appellant here states that his whole case "is set forth in paragraphs 3 and 4 of the complaint," so that we have not considered the first and second paragraphs. The substance of the third paragraph of complaint is: That appellant and appellee are separate owners of individual telephone exchanges in the town of West Lebanon, Ind., established under public franchises for the use of the streets and alleys of that town, and over the public highways leading therefrom, and holding themselves out to the public as operators of telephone exchanges for hire without discrimination and to all persons alike, and that their plants have for more than two years been physically connected, so that the patrons of each could converse directly through their respective exchanges, under a verbal contract, called a "working agreement," that each would render telephone service to the patrons of the other, both local and toll, through their respective exchanges, the consideration of which agreement was the mutual rendition of service to the patrons of each other, both local and toll, except as to the use of the toll line between West Lebanon and Danville, Ill., owned by appellee, as to which there was a later contract between the parties, partly written and partly oral, by which appellee was to serve appellant's patrons, the prices of service fixed, to be charged by each, and appellant was to pay appellee 50 per cent. of the revenue received by appellant from his patrons. That there was no obligation or agreement as to terminating the first agreement under which the connection was made, and the service had been furnished for two years, or as to how long it should continue; but the contract as to Danville, Ill., provided that either party might terminate it on 30 days' notice. That appellant had 250 patrons and appellee 150 patrons in West Lebanon and the country around. That they each had toll or long distance connection with several other towns, but neither had such connection with the same towns, so that each was dependent on the other for connection with those towns, and that they had for two years furnished direct service to those towns through their respective exchanges. That they were competitors with each other for business, and the exchanges in the other towns were competitors with them in the same business in the towns and in the country surrounding them, and they had numerous connections with other exchanges and towns and in the country around those towns, all operating under public franchises. That appellee has connection with Williamsport, Ambia, and Boswell, towns having, respectively, populations of 1,200, 600, and 1,000, and telephone patrons of 375, 250, and 400, respectively, with none of which appellant had

telephone connection, and his patrons and the patrons of the exchanges of those towns were served through appellee's exchange, through which the connection for each of said exchanges and their patrons with each other and with appellant's exchange and his patrons was made, and had been carried on for two years before the institution of this action. That large numbers of persons had become patrons through these connections, and an extended telephone connection between the patrons of each built up and established, and that appellant had faithfully performed all of his part of the agreement, under which the original connection of the two plants was made, and had been operated for two years. That shortly before the institution of this action a dispute had arisen between appellant and appellee as to the amount due appellee from appellant, growing out of the connection with the Danville plant. That appellant had tendered the amount he admitted to be due, but appellee claimed a greater amount and refused to receive it, and on December 27, 1906, served notice on appellant of his intention to discontinue service to him and his patrons by a fixed time, unless the amount claimed by him to be due should be paid by that time, and this being refused, and the time having passed, appellee has refused, and still refuses, to furnish on demand, to appellant and his patrons, the local and toll service to and with points and persons, to and with which and whom appellee could, and appellant could not, otherwise obtain telephone service than through appellee's plant, and that such service was embraced in the original agreement, alleging an offer to comply with all reasonable rules and regulations then or thereafter established by appellee for the operation of his plant, showing the inconvenience to the public and special injury to himself as owner of the one plant, demanding damages, and that appellee be required to furnish him and his patrons service by direct communication through his plant under such rules and regulations as appellant might establish.

The fourth paragraph is substantially the same in its allegations as the third, except that no reference is made to the alleged "working agreement," or the agreement as to the Danville connection, or the notice of December 27, 1906, but is grounded upon the allegations: That for more than two years each of them has been and is carrying on the business for hire for the public generally, and holding themselves out to the public as ready to serve all without discrimination, and that both are conducting their business under public franchises from the town of West Lebanon for the use of the streets, alleys, and public places, and on the highways between said towns, and adjoining towns and cities; that for more than two years last past, the switch boards of the telephone plants of relator and appellee have been connected, and are now connected, by which the patrons of each have interchangeable local, and toll, or long distance, service, and that during all that time said connection existed with the consent of both parties; that the telephone facilities furnished by the telephone plants in the towns of Ambia, Williamsport, and Boswell are substantially the

same as those furnished by the parties hereto to their patrons. * * *

Appellant urges the sufficiency of the third and fourth paragraphs of complaint on the ground: First, that telephone companies are subject to the rule governing common carriers, and are bound to furnish equal facilities to all persons or corporations belonging to the classes which they undertake to serve, and that this duty exists independently of any Constitution or statute; second, that telephone companies are subject to legislative control; third, that property devoted to public use becomes a legitimate subject of legislative control; fourth, that state regulation and control of property devoted to a public use is not the taking of property for a public purpose within the meaning of the Constitution of the state, nor an interference with the rights of private property; fifth, that private persons engaged in the telephone business are under the same duties and obligations as corporations engaged in the same business; sixth, that debt alone, where the debtor is solvent, is not sufficient reason for refusal to furnish telephone service; seventh, that the use of telephones has become a commercial and social necessity to the extent that it is in legal contemplation devoted to a public use—that where there is a contract between telephone exchanges as to exchange service, and no period of time is mentioned, the service must be furnished as long as the party is in the business. As against these propositions, appellee contends: First, that the third paragraph being founded upon a contract, which provides for its abrogation upon 30 days' notice, specific performance will not be decreed for want of mutuality, and that it is also bad for the reason that it shows that the service was discontinued by reason of nonpayment of tolls, and that by paying the claim under protest he could have recovered it in an action at law if erroneous, and that he cannot resort to the extraordinary writ of mandate. That neither paragraph of the complaint is sufficient because: (a) The common-law obligations of a common connecting carrier are the same as those owing to an individual, and that whatever rights beyond those belonging to a natural person are claimed by one company against another, operating a connecting line, must arise out of special contract; (b) that one telephone company or the individual owner cannot compel another to permit the physical application of his plant for the accommodation of their respective patrons, any more than one railroad can compel another road to permit the use of its tracks for its trains.

The third paragraph is based upon an alleged "working" contract, presumed to be verbal, as no written agreement is pleaded, that the physical connection between the two plants was made under express contract, the consideration for which, as alleged, was the return service rendered each to the patrons of the other. This action was instituted January 23, 1907, and it is alleged that for more than two years the switch boards of the two plants had been connected, and during all that time, and at the commencement of the action, there had been in force the alleged "working" agreement; the Danville, Ill., contract

was dated February 7, 1906, so that it cannot be fairly inferred that the plants were connected under that agreement. We are therefore bound to assume that the connection of these plants was with relator's assent, and under the alleged verbal "working" agreement, the only material portion of which, as alleged, is that each agreed to furnish the patrons of the other facilities for telephonic communication; the consideration being the return service rendered the patrons of each. Whether this agreement lacks mutuality depends, not upon its terms wholly, but upon its terms and upon the question whether as a matter of law either can abandon it at will. If so, its specific performance cannot be compelled; if not, it may be. Fowler Utilities Co. v. Gray, 168 Ind. 1, 79 N. E. 897, 7 L. R. A. (N. S.) 726, 120 Am. St. Rep. 344, and cases cited. So far as the specific terms of the agreement are concerned, it is silent as to the question of continuation or discontinuation, and ordinarily either party might discontinue at pleasure, and the other be remitted to his remedy for damages, and this we think must be so, unless the business itself is so impressed with a public character, and the public interest is such, that the court may say as a matter of law that it may not be discontinued and specific performance decreed upon that ground.

A telephone company doing a general telephone business is a common carrier of news. Central Union Co. v. Fehring, 146 Ind. 189, 45 N. E. 64; Central Union Co. v. Bradbury, 106 Ind. 1, 5 N. E. 721; Central Union Co. v. State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114. Individuals may conduct this business, and are given the same authority by statute as corporations to "set and maintain their poles, posts, piers, abutments, wires, and other appliances or fixtures upon, along, under and across, any of the public highways and waters of this state outside of cities and incorporated towns," with certain restrictions. Magee v. Overshiner, 150 Ind. 127, 49 N. E. 951, 40 L. R. A. 370, 65 Am. St. Rep. 358; Burns' Ann. St. 1908, § 5796. By analogy, and by statute, where they are constructed or maintained for the public for profit, or charges are made for their use, individuals conducting telephone exchanges are subject to the same obligations as corporations with respect to equal facilities and equal charges and freedom from discrimination and partiality as against any person, persons, or corporations in like situation, conducting a lawful business. Burns' Ann. St. 1908, § 5802. This duty does not amount to an absolute requirement that one company or individual shall furnish the patrons of another the use of its or his exchange and lines, unless it has been voluntarily undertaken, so that he or it may not afterward discriminate in classification. Patrons of the corporation or individual contracted with are bound to know that, in the absence of an undertaking so to do, another corporation or individual is not bound to subject its or his property to their use by direct or unrestricted use of their lines. Telephone exchanges conducted for the benefit of the public for compensation may fairly be said to be impressed with a public interest, but their public character

depends upon the nature, and not the extent, of their business. Each agency or exchange conducted by a corporate entity or individual is separate and distinct from all others with respect to the conduct of its business and in its relations to the public, and owes duties of an impartial character and free from discrimination to all who are like circumstanced. The fact that it is a quasi public agent, by reason of being impressed with a public interest, is only so to the extent that it owes an impartial duty to all with respect to its particular capacity and undertakings from its or his own initiative, agreement, or consent. If this were not true, it will readily be seen that any one who saw fit could, by establishing a telephone exchange and procuring few or many patrons, or if a once extensive field of operations had existed when the relation began, which furnished the consideration, but had dwindled to small proportions, so that there would be practically no return to the one for the service to the other, could insist upon connection with and service through indefinite extensions, and produce an inequality which in itself would be inequitable and lacking in consideration. If the right to such connection were once admitted to exist, as an abstract right, it would not depend upon the number of patrons, but upon the question of individual right, and it must be based upon that right if it exists at all, in the absence of contract, express or implied, for there would be no means of determining where the particular plant, exchange, or property becomes or ceases to be impressed with a public interest. It could only be thus impressed by the character of the use, and not by the number of users. The effect would be the destruction of the private right of contract, and would amount to practical confiscation of another's property.

When a business becomes that of a common carrier, it becomes impressed with the common-law duty of receiving from a connecting carrier and transporting commodities, the same as if offered by an individual, and so here, relator and his patrons through him, upon compliance with the reasonable rules and regulations and payment of the compensation which is ordinarily charged to others, would be entitled to have his and their messages handled and transmitted by appellee's exchange; but that is a very different thing, in the absence of contract, from the demand that a physical connection shall be maintained involuntarily, and as of right, when from the character of the business itself the control of appellee's plant would be in a measure wrested from him and subjected to the administration of another, or many others. The private right of property and of contract may not be thus interfered with, and we are treating now only of the relations of these quasi public utilities, where there is no statutory regulation and no contractual relation, express or implied.

The telegraph cases are not precisely in point, by reason of the different means of communication. In one the intervention of skilled employés is necessary in transmitting the news, or information. In the other no such intervention is necessary. The act of transmission

is coexistent with the opportunity and right, and is self-executing. But it has never been held that a telegraph company is bound to transmit beyond its own lines, by another company's initiative, in the absence of contract or statute, though it is bound to deliver to the connecting carrier, and the latter is bound to receive and transmit upon compliance with reasonable terms and regulations. U. S. Tel. Co. v. Western Union Co., 56 Barb. (N. Y.) 46; Baldwin v. U. S. Tel. Co., 6 Abb. Prac. N. S. (N. Y.) 405. The fact that no case has arisen, so far as we have been able to discover, wherein the claim was made as here, notwithstanding the long time operation of telegraph lines, that one line had a right, independently of contract or statute, to the physical use of another line, is a fair index of the fact that the profession has not deemed so radical a rule as being within the range of the rights of corporations or individuals with respect to the management of their property. Strong analogies may be found in the railroad connecting carrier cases. L. & N. R. R. v. Central, etc., Co., 212 U. S. 132, 29 S. Ct. 246, 53 L. Ed. 441. In Shelbyville, etc., Co. v. Louisville, etc., Co., 82 Ky. 541, it was held that one railroad company connecting with another one-half mile from an established station of the latter, though there had been at one time an agreement between the two companies by which the cars of each had been hauled over the road of the other, which had been abrogated, and the complaining company at the time the suit was brought was running its cars on the half mile of track of the other company by permission, did not authorize the connecting company to demand that the one company should permit the use of its engines and cars on the half mile of track. To do this, says that court, would be "destructive of appellee's franchise, and it would be to allow, without even the pretense of legislative sanction, the one company to take the property of another and appropriate it to its own use." * * *

Conceding that corporations and individuals operating telephones are subject to legislative regulation, the Legislature has made no attempt at requiring connection between telephone exchanges owned or operated by distinct corporations or individuals. The fact that it has not done so argues strongly that with due regard to private rights of property, and the well-defined obligations of common carriers, the matter of physical connections of differently owned systems is a matter well left to contract. * * *

It is one thing to furnish service to all without discrimination, but quite another thing to dictate or control the means of service by independent agencies. The public duty of impartial service may be required, not only by statutory regulation, but independently of statute, as a common-law obligation; but the agency may not be arbitrarily controlled. It would be quite as consistent to claim that, in the modern agency of transportation by electricity, one interurban or city street line should be permitted to run its cars upon the line of an independent connecting or parallel carrier, and we apprehend no such common-law right could be lawfully or consistently claimed.

That telephone exchanges are impressed with a public use as common carriers of news is settled in this state. That they must furnish impartial service without discrimination to all persons in the same or similar classes is, we believe, everywhere the rule. Hockett v. State, 105 Ind. 258, 5 N. E. 178, 55 Am. Rep. 201; Central Union Co. v. Falley, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; Central Union Co. v. Hopper, 123 Ind. 113, 24 N. E. 215; Central Union Co. v. Fehring, 146 Ind. 190, 45 N. E. 64; Central Union Co. v. Bradbury, 106 Ind. 1, 5 N. E. 721; Commercial Co. v. New Eng. Co., 61 Vt. 241, 17 A. 1071, 5 L. R. A. 11, and notes 15 Am. St. Rep. 893. There is, however, as we conceive, a marked difference between furnishing initial, independent service, through or by means of an independent exchange, and secondary service by an interchange of business, or by means of connecting two or more plants, so that for all practical purposes of the users they constitute but one system, for that in effect we have seen, in the absence of contract, would amount to practical confiscation of private property. The law must adapt itself to the varying conditions and progress of civilization and the new conditions which arise and are brought within the range of judicial investigation, and the courts must solve the questions thus arising by analogy to the settled maxims of the law, and, whilst recognizing the public character of the business of conducting telephone exchanges for public service, must determine not only the rights of the public with respect to these agencies, but as well the relations the independent agencies sustain to each other, and we think upon the subject of distinct telephone exchanges, and the duties owing among each other, that, in the absence of statutory regulation of the subject, the analogies furnished by the railroad cases, and their reasoning with respect to connecting carriers, fix the true legal relations of such public agencies and comport more with the idea of preserving individual rights of property than to hold that they are bound, in the absence of statute or contract, to furnish the patrons of each with unrestricted service by each submitting its or his exchange to the other.

What we have thus far said, applies to the common-law features of the question. A more serious question arises with respect to the alleged contracts and the alleged fact of appellee furnishing other exchanges the same service as is requested by relator, as presented by the third paragraph of complaint, and the question presented by the fourth paragraph, singly, that appellee is furnishing the same service to other exchanges which appellant has requested of him, through a physical connection made by mutual consent. Such physical connection cannot be required as of right, but if such connection is voluntarily made, as is here alleged to be the case by contract, so that the public acquires an interest in its continuance, the act of the parties in making such connection is equivalent to a declaration of a purpose to waive the primary right of independence, and it imposes upon the property such a public status that it may not be disregarded. Mahan v. Michigan, etc., Co., 132 Mich. 242,

93 N. W. 629. The force and effect of the working contract alleged in the third paragraph of complaint does not imply any right of withdrawal by either party. On the contrary, we think such agreement fixes a status which can only be terminated by the retirement of one or the other of the parties to it from the business. * * *

There is still another feature of the case which is of controlling importance. In each of the two paragraphs of complaint, it is averred that each of the two exchanges have long distance or toll connections with other named towns, which are shown to have considerable populations at considerable distances from each other and from West Lebanon, and it is averred that appellee is furnishing connected, immediate service in West Lebanon to separate exchanges in those towns, and to the patrons of such exchanges, both local and toll, of the same class and character that he denies to relator. This fact not only furnishes added evidence of the impression of this property with a public interest, but discloses that appellee discriminated against relator, in violation of his statutory and common-law duty.

The fourth paragraph of complaint eliminates all questions of contract, except a physical connection by agreement, and stands upon the common-law grounds for relief, and what we have said as to the third paragraph applies to the fourth, except in respect to the contract feature of the former. It will be seen from the allegations: That the physical connection between the plants has not been severed; that relator has offered to comply with all reasonable rules and regulations fixed by appellee, and the service is demanded to noncompeting points, and those points and persons with which and whom relator and his patrons have no other means of communication; and that appellee is furnishing to other exchanges in West Lebanon direct connection and communication with their patrons to other exchanges and the same service requested by appellant. He has thus himself fixed a classification of those similarly situated and affected. Delaware, etc., Co. v. State, 50 F. 677, 2 C. C. A. 1. The allegations also show consent to the connection. Having elected to furnish direct physical connection between, and immediate communication to and for, other exchanges and their patrons through his exchange in West Lebanon, he cannot exclude a like service to an exchange in the same town, for the reason that he is compelled to treat all of the same class alike, and there can, it seems to us, be no rational ground for excluding one exchange, when others are admitted. The act of admitting the connection alleged is equivalent to a declaration that all will be admitted to the connection, on the terms and conditions imposed as to one, or more. Appellee has admitted to his exchange the exchanges of Ambia, Boswell, Williamsport, and Danville. Not only the patrons of appellant's plant, but those of appellee, the public at large, have an interest in the matter. Appellee could have refused to connect his plant and to furnish direct or immediate service to appellant's patrons and to other exchanges and their patrons, but did not so refuse; but he and

they opened their exchanges to all applicants. Could it be insisted, other things being equal, that appellee could refuse connections from Ambia and accept those from Boswell? We take notice as a matter of science that the connection with the other towns and with appellee's patrons is made through a device known as a "switch" in West Lebanon, so that the conditions of connection are the same, and in numerous cases it has been held, with reference to telegraph lines, that, if service is furnished to one, another in the same town or city is entitled to the same service, not upon the ground of a primary right, but because, having elected to furnish the service to one, the same obligation arises in favor of all others like situated.[38] Cent. Union Co. v. Hopper, 123 Ind. 113, 24 N. E. 215; Cent. Union Co. v. Falley, 118 Ind. 194, 20 N. E. 145; Cent. Union Co. v. Bradbury, 106 Ind. 1, 5 N. E. 721; Williams v. Maysville Co., 119 Ky. 33, 82 S. W. 995; State v. D. & A. T. Co. (C. C.) 47 F. 633; Commercial Co. v. New England Co., 61 Vt. 241, 17 A. 1071, 5 L. R. A. 161, and notes, 15 Am. St. Rep. 893; Chesapeake, etc., Co. v. B. & O. Co., 66 Md. 399, 7 A. 809, 59 Am. St. Rep. 167.

We have given the cause this much attention because of its public interest and character, but the judgment must be affirmed [39] upon other grounds. * * *

CLAY COUNTY CO-OP. TELEPHONE ASS'N v. SOUTHWESTERN BELL TELEPHONE CO. et al.

(Supreme Court of Kansas, 1920. 107 Kan. 169, 190 P. 747, 11 A. L. R. 1193.)

Appeal and petition in mandamus by the Clay County Co-operative Telephone Association against the Southwestern Bell Telephone Company, the United Telephone Company, and the Court of Industrial Relations, to review an order of the Court of Industrial Relations denying an application of the Clay County Co-operative Telephone Association to require switchboard connection between it and the other two telephone companies.

BURCH, J.[40] The proceeding is one induced by an order of the court of industrial relations denying an application to require switchboard connection between independent telephone systems.

The Co-operative Company has an exchange at Clay Center, with an installation of 117 business phones, 262 residence phones, and 275 rural phones. It has recently purchased an exchange at Idana, a small city in Clay county west of Clay Center, and has a connection with that exchange. The United Company has numerous exchanges and toll lines

38 For a discussion of the problem involved in the principal case and a collection of cases on the subject, see 11 A. L. R. 1204.

39 A petition for rehearing was overruled. 172 Ind. 619, 87 N. E. 652, 89 N. E. 319 (1909).

40 Parts of the opinion are omitted.

in Kansas, and toll-line connections with the lines of other companies serving Kansas and other states. It has an exchange at Clay Center, and has a toll-line connection with the Idana exchange, operated under contract. The Bell Company has an extensive telephone system, with a toll line from Kansas City, Mo., through Topeka, Kan., to Clay Center. It owns a portion of the stock of the United Company, and by agreement has its toll line connected with the switchboard of the United Company at Clay Center.

The Co-operative Company presented an application to the court of industrial relations for an order requiring switchboard connection at Clay Center between its lines and the lines of the United and Bell Companies. The ground of the application was that the public service and convenience of the patrons of the Co-operative Company would be promoted and the court of industrial relations was asked to fix liability for cost of the connections, and to fix compensation for the transmission of messages arising with and delivered through the several exchanges. The United Company and the Bell Company responded with a denial of jurisdiction in the court of industrial relations to make the orders applied for. They further averred that the relief sought would deprive them of property without due process of law, and would deprive them of the equal protection of the law, contrary to provisions of the Constitution of the United States. Reserving these questions, the respondents then stated facts to show that from economic, operative, and other standpoints the orders prayed for should not be granted. The action of the court of industrial relations was expressed in the following order:

"Now on this first day of April, 1920, the above-entitled matter comes on for order by the court upon the complaint filed herein on the fifth day of November, 1919, and the evidence introduced in support of said complaint on the 19th day of February, 1920; and the court, being fully advised in the premises, finds that under the evidence and circumstances of this case it would be unreasonable for the court to order a connection between the lines of the complainant and the respondents, in the city of Clay Center, prayed for herein.

"It is therefore by the court ordered: That the complaint of the Clay County Co-operative Telephone Association, Complainant, v. Southwestern Bell Telephone Company and United Telephone Company, Respondents, be, and the same is, hereby dismissed." * * *

The plaintiff claims that, aside from the Public Utilities Act, the rights which it recognizes and the remedies which it affords for the protection of such rights, the plaintiff has a clear legal right, and the defendants rest under a correlative legal duty, respecting the subject in controversy, under the common law. The court is of a different opinion.

There is no dispute that telephone companies are analogous to common carriers with respect to communication of intelligence, and are obliged to serve without discrimination all applicants for service within

the field occupied. Likewise there is no dispute that in the absence of statute, no telephone company is obliged to make an initial switchboard connection with any other. The question, however, is whether or not the United Company, which has voluntarily contracted service connection with the Bell Company, is compelled to permit general switchboard connection with any other telephone company which applies; and whether or not the Bell Company, which has voluntarily contracted service connection with the United Company, is compelled to establish the same relations with any other company which applies.

[After referring to and quoting from the case of State ex rel. v. Cadwallader, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319, the court proceeded:]

This pronouncement has been restated as law by some text-writers, has been favored by some case annotators, and has been approved by some courts in disposing of controversies which did not require decision of the question. The ruling has been condemned by some courts in disposing of controversies which did not require decision of the question, and a contrary view has been indicated by other courts under like circumstances. [At this point the court discussed the Cadwallader Case, and quoted from Telephone Co. v. Telephone & Telegraph Co., 125 Tenn. 270, 141 S. W. 845, 43 L. R. A. (N. S.) 550.]

In the case of Telephone Co. v. Telephone Co., 147 Mo. App. 216, 126 S. W. 773, the court followed the decision in the Cadwallader Case. The presiding judge filed a dissenting opinion, in which he made the discriminations indicated by the following quotations:

"Fairness and equality to all, favors or special privileges in the conduct of the business as a public business to none, is the life of the law. This is very far from letting another in the same line of business into a participation in that business, even if the owner, by his voluntary act has chosen to let in some other. It is the public who is under the protection of the law and the courts. Neither are concerned in promoting the interests of one corporation as against another. * * *

"The trouble with the opinion of my learned Brother, in my judgment, is that two ideas are confused: One the right of all the public to enjoy equal privileges with every one else of the public in the use of telephone service over defendant's line; the other, the right of the defendant, notwithstanding its contract with plaintiff, to allow another company, engaged in the same business, the same rights granted plaintiff—in short the right to become a part of its system."

147 Mo. App. 248, 249, 126 S. W. 783.

The Supreme Court of the state of Missouri, in an identical case, overruled the Court of Appeals, and held that the dissenting opinion stated the law. Home Telephone Co. v. Sarcoxie Telephone Co., 236 Mo. 114, 139 S. W. 108, 36 L. R. A. (N. S.) 124. The substance of the decision may be indicated as follows: In the absence of statute or contract, the relation of telephone company A to telephone company B in respect to service is simply that of an individual of the general pub-

lic. Telephone company B may extend its field of operations by making a contract with telephone company C whereby their systems are connected. This having been done, the relation of telephone company A to the connected systems is that of an individual of the general public. The public service has been extended, but the private right of the individual has not been enlarged, and company A has no more right to appropriate the joint facilities of companies B and C to the extension of its own system than it had to connect with company B's system before the contract was made. After citing the statute of the state of Missouri regarding sufficient facilities for the dispatch of public business, and prompt and impartial service on demand or tender of usual charges, the court said:

"This section does not require physical connection between telephone lines. It does require such company to receive all messages from other telephone or telegraph lines and transmit them, as it likewise requires it to receive all messages from individuals. This does not mean that such corporation must yield to a physical connection with its lines by a competitive company and permit the use thereof in that way. In such case and under this statute the telephone corporation or the telegraph corporation has no greater right than the individual. If the individual goes to the office of the telephone company and tenders payment for a message, the company must accommodate him. So, too, if a telegraph company or other telephone company goes in the capacity of an individual or corporate entity and demands a similar service, it must be rendered. But this does not mean that the telephone company must put up a switchboard for all such individuals or corporations desiring to do business with the telephone company. * * *

"The theory of the case at bar is that under the law the Sarcoxie Company was compelled to grant physical connection to the Bell Company, because it had arranged for such connection with a competitor of the Bell Company. Under the railway cases cited, supra, this contention is not well founded."

236 Mo. 133, 138, 139 S. W. 108, 113 (36 L. R. A. [N. S.] 124).

In the case of Pacific Telephone & Telegraph Co. v. Anderson, 196 Fed. 699, Rudkin, District Judge, after referring to the Cadwallader Case, said:

"Where a public service corporation enters into private contracts with others in furtherance of its business, I find no warrant for holding that its public duties are in all cases extended to the full scope of the private contract. * * *

"It is a common practice among railroads to permit other companies to operate trains over their lines on terms agreed upon between them; but it has never been held or intimated that by such an act a company loses all control over its property or obligates itself to grant similar privileges to every other company that may apply therefor. Any such rule would wrest from the proper officers of the corporation the power to

manage and control its affairs, and would be destructive of private property rights.

"The defendant companies had therefore no right to demand a physical connection with the Anderson line simply because that right had been accorded to another, and they certainly have no such rights under the statute of this state, for that statute vests the power and discretion to direct physical connection in the Public Service Commission." Pages 703, 705.

In the case of Union Trust & Savings Bank v. Telephone Co., 258 Ill. 202, 101 N. E. 535, 45 L. R. A. (N. S.) 465, Ann. Cas. 1914B, 258, the court had under consideration a contract for exclusive telephone connection.[41] In the opinion it was said:

"Without the contract the telephone company would be at liberty to contract with both the Kinloch and Bell systems for long distance connections. * * * Such service, however desirable, is now impossible. It will continue to be impossible unless contracts can be made with both long distance companies. These contracts cannot be compelled, but none of the corporations can by any contract deprive themselves of the power to make them. It may be that the telephone company cannot be compelled to give long distance service or to connect its exchange with any other system, or, having connected with one system, to permit a connection with another. It may decline to undertake any service which cannot be begun and completed over its own lines. If it does undertake such service, it may select its own lines and it may confine itself to one agent, but it may not bind itself to do so and contract away its right and power to use more than one agency." 258 Ill. 209, 101 N. E. 537, 45 L. R. A. (N. S.) 465, Ann. Cas. 1914B, 258. * * *

These cases are sufficient to show substantial grounds of opposition to the views expressed in the Cadwallader Case. It may be conceded they are not, in strictness, authoritative upon the precise question under consideration, but they are quite as much so as the decision in the Cadwallader Case, to the force of which nothing has been contributed by any of the courts which have approved it. * * *

If joint operation be in fact physically possible and safe and for the public benefit, it does not make much difference how the arrangement comes into existence. The Rock Island Railroad Company has no track between Topeka, Kan., and Kansas City, Mo. It operates trains over the tracks of the Union Pacific Railroad Company, under a contract, just as the United Company forwards its messages from Clay

41 As to the validity of such contracts, see, in addition to the case above, to which this footnote is appended, United States Telephone Co. v. Central U. Tele. Co., 202 F. 66, 122 C. C. A. 86 (1913), writ of certiorari denied 229 U. S. 620, 33 S. Ct. 1049, 57 L. Ed. 1354 (1913), holding the contract void; but similar contracts were sustained in Cumberland Telephone & Telegraph Co. v. State, 100 Miss. 102, 54 So. 670, 39 L. R. A. (N. S.) 277 (1911), and Wayne-Monroe Telephone Co. v. Ontario Telephone Co., 60 Misc. Rep. 435, 112 N. Y. S. 424 (1908). For other cases, see 11 A. L. R. 1204 (1205).

Center, Kan., to Kansas City, Mo., over the line of the Bell Company, under contract. If the officials of the two railroads were able to make a contract which renders this operation of trains possible and safe, it is conceivable a court or industrial commission, with the aid of experts, might frame an order in the terms of the contract. In the case of telephone companies, as in the case of railroad companies, there are physical connection and use of physical property, maintenance of structures and way, operation, and accounting; and equality of right may not be denied on the ground of mere inconvenience arising from bigness and complexity of the business. The rural subscriber at his telephone on a fence post and iron wire line, talking to his mail-order house over long distance, obstructs traffic as one freight train obstructs passage of another. Under the proposed theory, as fast as new telephone companies multiply and demand admission, the United Company must add to its switchboard, and the Bell Company must enlarge and improve its facilities. The Union Pacific Company can do the same thing. Every element on which right depends is as fully present in one kind of case as in the other; and if, as a matter of law, a telephone company, by admitting another to its switchboard under contract, dedicates that switchboard to general use by all who may apply, there is good reason to say the Union Pacific—simply another public utility for purposes of communication—dedicated its track to general use by its contract with the Rock Island Company. On the other hand, if it be the law that the Union Pacific Company waived nothing but its right to exclude the Rock Island Company from use of its tracks and other facilities, the same rule should govern the relation of the parties to this suit.

It will be observed the court has not quoted from the decisions in the railroad cases, and the subject may be considered on principle, independently of those decisions.

Telephone companies which engage in the business of furnishing telephones or facilities for telephone communication must serve the general public, within the field occupied, without discrimination. Individuals, whether persons or corporations, who desire telephones in their residences or places of business, or who desire to use telephone facilities, are members of the general public in that respect, and on the same footing.

Let it be assumed, for the purpose of analysis, that the United Company established an exchange at Clay Center. Any one who desires a telephone is entitled to have one. Let it be assumed that the Cooperative Company then established an exchange in Clay Center. Any one who desires a telephone of this company is entitled to have one; and each company is entitled to a telephone of the other, should it so desire. That service satisfies the public duty of each company. Patrons of the United Company have no right, as individuals or in the name of the public interest, to demand that the United Company

furnish them with means of communication with patrons of the Co-operative group who do not patronize the United Company. Patrons of the Co-operative Company are in the same situation. Without a statute, facilities for communication between the two groups of patrons cannot be compelled.

Let it be assumed that neither company has toll-line communication with Kansas city, Mo. Patrons of neither company can demand, as individuals or in the name of the public interest, that facilities for such communication be supplied. Afterwards the United Company builds a toll line to Kansas City. Patrons of the Co-operative Company have no right to that service, except as they take a United Company telephone or go to one of its booths, and have no right to demand that the Co-operative Company build a line to Kansas City. Local relations between the two groups of patrons remain as they were before the toll line was constructed.

Instead of building a toll line to Kansas City, the United Company buys one already built by the Bell Company. The situation is the same as if the United Company had built it. Instead of buying the line, the United Company enters into a contract with the Bell Company whereby both companies use it, and divide tolls on a satisfactory basis. The relation of the group of the public served by the Co-operative Company to the United Company and its toll-line connection is the same as if the United Company owned the toll line. Patrons of the Co-operative Company can subscribe for a United Company telephone, or go to its booths. Members of the public in Topeka and Kansas City who desire to communicate with Clay Center have a toll line to that place, and have at their disposal a local exchange serving the public—the exchange of the United Company.

The Co-operative Company extends lines into the country, and establishes a system of rural telephones. The rural patrons of the Co-operative Company stand on the same footing as the city patrons of that company, so far as right to access to the United Company's facilities is concerned. Besides that, those patrons have no right to call on the United Company for a class of service which it does not profess to give. It has dedicated its capital and facilities to no service beyond the Clay Center city exchange and the toll-line connection with Kansas City.

The Co-operative Company buys the Idana exchange, and connects it with the Clay Center exchange. The relation of patrons of the Idana exchange to the United Company's exchange and toll line is precisely the same as that of the Co-operative Company's rural patrons.

The United Company extends its line northward to connect with exchanges at Morganville, Clyde, and Concordia. Nobody can complain because it did not choose to make southerly connections with Broughton, Wakefield, and Junction City.

These illustrations are sufficient to develop the subject. The result is that by building or buying a line to Kansas City, or by contracting

for a line to Kansas City, the United Company has made no classification of telephone users, and has discriminated against no group of telephone users whatever; and no telephone user, or group of telephone users, has any lawful ground for complaint. The patrons of one telephone system must go to the Legislature to obtain authority to compel another telephone system to serve them.

The Bell Company might have stopped its toll line at Topeka. If it had done so, Clay Center could not have complained of unjust classification or discrimination. No community beyond Clay Center can complain because the toll line stopped there. At Clay Center the Bell Company furnishes toll service to Kansas City to all telephone users who may apply, and by virtue of its connection with the United Company furnishes exchange service to all telephone users who may apply. It has made no classification of telephone users, and has not discriminated against any telephone users.

So much for those individuals and groups of individuals for whose benefit telephone service is instituted and maintained. What about the relations of telephone companies organized to institute and maintain such service, among themselves?

No amount of refinement on the nature of telephone communication and telephone service can disguise the fact that what the plaintiff seeks, and what any third company seeks, is use of the property, organization, and fruits of enterprise of the parties to the contract. The court is perfectly willing to say that by their contract the United Company and the Bell Company waived the independence they possessed before the contract was made. They cannot refuse to each other the service secured by the contract. The court is not able, however, to add to the extent of the waiver disclosed by the contract. To do so is to go beyond the intention of the parties and the factual results of the contract. To declare that the contract operates as a general waiver for the benefit of companies not parties to it is not to declare a fact, or inference of fact, at all. It is to attach a legal consequence. This legal consequence is not attached by way of applying well-understood principles of law to a novel state of facts. The state of facts is of a common kind, and the legal consequence is attached by application of a new rule of law of tremendous importance, special in its nature, and made out of whole cloth, which is legislation, and not adjudication.

There is no rule or presumption of common law that any third company ought to participate in the joinder of two others. No doubt there are telephone lines and exchanges which ought to be united. No doubt there are instances in which exchanges are formed for the sole purpose of pirating upon other systems. Each case of proposed physical connection must be considered on its merits, and the subject of compelling involuntary physical connection between different telephone systems cannot be dealt with except by some agency acting under special legislative authority.

The decision is, the plaintiff has no remedy by virtue of section 12 of the act of 1920, no remedy by appeal according to the Code of Civil Procedure, and whatever right it may have by virtue of the Public Utilities Act should be vindicated by invoking the remedies there provided. The plaintiff has no common-law right on which to predicate the proceeding. Therefore the appeal is dismissed, and the writ of mandamus is denied.

All the Justices concurring.[42]

STATE PUBLIC UTILITIES COMMISSION ex rel. COLLINSVILLE PRESSED BRICK CO. v. PITTSBURGH, C., C. & ST. L. R. CO.

(Supreme Court of Illinois, 1919. 290 Ill. 580, 125 N. E. 495.)

CARTER, J.[43] This is an appeal from a judgment of the circuit court of Sangamon county, affirming an order and decision of the State Public Utilities Commission with reference to a controversy between the Collinsville Pressed Brick Company and the appellant, the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company.

The Collinsville Pressed Brick Company (hereinafter referred to as the brick company) is located at Collinsville, Ill., on the line of said railroad company, hereinafter referred to as the Pennsylvania. The Pennsylvania is a common carrier operating a steam railroad across the state of Illinois, passing through Collinsville to East St. Louis, Ill. The East St. Louis, Columbia & Waterloo Railway Company (hereinafter referred to as the electric line) is an electric railway or interurban running from Waterloo, Ill., to East St. Louis. There is no direct physical connection between the electric line and the Pennsylvania at East St. Louis, other than by the switching tracks of the Terminal Railroad Association. * * *

The facts involved in the merits of this case are not complicated. The brick company loaded a car with brick at Collinsville and then demanded that the Pennsylvania accept the same and issue a through bill of lading to Waterloo via the electric line. This the Pennsylvania refused to do, on the ground that it did not physically connect with

42 As to the power of the state to compel physical connections between telephone lines, see Pacific Telephone & Telegraph Co. v. Wright-Dickinson H. Co. (D. C.) 214 F. 666 (1914), on basis of police power; and, to same effect, Milbank v. Dakota C. Tele. Co., 37 S. D. 504, 159 N. W. 99 (1916). But see Pacific Telephone & Telegraph Co. v. Eshleman, 166 Cal. 640, 137 P. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822 (1913), on basis of eminent domain. See, also, 1 Minn. Law Rev. 95. For other cases, see annotation, "Right and Duty of Telephone Companies to Make Physical Connection of Exchanges or Lines," 11 A. L. R. 1204; and see a further annotation, under Blackledge v. Farmers' Independent Telephone Co., 105 Neb. 713, 181 N. W. 709, 16 A. L. R. 343 (1921), on "Regulations or Provisions upon Requiring Physical Connection of Telephone Lines," 16 A. L. R. 352.

43 Parts of the opinion are omitted.

the electric line, and had no through route, rate, or working arrangements with the electric line. The Pennsylvania was willing to bill and haul the car over its line to its terminus at East St. Louis, but to this the brick company and the electric line would not agree. For seven days the parties argued, until the brick company did bill the car to East St. Louis. Meanwhile the $20 demurrage had accrued, and the Pennsylvania collected this amount before it moved the car. It seems to be conceded that, if the Pennsylvania rightly refused to issue a through bill of lading under the circumstances shown on this record, it was not legally at fault for the seven-day delay and therefore could properly collect the demurrage. The Public Utilities Commission in its final order ordered that the Pennsylvania "be and it is hereby directed to issue a through bill of lading to each and every shipper offering freight for shipment to points on the line of said company in the state of Illinois, consigned to points on said electric line." If this order in this regard by the commission was lawful, then the demurrage charge was not rightly demanded of the brick company.

While the law imposes upon common carriers the duty of carrying all goods offered to them in the usual course of business, at common law a carrier, in the absence of a special contract, could not be compelled to receive goods to be carried to points beyond its own line or to transport such goods beyond its own line or over the tracks of a connecting carrier. 4 R. C. L. 875. It is also stated that it is elementary that a carrier has no right to refuse to receive freight merely because it is destined to a point beyond its own line; it being the duty of the carrier to carry the freight to the end of its line and there deliver it to a connecting carrier to be forwarded. 10 Corpus Juris, 69. The right of an initial carrier to limit its liability to this one line and refuse to issue bills of lading beyond its own line is discussed at some length in Central of Georgia Railway Co. v. Murphey, 116 Ga. 863, 43 S. E. 265, 60 L. R. A. 817. On page 871 of 116 Ga., on page 269 of 43 S. E., on page 821 of 60 L. R. A., the opinion states:

"Railroad companies are not required to issue through bills of lading beyond their own lines, and if they do not desire to bear the burden incident to through bills of lading of this kind the remedy is in their own hands."

In Post v. Southern Railroad Co., 103 Tenn. 184, 52 S. W. 301, 55 L. R. A. 481, there is a full discussion of this question, with the same conclusion as is reached in the Georgia decision. The writ of error in the Tennessee case to the United States Supreme Court was dismissed (20 S. Ct. 1023, 44 L. Ed. 1219); therefore it is perhaps fair to assume that the reasoning of the Tennessee Supreme Court in that case was approved by the United States Supreme Court.

Counsel for appellee insist that under section 44 of the Public Utilities Act the Pennsylvania was required to give a through bill of lading as requested by the brick company. That section reads, in part, as follows:

"Every common carrier shall afford all reasonable, proper and equal facilities for the prompt and efficient interchange and transfer of passengers, tonnage and cars, loaded or empty, between the lines owned, operated, controlled or leased by it and the lines of every other common carrier, and shall make such interchange and transfer promptly without discrimination between shippers, passengers or carriers either as to compensation charged, service rendered or facilities afforded. Every railroad company shall receive from every other railroad company having the same gauge track, at any point of connection, freight cars of proper standard and in proper condition, and shall haul the same either to destination, if the destination be upon a line owned, operated or controlled by such railroad company, or to point of transfer according to route billed, if the destination be upon the line of some other railroad company. But nothing in this act shall be construed as requiring any common carrier to give the use of its terminal facilities to another common carrier engaged in like business." Hurd's Stat. 1917, p. 2297.

Counsel for appellant insist that before section 44 can apply there must be action taken by the Public Utilities Commission under section 42 of said act, providing for joint rates. That section provides, among other things, that—

"Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that the rates or other charges, or classifications in force over two or more common carriers, between any two points in this state, are unjust, unreasonable or excessive, or that no satisfactory through route or joint rate or other charge, or classification exists between such points, and that the public convenience and necessity demand the establishment of a through route and joint rate or other charge, or classification between such points, the commission may order such common carriers to establish such through route and may establish and fix a joint rate or other charge, or classification which will be just and reasonable, to be followed, charged, enforced, demanded and collected in the future, and the terms and conditions under which such through route shall be operated."

Counsel for appellant argue that, reading section 42 with section 44, it is clear that it is intended that section 44 should not be enforced, under the circumstances shown in this record, until action has been taken under section 42; that, even if the public interest and convenience demanded the establishment of a joint rate, such joint rate could not be established without a full hearing of all interested parties; that it is clear under the decisions that, before a satisfactory arrangement can be made for through rates, there must be an agreement of all parties interested. In Post v. Southern Railroad Co., supra, the court quoted with approval from the evidence of an expert witness on this subject as follows (103 Tenn. 208, 52 S. W. 307, 55 L. R. A. 488):

"Satisfactory arrangements necessary to be made with all parts of the line for operation of through rates include proportions to be allowed each carrier; the ability of the connecting lines to transport the traffic with the utmost speed; the solvency of different parts of the line; their willingness to and ability to promptly settle claims, either for loss to property, overcharge in rates, or loss of cars or other property of the company; reciprocity on the part of the connecting lines in delivering freights to the defendant for transportation over its line in return for freights delivered to such connecting lines by it; participation in salaries and expenses of agencies established for procurement of traffic; compliance with the law, state and national, with respect to rates applying to traffic over such other lines; friendly co-operation of connecting lines, and performances of the duty so as to satisfy patrons, and increase business; that it may not be compelled to send its cars over connecting lines which will not promptly return them; in order to select such connections as are able to furnish it a proportion of cars needed by the through lines; that it may not be required to haul cars to Memphis empty, to meet requirements of shippers in order to load their freight, while it may have a supply of empty cars on hand to be returned by other routes; so to distribute its tonnage as not to congest one or more of the roads, while forwarding so little traffic over other lines as to cause them to form other connections, to the disadvantage of the Southern Railway."

Counsel for appellant argue that the above statement applies with full force to the situation presented by this record; that to hold as did the Public Utilities Commission, that although no through rates were established after a hearing before the Public Utilities Commission, yet that body could require the Pennsylvania to accept and bill cars to destinations on interurban lines regardless of public necessity, convenience, or working arrangements, would be very unfair; that steam roads, with a full line of equipment, could thus be compelled to distribute cars over all kinds of small and irresponsible electric lines with which they had no system of accounting and which produced no trade or traffic; that the electric lines, in turn, could detain the cars and finally return them empty and leave the steam roads to handle the empties as best they could; that to so hold would be unfair to the Pennsylvania and other well-equipped steam roads; and that it is clear from a fair construction of section 42 of the Public Utilities Act that the Legislature never intended to grant the power to the Public Utilities Commission, which it undertook here to enforce under section 44 of said act, before it had found that public necessity and convenience demanded the establishment of through routes and before the parties interested were given a hearing on this question. Unless the Public Utilities Act clearly requires this, we do not think the commission would be authorized to require that the initial carrier must accept, bill, and carry beyond its terminus any goods that might be delivered to it.

We agree with counsel for appellant that a fair construction of the entire Public Utilities Act did not authorize the Public Utilities Commission to enter the order here in question, requiring it to give a through bill of lading over the electric line, as requested by the brick company. Whether the Pennsylvania could be required by the Public Utilities Commission to give a through bill of lading to any railroad with which it had direct physical connection is not in this case, and therefore need not be decided. The Pennsylvania not being required to give such through bill of lading, the law did not compel it to accept the car of brick seven days after it was loaded without the payment of demurrage, and we do not find it necessary to decide whether or not the Public Utilities Commission could compel such demurrage, if illegally charged, to be refunded by the Pennsylvania under section 72 of the Public Utilities Act.

The judgment of the circuit court of Sangamon county will be reversed, and the cause remanded to that court for further proceedings in harmony with the views herein stated.

Reversed and remanded.[44]

SOUTHERN PAC. CO. et al. v. INTERSTATE COMMERCE COMMISSION. SOUTHERN CALIFORNIA RY. CO. v. SAME. ATCHISON, T. & S. F. RY. CO. v. SAME. SANTA FÉ PAC. R. CO. v. SAME. SOUTHERN PAC. CO. v. SAME.

(Supreme Court of the United States, 1906. 200 U. S. 536, 26 S. Ct. 330, 50 L. Ed. 585.)

Appeals from the Circuit Court of the United States for the Southern District of California to review a decree for the enforcement of an order of the Interstate Commerce Commission requiring carriers to desist from maintaining or enforcing a rule under which initial carriers, as a condition of guaranteeing a through rate, were given the right to designate the route, beyond their own terminals.

Statement by Mr. Justice PECKHAM: * * *

The through tariff of rates from California to the East, with the right of routing, which had been agreed upon between the companies complained of (hereinafter called the initial carriers) and their East-

44 A state statute requiring a common carrier to sell tickets of a connecting carrier for transportation over the connecting line is considered in Stephens v. Central of Ga. Ry. Co., 138 Ga. 625, 75 S. E. 1041, 42 L. R. A. (N. S.) 541, Ann. Cas. 1913E, 609 (1912), and note in 42 L. R. A. (N. S.) 541. See note, "Compulsory Interchange of Transfers between Independent Street Railway Companies," 27 Harv. Law Rev. 380. On the validity of a state statute requiring railroads to provide mileage books good upon all railroads in the commonwealth: Attorney General v. Old Colony Railroad, 160 Mass. 62, 35 N. E. 252, 22 L. R. A. 112 (1893). See Lake S. & M. S. Ry. Co. v. Smith, 173 U. S. 684, 19 S. Ct. 565, 43 L. Ed. 858 (1899), as to validity, under Fourteenth Amendment, of state statute requiring the sale of thousand-mile books for less than ordinary fares. But see Penn. R. Co. v. Towers, 245 U. S. 6, 38 S. Ct. 2, 62 L. Ed. 117, L. R. A. 1918C, 475 (1917).

ern connections regarding the orange and other citrus fruit transportation, was in force January 1, 1900, and these proceedings were commenced February 26, 1900. Before the adoption of the rule for routing, there had been among the Eastern connections of the initial carriers under the through joint tariff rates then existing, the greatest rivalry to obtain the California fruit freight business; and this rivalry led, on the part of the connecting carriers, to a system of rebates from the through tariff rates, which was a clear violation of the Commerce Act, and was demoralizing in every way to honest business. Indeed, the president of one of complainants before the Commission admitted that his company (the Southern California Fruit Exchange) had in four years received rebates to an amount of over $174,000. The practice had become so general that the shippers came to regard a rebate as part of the legitimate returns from the orange business. Among those who participated in this system of rebates were what is termed the car line companies, which were incorporated companies owning cars in which the fruit was packed, described as ventilator or refrigerator cars, which were peculiarly adapted to the carriage of the fruit, and were hired by the initial carriers because they did not want to own equipment cars which they could keep in service only part of the year, while the car companies could use the cars for other purposes in other parts of the United States when the orange transportation was over. These car companies made arrangements with the connections of the initial carrier east of Chicago and New Orleans, by which a certain bonus, varying from $10 to $40 per car, was given the car line companies, in consideration of the car being routed over the line paying the bonus, a part of the bonus, varying from a quarter to a half, being usually turned over to the shipper by the car company, for the privilege allowed the latter of routing the shipment.

The initial carriers form two systems,—one called the Southern Pacific System, and the other the Santa Fé System. There are numerous points of junction on these lines of the defendants, where connection is made with other carriers, and at their termini in Chicago, Ogden, and New Orleans such connection is made, and through lines are formed over which the citrus fruit is transported to practically all the markets of the United States. The two systems are the only ones which reach the section of country where the orange industry in Southern California exists, and they about equally divide the transportation of the oranges therefrom. The Commission said the evidence was unsatisfactory as a basis for a conclusion whether the initial carriers pooled their citrus fruit traffic or divided the earnings therefrom; and it therefore retained such question for further hearing and investigation.

Prior to January, 1900, the rebates by the Eastern companies, already referred to, had become so great and demoralizing that the initial carriers at length determined to try and crush the whole thing.

The connecting carriers were themselves dissatisfied with this state of things, but each felt it necessary in order to compete with the others. It had been assumed that the car line companies were not common carriers, and were not within the Commerce Act, and therefore they were more ready to indulge in the practice of getting rebates whenever they could, and paying part of the amount to the shippers for giving them the right to route the shipment. Prior to the adoption of the through rate tariff with this rule under discussion, the shippers had been permitted by the initial carriers to control the routing of the freight, and also to divert it, en route, from the destination point named in the bill. In order to stop the rebating on these joint through rates it was proposed to agree upon a through rate tariff, to be assented to and accepted by the railroads interested in the fruit transportation, or by as many of them as possible, with the rule in question to form part of the agreement. Such a tariff agreement was made between some of the roads (and subsequently assented to and joined in by most of the roads) and filed with the Commission, for the transportation of oranges and other citrus fruit from Southern California at $1.25 per hundred pounds, to practically all points east of the Missouri river. The tariff agreed upon by the companies contains the rule complained of, which is part of such agreement, and by it the initial carriers agreed to guarantee the through rates to the shipper, but only on the following conditions:

"In guaranteeing the through rate named herein, the absolute and unqualified right of routing beyond its own terminal is reserved to initial carrier giving the guaranty. In accordance with this rule, agents will not accept shipping orders or other documents, if routing instructions are shown thereon. Neither will agents accept verbal routing instructions."

Another rule reads:

"Initial carrier will route each car from point of origin to point of destination, and diversions in transit will not be permitted except by consent of initial carrier, who will thereupon designate new routing when diversion necessitates change therein."

Notwithstanding the rule thus published in regard to routing, the initial carriers generally thereafter permitted the shippers to route the cars containing their fruit as they desired. * * *

The reason for the rule, reserving to the initial carrier this right to route the traffic, is stated to have been because it enabled the initial carriers to secure the discontinuance of the practice of paying rebates. Since the adoption of that rule the rebates which had been paid to shippers and to owners of car lines were discontinued, and the Commission says there is no evidence that the practice has been resumed. * * * As soon as the routing was agreed upon and the through tariff rates fixed, the Eastern connections had to do business with the initial carriers instead of the car company or the shipper. The shippers prepay or guarantee freight charges to destination. The

initial carrier does not assume liability from damage resulting from negligence of any connecting line.

The Commission (the chairman, Mr. Commissioner Knapp, dissenting) ordered the defendants to cease from exacting from the shippers the right to themselves make the route which the freight should take. The ground taken by the Commission was that such routing by the initial carriers subjected the shippers to undue, unjust, and unreasonable prejudice and disadvantage, and gave to the carrier an undue and unreasonable preference and advantage, and was a violation of the third section of the act.

The initial carriers, believing the Commission had erred in its decision, refused to obey the order which it made, and thereupon the Commission, pursuant to the sixteenth section of the act, filed its bill in the circuit court for the purpose of enforcing its order. * * *

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the court:[45]

Although there are separate proceedings in these various cases, the question arising in all is identical, and the cases will hereafter be spoken of as if there were but one proceeding before the court. The single question presented is, Has the carrier that takes the fruit from the shipper in California the right, under the facts herein, to insist upon the rule permitting such carrier to route the freight at the time it is received from the shipper?

The Commission has decided that the carrier has not the right, and that the rule denies to shippers the use of their transportation facilities, which such shippers are entitled to, and that, in its application by the initial carriers to the fruit traffic, the shippers are subjected to undue, unjust, and unreasonable prejudice and disadvantage, and the carriers are given an undue and unreasonable preference and advantage. If this be the necessary effect of the rule, it may be assumed to be a violation of section 3 of the Interstate Commerce Act, and the Commission, therefore, rightly ordered the carriers to desist from observing it.

By section 16 of the act, the circuit court is given authority to enforce "any lawful order or requirement of the Commission." If the order be not a lawful one, the court is without power to enforce it. Whether or not such order was lawful is the matter to be determined.

The Commission does not find that any contract existed between the initial carrier and its Eastern connections to bill the fruit according to certain proportions among the connecting railroads. The Commission said:

"The situation warrants the inference, however, that these two initial carriers or systems, connecting with other carriers at various points, and they, in turn, connecting with numerous other carriers, as shown by the tariff, are able, by acting in concert, and routing as

[45] Parts of the statement of facts and parts of the opinion are omitted.

they see fit, to only send traffic over the roads of such carriers as fulfilled an agreement to refrain from making any rate concession to the shippers, and some influence of like character could doubtless be exerted by them upon the car lines which are also hereinafter referred to."

Such statement simply shows that if any Eastern railroad with which an agreement for joint through rates existed should give rebates on the joint through rate tariff, thus carrying freight below the rates agreed upon as the through rate tariff, that road would not get the freight.

We see nothing in the initial carrier endeavoring to maintain the rates agreed upon as a through rate tariff, and thereby preventing the paying of rebates, which in itself is a violation of the act. The act especially prohibits, in the sixth section, any alteration of the rates agreed upon, in favor of any person or persons. There is no finding that there has in fact, as a result of the rule, been any discrimination or unjust action as between the initial carriers and the shippers themselves, and there is no evidence that any was ever practised.

In the examination of the rule it is well to bear in mind the situation of the companies and the business at the time of its adoption. It is fully set forth in the foregoing statement of facts. The payment of the rebates was a shame, and was in truth unsatisfactory to all the railroads, besides being plainly a violation of the commerce act.

We think there is nothing in the act which clearly prohibits the roads from adopting the rule in question. The decision turns upon the construction of a statute which at least does not in terms prohibit.

In cases such as this a court is bound to consider the bearing of the result of either construction upon the general purposes of the act. In enacting the Commerce Act this court has stated that the object of Congress was to facilitate and promote commerce by the adoption of regulations to make charges for transportation just and reasonable, and to forbid undue and unreasonable preferences or discriminations. Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. Ed. 940, 5 Inters. Com. Rep. 405, 16 S. Ct. 666.

The importance of the rule in this case, so far as the shipper is concerned, is not so great as is its importance to the railroads in preventing rebates. If the right of routing be looked at alone, without any connection with the claimed right of diverting the freight, the rule itself would be generally of little importance to the shipper. In all probability the freight gets to its destination when routed by the carrier as early as if routed by the shipper, and in that event the particular route taken is not very important to the latter. The evidence before the Circuit Court shows that the routing, when done by the carrier, was fairly apportioned among the Eastern connections, having an eye to good service and expedition, and the roads that the routing was done over were the best roads in the country; the roads that have been eliminated were the roundabout roads; there were no roads that were

insolvent, so far as known by the witnesses. Now, as the fact appears that the actual routing is generally conceded the shipper, and also his request for a diversion allowed, there is nothing in the mere right of routing by the companies, separate from other facts, of which the shipper can properly complain. The Commission says it does not distinctly appear in testimony that a delivery by a particular terminal road has been denied in any particular case, yet the manifest evil results of an arbitrary application of the rule must be considered in determining its legality. If there is no such arbitrary application, we do not agree that the rule itself is to be held illegal because a violation of the act may be committed, while the evidence is that none in fact was committed. It does appear that the mere existence of the right to route on the part of the company has ended the practice of rebating. But the opportunity to obtain rebates on the part of the shipper is surely not a ground for action by the Commission or by the court. Of course, if, in attempting to cut off rebates, there is a violation of the act, the act must be followed, and that means of prohibiting them must be abandoned. Courts may well look with some degree of care before so construing a statute which confessedly does not in terms so provide, as to prohibit such a rule on the ground that it would be a violation of the statute. We are of the opinion that the rule is not a violation thereof.

It is conceded that the different railroads forming a continuous line of road are free to adopt or refuse to adopt joint through tariff rates. The Commerce Act recognizes such right, and provides for the filing, with the Commission, of the through tariff rates, as agreed upon between the companies. The whole question of joint through tariff rates, under the provisions of the act, is one of agreement between the companies and they may, or may not, enter into it, as they may think their interests demand. And it is equally plain that an initial carrier may agree upon joint through rates with one or several connecting carriers, who between each other might be regarded as competing roads.

It is also undoubted that the common carrier need not contract to carry beyond its own line, but may there deliver to the next succeeding carrier, and thus end its responsibility, and charge its local rate for the transportation.[46] If it agree to transport beyond

[46] See section 15 (8–10) of Interstate Commerce Act (U. S. Comp. St. Ann. Supp. 1923, § 8583) for provisions on routing railroad freight, when and under what conditions the shipper may control, and United States v. American Ry. Exp. Co., 265 U. S. 425, 44 S. Ct. 560, 68 L. Ed. 1087 (1924), shippers by express. The carrier, undertaking to forward goods beyond its own lines, is bound to follow the shipper's instructions. Johnson v. N. Y. C. R. R. Co., 33 N. Y. 610, 88 Am. Dec. 416 (1865); Hinckley v. N. Y. C. & H. R. R. R. Co., 56 N. Y. 429 (1874). If no orders are given by shipper, the carrier, in selecting the route, must have due regard for the shipper's interest. Merchants' Despatch Transp. Co. v. Kahn, 76 Ill. 520 (1875), and see Post v. Southern R. Co., 103 Tenn. 184, 52 S. W. 301, 55 L. R. A. 481 (1899), and Stewart v. Comer, 100 Ga. 754, 28 S. E. 461, 62 Am. St. Rep. 353 (1897). See, also, Galveston, H. & S. A. Ry. Co. v. Lykes Bros. (D. C.) 294 F. 968 (1923).

its own line, it may do so by such lines as it chooses. Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co., 110 U. S. 667, 4 S. Ct. 185, 28 L. Ed. 291; Louisville & N. R. Co. v. West Coast Naval Stores Co., 198 U. S. 483, 49 L. Ed. 1135, 25 S. Ct. 745. This right has not been held to depend upon whether the original carrier agreed to be liable for the default of the connecting carrier after the goods are delivered to such connecting carrier. As the carrier is not bound to make a through contract, it can do so upon such terms as it may agree upon; at least, so long as they are reasonable and do not otherwise violate the law. In this case, the initial carrier guarantees the through rate, but only on condition that it has the routing. * * *

Having this right to agree on a joint through tariff on terms mutually satisfactory, we cannot find anything in the Commerce Act which forbids the agreement with such a condition therein as to routing. It is said that the sixth section, properly construed, prohibits such condition. We confess our inability to find anything in that section which does so. * * *

There seems to be unanimous agreement that all shippers are treated alike and are granted the same privileges, and the routing is generally accorded them. It is the power to route, which rests with the initial carrier, that really takes away the motive for a rebate in the manner indicated, and, therefore, the granting of the request of the shipper as to a particular route may be, and is, generally conceded, without danger that the rebate business may be again practised.

The important facts that control the situation are that the carrier need not agree to carry beyond its own road, and may agree upon joint through tariff rates or not, as seems best for its own interests. Having these rights of contract, the carrier may make such terms as it pleases; at least, so long as they are reasonable and do not otherwise violate the law. We think the routing rule is not unreasonable under the facts herein, and that it does not violate the third section of the act.

Because opportunities for the violation of the act may occur by reason of the rule is no ground for holding, as a matter of law, that violations must occur, and that the rule itself is therefore illegal. We are, consequently, unable to concur in the view taken by the Commission that the rule violates the third section of the act. * * *

Now, while the most important, if not the only, effect of the routing agreement is to take away this rebating practice, and to hold all parties to that agreement as part of the joint through rate tariff, we think no case is made out of a violation of the pooling provision in the fifth section of the act, even where the initial carrier promises fair treatment to the connecting roads, and carries out such promises.

We must remember the general purpose of the act, which is, as has been said, to obtain fair treatment for the public from the roads, and reasonable charges for the transportation of freight, and the honest performance of duty, with no improper or unjust preference

or discrimination. Under such circumstances, the court ought not to adopt such a strict and unnecessary construction of the act as thereby to prevent an honest and otherwise perfectly legal attempt to maintain joint through rates, by destroying one of the worst abuses known in the transportation business. The effort to maintain the published through joint tariff rates is entirely commendable.

We think that the agreement in question, upon its face, does not violate any provision of the commerce act, and there is no evidence in the case which shows that in fact there has been any such violation.

The decree of the Circuit Court is reversed and the case remanded with instructions to dismiss the bill.[47]

Reversed, etc.

[47] On the power of the Interstate Commerce Commission to establish through routes, Brandeis, J., in United States v. American Ry. Exp. Co., 265 U. S. 425, 44 S. Ct. 560, 68 L. Ed. 1087 (1924), footnote 3: "The Act to Regulate Commerce of February 4, 1887, chapter 104, 24 Stat. at L. 379, Comp. Stat. § 8563, 4 Fed. Stat. Anno. (2d Ed.) p. 337, did not confer upon the Commission any power to establish through routes. Compare Southern P. Co. v. Interstate Commerce Commission, 200 U. S. 536, 553, 26 S. Ct. 330, 50 L. Ed. 585, 593 (1906). The amendment of June 29, 1906, chapter 3591, § 4, 34 Stat. at L. 584, 590, Comp. St. § 8583, 4 Fed. Stat. Anno. (2d Ed.) p. 458, conferred power to do so 'when that may be necessary to give effect to any provision of this act,' and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through routes exist.' The amendment of June 18, 1910, chapter 309, § 12, 36 Stat. at L. 539, 552, Comp. St. § 8583, 4 Fed. Stat. Anno. (2d Ed.) p. 458, struck out the proviso and substituted therefor the limitation now re-enacted in paragraph 4 of section 15 of the Interstate Commerce Act as amended by Transportation Act 1920 (U. S. Comp. St. Ann. Supp. 1923, § 8583). The latter act struck out, also, the clause in the Act of 1910 by which the Commission's power to establish the through routes was dependent upon failure of the carriers to establish them voluntarily."

CHAPTER 4

LIABILITY

SECTION 1.—LIABILITY IN GENERAL

FORWARD v. PITTARD.

(Court of King's Bench, 1785. 1 Term R. 27.)

This was an action on the case against the defendant, as a common carrier, for not safely carrying and delivering the plaintiff's goods. This action was tried at the last summer assizes at Dorchester, before Mr. Baron Perryn, when the jury found a verdict for the plaintiff, subject to the opinion of the court on the following case.

"That the defendant was a common carrier from London to Shaftesbury. That on Thursday the 14th of October 1784, the plaintiff delivered to him on Weyhill twelve pockets of hops to be carried by him to Andover, and to be by him forwarded to Shaftesbury by his public road waggon, which travels from London through Andover to Shaftesbury. That, by the course of travelling, such waggon was not to leave Andover till the Saturday evening following. That in the night of the following day after the delivery of the hops, a fire broke out in a booth at the distance of about 100 yards from the booth in which the defendant had deposited the hops, which burnt for some time with unextinguishable violence, and during that time communicated itself to the said booth in which the defendant had deposited the hops, and entirely consumed them without any actual negligence in the defendant. That the fire was not occasioned by lightning."

Afterwards Lord MANSFIELD delivered the unanimous opinion of the court.[1]

After stating the case—The question is, whether the common carrier is liable in this case of fire? It appears from all the cases for 100 years back that there are events for which the carrier is liable independent of his contract. By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by the common law; a carrier is in the nature of an insurer. It is laid down that he is liable for every accident, except by the act of God, or the King's enemies. Now what is the act of God? I consider it to mean something in opposition to the act of

[1] The argument of counsel is omitted.

man: for every thing is the act of God that happens by his permission; every thing, by his knowledge. But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier unless he shews it was done by the King's enemies or by such act as could not happen by the intervention of man, as storms, lightning, and tempests.

If an armed force come to rob the carrier of the goods, he is liable: and a reason is given in the books, which is a bad one, viz. that he ought to have a sufficient force to repel it: but that would be impossible in some cases, as for instance in the riots in the year 1780. The true reason is, for fear it may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil.

In this case, it does not appear but that the fire arose from the act of some man or other. It certainly did arise from some act of man; for it is expressly stated not to have happened by lightning. The carrier therefore in this case is liable, inasmuch as he is liable for inevitable accident.

Judgment for the plaintiff.[2]

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lstein v Phillips, 146 NC 366

HULETT et al. v. SWIFT.

(Court of Appeals of New York, 1865. 33 N. Y. 571, 88 Am. Dec. 405.)

Appeal from the Supreme Court. The action was for the value of property committed by a guest to the charge of the defendant's testator, an innkeeper in Poughkeepsie, and lost by a fire, which destroyed the barn and stable attached to the inn, on the 26th of July, 1860.

The facts, as admitted by the pleadings and found by the referee, were substantially these:

One Banks, an employee of the plaintiffs, stopped at the Balding House, in Poughkeepsie, with his own horses and wagon, and a load of buckskin goods belonging to the plaintiffs. He was received as a guest, and the innkeeper took charge of his property. A fire occurred

[2] "In Forward v. Pittard, we have squarely presented for the first time a loss of goods by the carrier by pure accident absolutely without negligence—by an accidental fire for which the carrier was not in any way responsible. Counsel for the plaintiff relied on the language of Lord Holt. Borough, for the defendant, presented a masterly argument, in which the precedents were examined; the gist of his contention was that a carrier should be held only for his own default. Lord Mansfield, unmoved by this flood of learning, held the carrier liable; and he uttered these portentous words: 'A carrier is in the nature of an insurer.' From that time a carrier has been an insurer without the rights of an insurer." Beale, The Carrier's Liability: Its History, 11 Harv. Law Rev. 158, 167. Compare Holmes, The Common Law, Lecture V, expressing the view that the extraordinary liability of a common carrier is a survival of the ancient law applicable to all bailees.

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in the course of the night, which occasioned a loss to Banks and the plaintiffs of $1,250.50.

It did not appear how the fire originated, and the defendant failed to show that it was not the result of negligence. The referee held that the plaintiffs, in their own right, and as the assignees of Banks, were entitled to the value of the property destroyed.

On appeal to the General Term of the fourth district, the judgment was affirmed, on the ground that the innkeeper is an insurer of the goods of his guest while they remain in his custody. From that decision the defendant appealed.

PORTER, J. An innkeeper is responsible for the safe keeping of property committed to his custody by a guest. He is an insurer against loss, unless caused by the negligence or fraud of the guest, or by the act of God or the public enemy. This liability is recognized in the common law as existing by the ancient custom of the realm; and the judges in Calye's case treated the recitals in the special writ for its enforcement, as controlling evidence of the nature and extent of the obligation imposed by law on the innkeeper. (8 Coke, 32; 1 Smith's Lead. Cas., Hare & Wallace's ed., 194, 307.)

This custom, like that in the kindred case of the common carrier, had its origin in considerations of public policy. It was essential to the interests of the realm, that every facility should be furnished for secure and convenient intercourse between different portions of the kingdom. The safeguards, of which the law gave assurance to the wayfarer, were akin to those which invested each English home with the legal security of a castle. The traveler was peculiarly exposed to depredation and fraud. He was compelled to repose confidence in a host, who was subject to constant temptation, and favored with peculiar opportunities, if he chose to betray his trust. The innkeeper was at liberty to fix his own compensation, and enforce summary payment. His lien, then as now, fastened upon the goods of his guest from the time they came to his custody. The care of the property was usually committed to servants, over whom the guest had no control, and who had no interest in its preservation, unless their employer was held responsible for its safety. In case of depredation by collusion, or of injury or destruction by neglect, the stranger would of necessity be at every possible disadvantage. He would be without the means either of proving guilt or detecting it. The witnesses to whom he must resort for information, if not accessaries to the injury, would ordinarily be in the interest of the innkeeper. The sufferer would be deprived, by the very wrong of which he complained, of the means of remaining to ascertain and enforce his rights, and redress would be well-nigh hopeless, but for the rule of law casting the loss on the party entrusted with the custody of the property, and paid for keeping it safely.

The considerations of public policy in which the rule had its origin, forbid any relaxation of its rigor. The number of travelers was few, when this custom was established for their protection. The growth

of commerce, and increased facilities of communication, have so multiplied the class for whose security it was designed, that its abrogation would be the removal of a safeguard against fraud, in which almost every citizen has an immediate interest. The rule is in the highest degree remedial. No public interest would be promoted, by changing the legal effect of the implied contract between the host and the guest, and relieving the former from his common law liability. Innkeepers, like carriers and other insurers, at times find their contracts burdensome; but in the profits they derive from the public, and the privileges accorded to them by the law, they find an ample and liberal compensation. The vocation would be still more profitable, if coupled with new immunities; but we are not at liberty to discard the settled rules of the common law, founded on reasons which still operate in all their original force. Open robbery and violence, it is true, are less frequent as civilization advances; but the devices of fraud multiply with the increase of intelligence, and the temptations which spring from opportunity, keep pace with the growth and diffusion of wealth. The great body of those engaged in this, as in other vocations, are men of character and worth; but the calling is open to all, and the existing rule of protection should therefore be steadily maintained. It extends to every case, and secures the highest vigilance on the part of the innkeeper, by making him responsible for the property of his guest. The traveler is entitled to claim entire security for his goods, as against the landlord, who fixes his own measure of compensation, and holds the property in pledge for the payment of his charges against the owner.

In cases of loss, either the innkeeper or the guest must be the sufferer; and the common law furnishes the solution of the question, on which of them it should properly fall. In the case of Cross v. Andrews, the rule was tersely stated by the court. "The defendant, if he will keep an inn, ought, *at his peril*, to keep safely his guests' goods." (Croke's Eliz. 622.) He must guard them against the incendiary, the burglar and the thief; and he is equally bound to respond for their loss, whether caused by his own negligence, or by the depredations of knaves and marauders, within or without the curtilage.

This doctrine is too well settled in the English courts, to be shaken by the exceptional case on which the appellant relies. Calye's Case, 8 Coke, 32; Cross v. Andrews, Croke's Eliz. 622; Richmond v. Smith, 8 Barnw. & Cress. 803; Cashill v. Wright, 37 Eng. Law and Eq. 175.

In the courts of this State, it has always been held that the innkeeper, like the carrier, is, by the common law, an insurer. Purvis v. Coleman, 21 N. Y. 111, 112, 117; Wells v. Steam Navigation Co., 2 N. Y. 204, 209; Gile v. Libby, 36 Barb. 70, 74; Ingalsbee v. Wood, 36 Barb. 458; Washburn v. Jones, 14 Barb. 193, 195; McDonald v. Edgerton, 5 Barb. 564; Taylor v. Monnot, 11 N. Y. Super. Ct. 117; Stanton v. Leland, 4 E. D. Smith, 94; Grinnell v. Cook, 3 Hill, 488, 38 Am. Dec. 663; Piper v. Manny, 21 Wend. 282, 284; Clute v. Wiggins, 14 Johns. 175, 7 Am. Dec. 448.

The rule, as recognized by us, is sanctioned by the leading authorities in the other States. 1 Pars. on Cont. 623; 1 Smith's Lead. Cas. (Hare & Wallace's Ed.) 307; Shaw v. Berry, 31 Me. 478, 52 Am. Dec. 628; Sibley v. Aldrich, 33 N. H. 553, 66 Am. Dec. 745; Berkshire Woollen Co. v. Proctor, 7 Cush. (Mass.) 427; Mason v. Thompson, 9 Pick. (Mass.) 280, 20 Am. Dec. 471; Towson v. Havre de Grace Bank, 6 Har. & J. (Md.) 47, 14 Am. Dec. 254; Thickstun v. Howard, 8 Blackf. (Ind.) 535, 537; Kisten v. Hildebrand, 9 B. Mon. (Ky.) 72, 48 Am. Dec. 416.

A shade of doubt has, at times, been thrown over the question, by the unguarded language of elementary writers, and especially by the suggestion of Judge Story, in his treatise on the law of bailments, that the innkeeper could exonerate himself from liability by proving that he was not guilty of actual negligence; and this view seems to have been adopted in two of the Vermont and one of the English cases. Story on Bailments, sec. 472; Dawson v. Champney, 8 Adolphus & Ellis, N. S. 164; Merritt v. Claghorn, 23 Vt. 177; McDaniels v. Robinson, 28 Vt. 337, 67 Am. Dec. 720. The doctrine of these cases is opposed to the general current of English and American authority, and evidently had its origin in a misapprehension of the rule as stated by the judges in Calye's Case. It is true that the liability of the innkeeper, by the custom of the realm, was not unlimited and absolute, and that the loss of the goods of the guest was merely presumptive evidence of the default of the landlord. But this presumption could only be repelled, by proof that the loss was attributable to the negligence or fraud of the guest, or to the act of God or the public enemy. No degree of diligence or vigilance on the part of the innkeeper, could absolve him from his common law obligation for the loss of his guest, unless traceable to one of these exceptional causes. Shaw v. Berry, 31 Me. 478, 52 Am. Dec. 628; Sibley v. Aldrich, 33 N. H. 553, 66 Am. Dec. 745. The rule is salutary, and should be steadily and firmly upheld, subject to the statutory regulations for the protection of hotel proprietors from fraud and negligence on the part of their guests.

We are of opinion that the judgment should be affirmed, on the ground that the testator was an insurer of the property committed to his charge, and that its loss has not been traced to either of the causes recognized as creating an exception to the general rule of liability.

It is proper to remark, that if the law were otherwise, and the innkeeper were responsible only for actual negligence, it would not avail the defendant on the appeal papers in the present case, as they come to us from the court below. The findings of the referee are not embodied in the case, as required by the existing practice; and on reference to the record prefixed to the case, it appears that the defendant failed to repel by proof the conceded presumption of negligence. Bissel v. Hamlin, 20 N. Y. 519; Grant v. Morse, 22 N. Y. 323.

The judgment should be affirmed, with costs.

All the judges concurred in the opinion of PORTER, J., except DENIO, C. J., who delivered a dissenting opinion, in which BROWN, J., concurred.

Judgment affirmed.[3]

[3] In the following cases an innkeeper was held liable as an insurer against loss due to fire: Pettit v. Thomas, 103 Ark. 593, 148 S. W. 501, 42 L. R. A. (N. S.) 122, Ann. Cas. 1914B, 762 (1912); Fay v. Pacific Improvement Co., 93 Cal. 253, 26 P. 1099, 28 P. 943, 16 L. R. A. 188, 27 Am. St. Rep. 198 (1892). In the following cases an innkeeper was held liable as an insurer for loss due to other casualties: Russell v. Fagan, 7 Houst. (Del.) 389, 8 A. 258 (1886); Sibley v. Aldrich, 33 N. H. 553, 66 Am. Dec. 745 (1856); Shaw v. Berry, 31 Me. 478, 52 Am. Dec. 628 (1850). In the following cases an innkeeper was held liable as an insurer for loss due to theft or disappearance of goods from the inn: Fisher v. Bonneville Hotel Co., 55 Utah, 588, 188 P. 856, 12 A. L. R. 255 (1920); Swanner v. Conner Hotel Co., 205 Mo. App. 329, 224 S. W. 123 (1920); Watkins v. Hotel Tutwiler Co., 200 Ala. 386, 76 So. 302, L. R. A. 1917F, 834 (1917), semble; Wagner v. Congress Square Hotel Co., 115 Me. 190, 98 A. 660 (1916); Watt v. Kilbury, 53 Wash. 446, 102 P. 403 (1909); Cunningham v. Bucky, 42 W. Va. 671, 26 S. E. 442, 35 L. R. A. 850, 57 Am. St. Rep. 878 (1896); Shultz v. Wall, 134 Pa. 262, 19 A. 742, 8 L. R. A. 97, 19 Am. St. Rep. 686 (1890), semble; Lanier v. Youngblood, 73 Ala. 587 (1883); Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657 (1867).

Sections 200, 201, and 202 of the General Business Law of New York (Consol. Laws, c. 20) materially limit the innkeeper's common-law liability, and relieve the innkeeper from all liability for damage to or loss of property by fire, when it shall appear that such fire was occasioned without his fault or negligence. See interesting note on the innkeeper's liability for loss of clothing and other personal property in New York, 26 Col. Law Rev. 349.

In many states, statutes have been passed relieving innkeepers from liability as an insurer of money, jewels or ornaments not deposited with the innkeeper for safe keeping, provided the innkeeper maintains a safe for such purpose and posts the notice required by the statute. Hyatt v. Taylor, 42 N. Y. 258 (1869). As to what is "money, jewel or ornament" within the meaning of such statutes, see and compare Ramaley v. Leland, 43 N. Y. 539, 3 Am. Rep. 728 (1871), holding a gold watch to be neither "a jewel nor ornament" within the meaning of the statute, and Stewart v. Parsons, 24 Wis. 241 (1869), holding a gold watch to be included within a statute requiring "money, jewelry and articles of gold and silver manufacture, and of the like," to be deposited with the innkeeper. When the specified articles are deposited with the innkeeper, he is liable as an insurer. See Wilkins v. Earle, 44 N. Y. 172, 4 Am. Rep. 655 (1870), in which an innkeeper was held liable as an insurer for the loss of $20,000 which had been deposited with him for safe keeping. Furthermore, even if the specified articles are not deposited with the innkeeper, he is responsible for any loss attributable to his fault. Honig v. Riley, 124 Misc. Rep. 809, 209 N. Y. S. 233 (1925); Watson & Powers v. Loughran, 112 Ga. 837, 38 S. E. 82 (1900).

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JOHNSON v. CHADBOURN FINANCE CO.

(Supreme Court of Minnesota, 1903. 89 Minn. 310, 94 N. W. 874, 99 Am. St. Rep. 571.)

COLLINS, J.[4] The defendant in this action, a corporation, was the proprietor of what was known as the "Hotel Vendome," in the city of Minneapolis. The plaintiff and his wife, residents of Morris, in this state, while on their way to Florida, stopped for a few days at the Vendome, making preparations for their journey. They were undoubtedly transients, and were in this building when a fire occurred, February 7, 1902. They lost a quantity of personal property, such as wearing apparel and ornaments, and brought this action to recover the value of the same. * * *

2. The second question in this case, of importance, is as to the extent of an innkeeper's liability. That he has been held to a very stringent, unyielding rule in this respect is manifest from an examination of the cases. The policy of the law has been to render him liable to the same extent as a common carrier of goods for hire, although there has been much doubt expressed as to this extraordinary responsibility in some cases. That the law requires of him extraordinary diligence in many respects—such as the care of his guests' baggage or other property which has been confided to his actual custody—there can be no doubt.

In the case of Lusk v. Belote, 22 Minn. 468, the common-law rule was adopted, and it was held that a landlord is responsible for the loss in his inn of the goods of a traveler who is his guest, except when such loss arises from the negligence of the guest, or the act of God or of the public enemy. There the guest's goods had been stolen from his room. It must be admitted that there has been a strong indisposition upon the part of courts to admit of any relaxation, just or unjust, of this rule, and it has been applied to all classes of public hotels. In Edwards on Bailments, § 462, it is stated as a reason for so stringent a rule that it was established in a period when theft and robbery were quite frequent, and innkeepers were thought to have many opportunities, and some temptations, to combine and connive with ruffians and others in the plunder of strangers, and that it has been continued in more modern times on the ground of public utility and convenience. In two cases the reason for the continuance of such a doctrine has been discussed with great vigor, and, under the circumstances there appearing, not improperly. Hulett v. Swift, 33 N. Y. 571, 88 Am. Dec. 405; Wilkins v. Earle, 44 N. Y. 172, 4 Am. Rep. 655. But the fact is that, in nearly all of the cases supporting the doctrine of absolute liability, unexplained thefts or losses of property were involved. No distinction was made between goods stolen, and goods destroyed by

[4] Parts of the opinion are omitted.

fire for which the landlord was in no manner responsible. That there might be a well-defined distinction does not seem to have been thought of.

But it must be admitted that the logical consequence of the strict rule is that no discrimination can be made between losses arising from thefts by other guests, or by servants, and those which result from such an entirely distinct cause as an accidental fire. However, in a number of states there has been a departure, and there has been adopted what is called the "rule of prima facie liability," and there are also decisions in England to the same effect. The doctrine is thus stated in 16 Am. & Eng. Enc. (2d Ed.) 536: "An innkeeper is prima facie liable for the loss of goods in his charge, but may discharge himself by showing that it happened by irresistible forces, though not the act of God or a public enemy, or by inevitable accident, or otherwise, without fault or negligence on his part;" a number of cases being cited in support thereof. Cutler v. Bonney, 30 Mich. 259, 18 Am. Rep. 127, and Merritt v. Claghorn, 23 Vt. 177, are very strong opinions in support of this rule, and in them the subject is discussed with much force and ability. Vance v. Throckmorton, 5 Bush (Ky.) 41, 96 Am. Dec. 327, is also a strong case in support of this view. See also cases cited in note to 16 Am. & Eng. Enc. (2d Ed.) 538.

Conceding that the rigorous rule before stated was just and necessary in its day, there never was any reason or foundation for it in cases where the loss was occasioned by an accidental fire, for which the landlord was not responsible, and when no negligence in connection therewith could be attributed to him. In the present case the fire originated upon premises not occupied by the defendant, and over which it had no control, although in the same building. From the record, it does not appear that the fire spread into that part of the building occupied by the defendant through its negligence; and, as before stated, the jury found, in answer to a special question, that the defendant was not negligent in any manner which contributed to the loss. With these conflicting rules in respect to the liability of the proprietor of a hotel or inn, we are justified in stating one to govern this case which is more just and sensible than the common-law doctrine, before referred to; but we are not quite willing to go to the extent that some of the courts have, and absolve the landlord from all liability in case of loss through thefts if he can show that they were unavoidable accidents, or were otherwise committed without fault or negligence on his part. We do not think that the landlord of a public hotel or inn should in every case of loss be held responsible to the same extent as a common carrier, and that under some circumstances they do not stand upon precisely the same footing. Public policy does not require it, nor is such a doctrine reasonable.

We therefore adopt what is known as the "rule of prima facie liability." All losses of property incurred by guests at a public hotel or inn by fire are prima facie due to the negligence of the proprietor, but

he may discharge or relieve himself from liability by showing that the loss happened by an irresistible force or unavoidable accident, such as a fire originating upon premises over which he had no control, without fault or negligence on his part. This doctrine does not infringe upon the common-law rule, which makes him responsible for all thefts from within his house, or unexplained, whether committed by guests, servants, or strangers, upon the general principle that an innkeeper guaranties the good behavior of all who may be under his roof—particularly his servants. The doctrine which we adopt, and which must control this case, is that an action cannot be maintained against a hotel or innkeeper by a guest to recover for property lost by fire which was occasioned by unavoidable casualty or superior force, and without any negligence on the part of the innkeeper or his servants. A landlord is not liable for a loss by fire happening through a cause beyond his control. He must be reasonably diligent under the circumstances known to exist after the fire breaks out, but it is not necessary that he should be extremely vigilant or cautious.

This rule is more in accordance with our views of justice, and will, we believe, commend itself to all. As before stated, the jury found that there was no negligence on the part of either plaintiff or defendant. If this cause had been properly submitted to the jury, and the jury had been instructed along the lines herein indicated, judgment could properly have been ordered for the defendant, but such was not the case. The trial court was in error not only as to the nature of the establishment kept by the defendant, but it also charged that the burden of proof was upon the plaintiff to show that the defendant was negligent. Such is not the rule, under the doctrine of prima facie liability, herein indorsed. * * *

Order reversed and new trial granted.[5]

[5] In the following cases it was held that an innkeeper is not an insurer: Palace Hotel Co. v. Medart, 87 Ohio St. 130, 100 N. E. 317, Ann. Cas. 1913E, 860 (1912), theft; Rockhill v. Congress Hotel Co., 237 Ill. 98, 86 N. E. 740, 22 L. R. A. (N. S.) 576 (1908), theft; Jalie v. Cardinal, 35 Wis. 118 (1874), theft; Baker v. Dessauer, 49 Ind. 28 (1874), theft; Case & Sons Cutlery Co. v. Canode (Tex. Civ. App.) 205 S. W. 350 (1918), theft; Howth v. Franklin, 20 Tex. 798, 73 Am. Dec. 218 (1858), theft; Howe Machine Co. v. Pease, 49 Vt. 477 (1877), injury; Laird v. Eichold, 10 Ind. 212, 71 Am. Dec. 323 (1858), injury; Cutler v. Bonney, 30 Mich. 259, 18 Am. Rep. 127 (1874), fire; Merritt v. Claghorn, 23 Vt. 177 (1851), fire.

Innkeeper not insurer for safety of Guest but must use reasonable care.

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reasonable care in N.C.

PULLMAN PALACE CAR CO. v. LOWE.

(Supreme Court of Nebraska, 1889. 28 Neb. 239, 44 N. W. 226, 6 L. R. A. 809, 26 Am. St. Rep. 325.)

MAXWELL, J.[6] This action was brought by the defendant in error against the plaintiff in error to recover the value of an overcoat which it is alleged was lost or stolen from a Pullman car in which the defendant in error was a passenger, on the Wabash Railway, from St. Louis to Council Bluffs. The court was requested to make special findings in the case, which it did, as follows:

"I find, as the facts proven on the trial of this case, that on the 18th day of April, 1887, the plaintiff took passage at St. Louis for Council Bluffs on the Wabash & St. Louis Railroad, and purchased a sleeping-car ticket from the defendant's agency at St. Louis, entitling him to a lower berth in the sleeping-car attached to the train which left St. Louis the evening of that day. That the train left St. Louis at 8:25 p. m. That a short time before the train left plaintiff entered the sleeping-car, and, upon doing so, delivered his coat to the porter of the car, who took it, and placed it in the vacant upper berth of the section of which plaintiff had secured the lower berth. That, shortly after the train started, the sleeping-car conductor passed through the car, and took up the ticket which had been purchased by the plaintiff, and gave him in exchange therefor another ticket, known as a 'berth-ticket,' which was in turn taken up by the porter soon afterwards, when he prepared the sleeping berth for occupation by the plaintiff. That the next morning, when the plaintiff arose, he took out from the upper berth a portion of his clothing, and then saw his overcoat there, where it had been placed the evening before by the porter, and where he (the plaintiff) left it. That plaintiff was last to leave his berth, and, with the exception of a gentleman and lady, the last of the passengers to leave the car for breakfast that morning. That plaintiff went out to breakfast at the regular breakfast station, which occupied him about 15 minutes, and that after breakfast he stood on the rear platform of the sleeper about ten minutes smoking a cigar, and then went to his berth in the car, the same having been made up, and then discovered that his overcoat was missing. That he immediately called the attention of the conductor of the sleeping-car to the fact, who, after first disclaiming any responsibility for the care of the coat, after a time caused a search to be made through the car, in company with the porter, for it, but without finding it, and the coat has been entirely lost to the plaintiff, and was of the value at the time of the loss of $50.

"I also find that the conductor left the car at the breakfast station, and went to his breakfast at the same time as the passengers, including the plaintiff, were at their breakfast, and that during the interval of about 25 minutes' absence of plaintiff from his berth in sleeping-car,

[6] Part of the opinion is omitted.

between the time when he left the car for breakfast and the time when he returned into it, his berth was made up, and his overcoat abstracted.

"Conclusion of Law. I find, as a conclusion of law, that defendant was guilty of negligence in not properly guarding and taking care of property of plaintiff during his necessary absence from defendant's car, and that plaintiff was not guilty of negligence in the matter. I therefore find that defendant is liable to the plaintiff for the value of the overcoat, to-wit, $50, with interest thereon from April 20, 1887, to the first day of this term, $3.75."

The rules of the company were also introduced in evidence in its behalf, but, as the defendant in error had no notice of them, they do not enter into the case.

The question presented, therefore, is the liability of a sleeping-car company for the loss of necessary wearing apparel of one who had paid the necessary sleeping-car charges, and was lawfully riding in one of its cars, which apparel had been placed in the care of the employés of the company. We find no case exactly in point, and as the question is a new one, not only in this state, but, to a great extent, in the other states of the nation, we are practically without precedents to aid us, and must adopt such rule as may seem just and equitable. It may be well to consider what the company undertakes to perform, and also what it does not undertake. The latter proposition will be considered first. It does not undertake to furnish the railway for its cars to run upon, nor the motive power to propel them, and hence is not entitled to compensation for the ordinary carriage of passengers. It does invite for hire all passengers holding first-class tickets to occupy its cars. In effect, it says to all such passengers: "We will furnish you safe, pleasant, commodious cars, with all possible facilities to prevent weariness and fatigue, with comfortable sleeping accommodations, and the necessary toilet facilities, if you pay the price demanded in addition to the ordinary fare." The nature of this undertaking is the question for consideration. On the one hand, it is claimed that, so far as the company holds itself out as performing the duties of an innkeeper, so far it should be charged with the strict liability of the same. On the other, it is sought to make the liability of the company merely that of a lodging-house keeper. * * *

It will be seen that the engagement of the sleeping-car company, so far as it goes, is exactly the same as the duties assumed by an innkeeper. A passenger, on entering a sleeping-car as a guest, because that is what he is in fact, necessarily must take his ordinary wearing apparel with him, and some articles for convenience, comfort, or necessity. The articles, when placed in the care of the company's employés, are infra hospitium, and are at the company's risk. The liability of innkeepers is imposed from considerations of public policy, as a means of protecting travelers against the negligence and dishonest practices of the innkeeper and his servants. Occasionally, no doubt, the innkeeper is subjected to losses without any fault on his part. This, how-

ever, is one of the burdens pertaining to the business, and the courts have deemed it necessary to enforce this wholesome rigor to insure the security of travelers. Besides, where loss is sustained, neither party being in fault, it must be borne by one of them, and it is no more unjust to place it on the innkeeper than on the guest. The liabilities incident to the business are to be considered in fixing the charges for the service. Mason v. Thompson, 9 Pick. 283.

Except in the matter of furnishing meals, there seems to be no essential difference between the accommodations at an inn and those on a sleeping-car, except that the latter are necessarily on a smaller scale than at an inn. In both cases the porter meets the traveler at the door, and takes whatever portable articles he may have with him. He waits upon him and the other passengers in the car so long as they remain therein. The traveler is not required to sit in his seat during the day, but may, if he so desires, go forward into the other cars of the train, and at stations may go out on the platform. A passenger in a sleeping-car need not avail himself of these privileges, but the fact that he may do so, and that many persons actually do avail themselves of the same, is well known to every traveler and to the company, and is a circumstance in the case. If it is said that it would be unjust to hold the company to the same liability as an innkeeper, because thieves might take one or more berths in a car, and at the first opportunity leave the car, carrying what articles they could steal before leaving, the same is true of an innkeeper. Thieves, in the garb of respectable people, may take rooms at an inn, and afterwards steal what they can, and escape, yet no one would contend that the innkeeper would not be responsible for the property so stolen, and this, whether it is stolen at night or in the daytime; yet in many of the large inns of this country, at least, there are numerous doors for ingress and egress, while in a sleeping-car there are but two. Were meals served on a sleeping-car, no one would contend that it differed from an inn in its accommodations. In this state meals are furnished on the through trains, and a passenger need not leave the train from the time of entering it until he reaches the end of the line. This, however, does not appear to have been the case on the railway in question. But the fact that meals are taken at designated stations on the line of the road, instead of on the train itself, does not change the character of the service rendered. So far as such services are rendered, they are the same in kind as those furnished by an innkeeper; and the security of travelers, and as a means of protecting them, not only against the negligence, but also against the dishonest practices, of the agents or employes of the sleeping-car company, requires that the company, so far as it renders service as an innkeeper, shall be subject to like liabilities and obligations.

The judgment is therefore affirmed. The other judges concur.[7]

[7] See interesting comment on the principal case, 3 Harv. Law Rev. 76. "Sleeping car companies are not insurers of the baggage, money, or other personal effects of a passenger, and courts have almost universally refused

WHICHER v. BOSTON & A. R. CO. et al.

(Supreme Judicial Court of Massachusetts, 1900. 176 Mass. 275, 57 N. E. 601, 79 Am. St. Rep. 314.)

Contract, with a count in tort, against the Boston and Albany Railroad Company and the Wagner Palace Car Company, for the loss of a travelling bag. Trial in the Superior Court, before Sheldon, J., who, at the close of the evidence, directed the jury to return a verdict for the Boston and Albany Railroad Company, and submitted the case to the jury as to the Wagner Palace Car Company.

The jury returned a verdict for the plaintiff against the last named defendant. The plaintiff alleged exceptions to the order directing a verdict in favor of the Boston and Albany Railroad Company; and the Wagner Palace Car Company alleged exceptions to the refusal of the court to direct a verdict for it. The facts appear in the opinion.

LATHROP, J.[8] There is no material dispute about the facts in this case. The plaintiff was a passenger on a sleeping car of the Wagner Palace Car Company, which was hauled with other cars from Albany to Boston by the Boston and Albany Railroad Company, leaving Albany at three o'clock in the afternoon, and arriving in Boston at nine in the evening. The Wagner Palace Car Company had no control of the car in so far as its movement over the roadbed was concerned, but retained the internal management thereof, and hired the porter and conductor for said car. Although there was some discrepancy in the

to impose upon them the absolute liability attaching to innkeepers and common carriers of goods. Carpenter v. New York, N. H. & H. R. R. Co., 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759, 21 Am. St. Rep. 644 (1891); Blum v. Southern Pullman Palace Car Co., 1 Flip. 500, Fed. Cas. No. 1,574 (1876); Pullman Palace Car Co. v. Smith, 73 Ill. 360, 24 Am. Rep. 258 (1874); Woodruff Sleeping & Parlor Coach Co. v. Diehl, 84 Ind. 474, 43 Am. Rep. 102 (1882); Lewis v. New York Sleeping-Car Co., 143 Mass. 273, 9 N. E. 615, 58 Am. Rep. 135 (1887); Root v. New York Central Sleeping-Car Co., 28 Mo. App. 199 (1887); Pullman Palace Car Co. v. Adams, 120 Ala. 581, 24 So. 921, 45 L. R. A. 767, 74 Am. St. Rep. 53 (1897); Belden v. Pullman Palace Car Co. (Tex. Civ. App.) 43 S. W. 22 (1897); Falls River & Machine Co. v. Pullman Palace Car Co., 6 Ohio Dec. 85 (1896); Pullman Palace Car Co. v. Gardner, 3 Penny. (Pa.) 78 (1883). Though the contrary doctrine, imposing this onerous common-law liability, has been enunciated (Pullman Palace Car Co. v. Lowe, 28 Neb. 239, 44 N. W. 226, 6 L. R. A. 809, 26 Am. St. Rep. 325 [1889]), yet we think that it fails to recognize that the introduction of this modern convenience of travel has created novel relations between carrier and passenger unknown to the common law, and which, were they disregarded for the purpose of enforcing that rigorous obligation, would oftentimes work both hardship and injustice." Per Leventritt, J., in Williams v. Webb, 27 Misc. Rep. 508, 510, 58 N. Y. S. 300 (1899).

For a collection of cases dealing with the question, What is a common inn? see note, 19 A. L. R. 517. For a collection of cases dealing with the liability of sleeping car companies, see note, 21 L. R. A. 289. In Nashville, C. & St. L. R. Co. v. Lille, 112 Tenn. 331, 78 S. W. 1055, 105 Am. St. Rep. 947 (1903), it was held that, although a railroad company was not responsible as an insurer for baggage taken into a day coach by a passenger, the railroad was liable as an insurer for baggage taken by the passenger into a sleeping car.

[8] Parts of the opinion are omitted.

evidence on the point whether the plaintiff carried his traveling bag to his section, or whether the porter carried it for him, we assume in favor of the plaintiff that the porter carried it for him. The bag was placed in the section nearest the front door of the car. The plaintiff remained by it for ten minutes, and then went into the smoking compartment of the car, which was at the rear end. He remained there half an hour, and then returned to his section, took something out of his bag, and returned to the smoking compartment and remained there until the train was approaching Boston. He then went to his section and his bag was gone. Search was made for it, but it could not be found. The train made three stops between Albany and Boston, namely, at Pittsfield, Springfield, and Worcester. The porter testified that he received one passenger at Pittsfield but none at the other two stations; that two passengers left the car at Springfield, neither of whom had a hand bag; that no passengers left at the other stations; and that, while the train was in motion, passengers walked back and forth from the other coaches. He further testified that there were three sleeping cars on the train, and it appeared that there were also ordinary cars.

The principles of law which govern these cases we consider to be well settled. In the first place neither a railroad company, a steamboat company, a sleeping car company, nor a palace car company owes to a passenger in regard to baggage the duty imposed by law on carriers or innkeepers, where the passenger keeps the baggage in his own custody and control. The only obligation imposed upon them is that of exercising reasonable care, and they are liable only when the loss is due to the negligence or misconduct of the servants or agents of the carrier. Railroads: Tower v. Utica & Schenectady Railroad, 7 Hill, 47, 42 Am. Dec. 36; Henderson v. Louisville & Nashville Railroad, 123 U. S. 61, 8 Sup. Ct. 60, 31 L. Ed. 92; Illinois Central Railroad v. Handy, 63 Miss. 609, 56 Am. Rep. 846; Steamboats and steamships: Clark v. Burns, 118 Mass. 275, 19 Am. Rep. 456; Steamboat Crystal Palace v. Vanderpool, 16 B. Mon. (Ky.) 302; Abbott v. Bradstreet, 55 Me. 530; American Steamship Co. v. Bryan, 83 Pa. 446; Gleason v. Goodrich Transportation Co., 32 Wis. 85, 14 Am. Rep. 716; The R. E. Lee, 2 Abb. (U. S.) 49, Fed. Cas. No. 11,690. In New York, however, a steamboat is regarded as a floating inn; but we believe this view is peculiar to that state. Adams v. New Jersey Steamboat Co., 151 N. Y. 163, 45 N. E. 369, 34 L. R. A. 682, 56 Am. St. Rep. 616, affirming several earlier cases in that state. Sleeping cars: Lewis v. New York Sleeping Car Co., 143 Mass. 267, 273, 9 N. E. 615, 58 Am. Rep. 135; Pullman Palace Car Co. v. Smith, 73 Ill. 360, 24 Am. Rep. 258; Woodruff Sleeping & Parlor Coach Co. v. Diehl, 84 Ind. 474, 43 Am. Rep. 102; Carpenter v. New York, New Haven & Hartford Railroad, 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759, 21 Am. St. Rep. 644; Welch v. Pullman Palace Car Co., 16 Abb. Pr. (N. S.) 352;

Root v. New York Central Sleeping-Car Co., 28 Mo. App. 199. It is obvious that a higher degree of care is required during the night, when a passenger is asleep, than is required in the daytime, when he can look after his own effects. See cases supra. Palace car day coaches: Whitney v. Pullman's Palace Car Co., 143 Mass. 243, 9 N. E. 619.

It is also well established that the mere loss of an article is not evidence of negligence on the part of the defendant. Something more must be shown. Carpenter v. New York, New Haven & Hartford Railroad, 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759, 21 Am. St. Rep. 644; Sessions v. New York, Lake Erie & Western Railroad, 78 Hun, 541, 29 N. Y. S. 628; Efron v. Wagner Palace Car Co., 59 Mo. App. 641; Stearn v. Pullman Car Co., 8 Ont. 171. In Lewis v. New York Sleeping Car Co., 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135, relied upon by the plaintiff, there were two larcenies the same night, and the porter, who was required to be on duty continuously for thirty-six hours, including two nights, was found asleep in the early morning. These facts were held to be evidence of negligence. * * *

Applying these principles to the facts of this case, we are of opinion that the judge rightly directed the jury to return a verdict for the railroad company. The plaintiff, instead of having his bag checked, chose to retain the control and custody of it. If it had been lost through any fault or negligence of the agents or servants of the railroad company, and the plaintiff had been in the exercise of due care, the case would be different. * * *

As to the liability of the last named defendant, we are of opinion that the judge erred in submitting the case to the jury. The bag was in no just sense delivered into the sole custody of this defendant. While its servant was carrying the bag into the car, it may have been in the sole custody of the defendant for the moment, but the plaintiff renewed his custody and control over it. Instead of looking out for it, he abandoned it for over five hours. It seems to us that the case falls clearly within that of Whitney v. Pullman's Palace Car Co., 143 Mass. 243, 9 N. E. 619, and is very similar in its facts to Efron v. Wagner Palace Car Co., 59 Mo. App. 641.

Nor do we see any evidence of a breach of any duty which the last named defendant owed the plaintiff, or what there was for the jury to pass upon. The car was equipped with its usual force of servants. It was running in the day time as a day car. There was no necessity for the care required in a sleeping car when passengers are asleep. All that was required was the exercise of reasonable care. As has been before stated, the mere loss of the bag was not evidence of a want of such care. There was no evidence of a breach of the defendant's rules by the porter, as in the case of Dawley v. Wagner Palace Car Co., 169 Mass. 315, 47 N. E. 1024. The porter in the case before us, for aught that appears, in every way performed his duty, and we see no ground for holding the last named defendant responsible.

The result is that the plaintiff's exceptions must be overruled; and the exceptions of the last named defendant be sustained.

So ordered.[9]

GOLDSTEIN v. PULLMAN CO.

(Court of Appeals, New York, 1917. 220 N. Y. 549, 116 N. E. 376, L. R. A. 1918B, 1060.)

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 25, 1914, which reversed a determination of the Appellate Term, affirming a judgment of the Municipal Court of the city of New York in favor of defendant and granted a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

POUND, J. This action is brought to recover the value of a satchel and contents consisting of ordinary clothing and a diamond scarf pin. Plaintiff having paid for transportation and Pullman accommodation, took the night train at about 10:30 o'clock at Cincinnati for Wheeling. The porter escorted him into the sleeping car, carrying the satchel and depositing it at the proper berth, which had been made up. Plaintiff before going to bed went into the wash room, taking his satchel with him, in order to prepare some changes in his linen so that he might be ready to leave the train when he reached his destination, at 5:30 o'clock the next morning. He there put his diamond scarf pin, eyeglasses, collar and tie into the satchel, took it back to the berth, left it in the aisle as the porter had left it and went to bed at about eleven o'clock. In the morning when he arose the satchel was gone. He notified the porter who aroused the sleeping Pullman conductor. They searched for it in vain. Wherefore he brought suit.

At the trial in the Municipal Court of the city of New York plaintiff gave proof of the above facts and rested his case, whereupon the defendant gave no evidence and moved for the direction of a verdict.

[9] Although a sleeping car company is not an insurer of the passengers' effects, it has been held that it is under a duty to use care to protect its passengers from loss by theft, and therefore is responsible for a theft committed by an employee, Pullman's Palace Car Co. v. Martin, 95 Ga. 314, 22 S. E. 700, 29 L. R. A. 498 (1895); Pullman Palace Car Co. v. Gavin, 93 Tenn. 53, 23 S. W. 70, 21 L. R. A. 298, 42 Am. St. Rep. 902 (1893); notwithstanding the contributory negligence of the passenger, Morrow v. Pullman Palace Car Co., 98 Mo. App. 351, 73 S. W. 281 (1903). Contra, Levins v. New York, N. H. & H. R. Co., 183 Mass. 175, 66 N. E. 803, 97 Am. St. Rep. 434 (1903). For losses caused by the theft of a person other than an employee, a sleeping car company is responsible only if its negligence or the negligence of its employees contributed to the loss. See cases in note, 21 L. R. A. 289. As to whether a sleeping car company may be charged with liability for the loss of articles other than baggage, see note, 9 L. R. A. (N. S.) 409. As to the liability of a railroad company for loss or injury due to the negligence or otherwise wrongful conduct of the sleeping car company's employees, see 30 Harv. Law Rev. 81; and cases collected in note, 21 L. R. A. 289.

The court dismissed the complaint for failure of proof. The Appellate Term of the Supreme Court for the first judicial department affirmed the judgment of dismissal. The Appellate Division reversed the determination of the Appellate Term and the judgment of the Municipal Court and ordered a new trial. Defendant appeals to this court by permission of the Appellate Division and with the proper stipulation for judgment absolute in the case of affirmance.

The rule of law governing the liability of sleeping car companies for the loss of baggage, money or other personal effects of a passenger is not in dispute. The ground thereof is negligence. They are not insurers, held as such, without proof of negligence, to the strict accountability of innkeepers and common carriers of goods under the ancient rigid rule of the common law. Carpenter v. N. Y., N. H. & H. R. R. Co., 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759, 21 Am. St. Rep. 644; Adams v. New Jersey Steamboat Co., 151 N. Y. 163, 45 N. E. 369, 34 L. R. A. 682, 56 Am. St. Rep. 616. The ground of responsibility is the same as to all passengers, whether they use sleeping berths or seats in an ordinary coach, though the degree of care required is different. Adams Case, supra, 151 N. Y. 170. The result of the controversy thus depends upon plaintiff's success or failure in making out a prima facie case of negligence. "The mere proof of the loss of money by a passenger while occupying a berth does not make out a prima facie case, and to sustain a recovery some evidence of negligence on the part of the defendant must be given" (Follett, C. J., in Carpenter Case, supra, 124 N. Y. 57); "more must be shown than mere loss" (Lewis v. N. Y. Sleeping Car Co., 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135; Whicher v. Boston & Albany R. R. Co., 176 Mass. 278, 57 N. E. 601, 79 Am. St. Rep. 314). The defendant urges that if the facts proved herein are held to constitute negligence on the part of the defendant, without other evidence explaining the disappearance of the satchel, the difference in the liability of innkeepers and sleeping car companies is obliterated and the latter are in effect held as insurers against theft. Springer v. Pullman Co., 234 Pa. 172, 83 A. 98.

The rule is not so strictly applied against the passenger and in favor of the sleeping car company. What is said as to mere loss as evidence of negligence in the two New York cases above cited must not be read too literally apart from the context. Plaintiff in the Carpenter Case proved only the familiar circumstances of the arrangement of a sleeping car, the stoppings of the train to take on and let off passengers and the varied duties of the solitary porter. If these facts are evidence of negligence, common knowledge and experience teach that negligence is so usual that proof is unnecessary to make the court aware of it. Facts of universal notoriety need not be proved. Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200. The court then said that the evidence was sufficient to put the defendant to its proof and, in the absence of any explanation, to make a question for the jury, because the company

was "bound to have an employee charged with the duty of carefully and continually watching the interior of the car while berths are occupied by sleepers." In the Adams Case the learned judge wrote to establish the strict liability of passenger steamboat companies and to emphasize the distinction between such companies and the sleeping car companies. He concerned himself not with the rules of evidence but with the rules of substantive law.

The tendency in the more modern decisions in cases like this is to put the company on its defense when the loss is inconsistent with the proper care and the facts are in its possession, because "the thing itself speaks." Cullen, J., in Griffen v. Manice, 166 N. Y. 188, 193, 194, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630, writing of res ipsa loquitur, says that negligence may be established by proof of circumstances in all cases; that "it is not the injury, but the manner and circumstances of the injury, that justify * * * the inference of negligence;" that "where the defendant has knowledge of a fact but slight evidence is requisite to shift on him the burden of explanation"; that, therefore, in proper cases the jury may be permitted to infer negligence from the accident and the attending circumstances in the absence of an explanation, and that these rules are general, not confined to any particular class of cases, but applicable wherever issues of fact are to be determined. The surrounding circumstances here suggest that a loss ordinarily would not happen if care commensurate to the duty of active watchfulness had been exercised, and the burden should shift to the defendant to show what degree of care and diligence was actually exercised.

Shifting the burden of explanation does not change the rule of liability. "Proof of the non-delivery of property by a bailee upon demand, unexplained, makes out a prima facie case of negligence against such bailee in the care and custody of the thing bailed, and, in the absence of any evidence on his part, excusing such non-delivery, presents a question of fact as to the negligence of the bailee for the consideration of the jury" (Canfield v. B. & O. R. R. Co., 93 N. Y. 532, 538, 45 Am. Rep. 268; Hasbrouck v. N. Y. C. & H. R. R. R., 202 N. Y. 363, 95 N. E. 808, 35 L. R. A. [N. S.] 537, Ann. Cas. 1912D, 1150), but the burden remains with the plaintiff of persuading the jury that his contention is right (Heinemann v. Heard, 62 N. Y. 448; Farmers L. & T. Co. v. Siefke, 144 N. Y. 354, 39 N. E. 358). Where the liability is that of an insurer, proof of loss proves the case as a matter of judicial ruling and there is no risk of non-persuasion. Adams Case, supra.

The sleeping car company contends that it is not a bailee for hire unless it takes physical possession of the passenger's hand baggage and personal effects, as in the Hasbrouck Case, supra. We fully agree with the learned court below that the question of possession at night should rest not so much upon the customary and somewhat casual handling

of the baggage by the porter and his promises or assurances as upon the general obligations of the defendant. The possession of the company was not exclusive. It was charged with the duty of keeping an eye on the baggage rather than the duty of taking and keeping it for the owner to be returned to him when called for. Its duty was analogous to that of a servant and on historical grounds the servant is said not to have possession of the master's goods (Holmes, The Common Law, 277), while the liability of the bailee is based on possession. But it is unnecessary to make fine distinctions to determine the exact status of the sleeping car company. It is quasi bailee for hire and quasi watchman. In either capacity its duty at night when the passengers are at rest is one of vigilance so that the passenger may not lose his property through its inattention. When that duty is faithfully discharged, baggage does not as a rule disappear. The porter knows whether he "carefully and continually watched the interior of the car when berths were occupied by sleepers" and ought to be able to know where the plaintiff's baggage went between eleven o'clock at night and five o'clock the next morning, or to explain his ignorance. Kates v. Pullman's Palace Car Co., 95 Ga. 810, 23 S. E. 186. This is a fair rule. The tradition that juries invariably find against a corporation defendant if given the opportunity to decide the question of fact is obsolescent if not obsolete.

The order of the Appellate Division should be affirmed, with costs in all courts, and judgment absolute directed for plaintiff on the stipulation.

CHASE, COLLIN, HOGAN, CARDOZO and ANDREWS, JJ., concur.

CRANE, J., not sitting.

Order affirmed.[10]

[10] In the earlier New York case of Carpenter v. New York, N. H. & H. R. R. Co., 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759, 21 Am. St. Rep. 644 (1891), the court said: "The mere proof of the loss of money by a passenger while occupying a berth does not make out a prima facie case, and to sustain a recovery some evidence of negligence on the part of the defendant must be given." But in Pullman Company v. Schaffner, 126 Ga. 609, 55 S. E. 933, 9 L. R. A. (N. S.) 407 (1906), the court declared: "Where a loss to a passenger occurs while he is asleep in a sleeping car, and this fact is established, the burden of proof is shifted to the defendant company, and it is bound to show that it exercised reasonable diligence to prevent the loss. Kates v. Pullman's Palace Car Co., 95 Ga. 814, 23 S. E. 187 (1895). This is a rule of evidence which, as was said in the case cited, 'rests upon the general and well-recognized principle that, where it is peculiarly within the power of one of the parties to a case to produce evidence, he is under an obligation to do so.'" In Robbins v. Pullman Co. (Sup.) 164 N. Y. S. 111 (1917), it was held that the Pullman Company must exercise the same care to protect passengers sleeping during the day as it is required to exercise in behalf of those asleep at night.

FOWLER v. WESTERN UNION TEL. CO.

(Supreme Judicial Court of Maine, 1888. 80 Me. 381, 15 A. 29, 6 Am. St. Rep. 211.)

FOSTER, J.[11] This case comes up on report. It appears that on the evening of August 20, 1883, the plaintiffs, whose business is that of pork-packing, delivered to the defendants' agent at Portland, for transmission and delivery, the following night message: "Portland, August 20, 1883. To H. F. Googins, Union Stock-Yards, Ill.: Ship one car hogs to-morrow. Thompson, Fowler & Co." The message never having been delivered by the defendants, this action is sought to recover damages alleged to have been sustained in consequence. In defense of the action the defendant introduced evidence, and established the following facts: At the Union Stock-Yards, which are about six miles from Chicago, the defendant company had only a day office,—open from half-past 6 in the morning till 10 o'clock in the evening. Night messages directed to the stock-yards, received at the Chicago office during the night, were necessarily kept in that office until after the opening of the office at the stock-yards on the following morning. This dispatch was received at the Chicago office during the night of August 20–21, and the copy was hung upon what was called the "Stock-Yard's Hook" in the operating room, awaiting the opening of the office at that place on the morning of the 21st. About 30 minutes past 6 that morning, and immediately prior to the opening of the stock-yards office, a fire suddenly broke out in the operating room of the Chicago office, and spread with such rapidity that nothing could be saved from the room, and this copy, together with everything in the room, was destroyed. The fire was first discovered in this room upon the back of the "switch-board," where it is covered with numerous wires necessarily running very close to each other, and was caused by the crossing of several wires charged with large batteries. This crossing resulted from atmospheric conditions, the moisture accumulating on the back of the switch-board forming a partial connection between the wires, and acting as a partial conductor, thereby causing the electric current to leave its proper course, with the result as above stated. That such accidents are exceedingly rare is not disputed, and that there are no improvements known to the art or anywhere in use by which the possibility of such an occurrence can be prevented. In consequence of this fire it became impossible for the defendant to deliver the plaintiff's message. * * *

To ascertain the duties and liabilities of the defendant company we must look to the nature of the employment, and, except so far as it has limited its ordinary obligations by any special stipulation which may be held to be reasonable, be governed by the general and well-established principles of law pertaining to such employment. It is

[11] Parts of the opinion are omitted.

now perfectly well settled by the great weight of judicial authority that although telegraph companies are engaged in what may appropriately be termed a "public employment," and are therefore bound to transmit, for all persons, messages presented to them for that purpose, they are not common carriers in the strict sense of the term. To be sure, they are engaged in a business almost, if not quite, as important to the public as that of carriers. But while the analogy between the common carrier of goods and common carrier of messages is very strong, nevertheless their responsibility differs in a manner corresponding to the difference in the nature of the services they perform. The common carrier of goods, in the absence of any special contract or regulation limiting its general liability, becomes an insurer of property intrusted to it for carriage; whereas, in the absence of any contract or regulation modifying the liability of telegraph companies, they do not insure absolutely the safe and accurate transmission of messages as against all contingencies, but they are bound to transmit them with care and diligence adequate to the business which they undertake, and for any failure in such care and diligence they become responsible. This appears to be the doctrine now settled by the courts, and is founded upon reason. The following decisions in this country are authority, and may properly be cited in this connection: Bartlett v. Telegraph Co., 62 Me. 220, 221; Ayer v. Same, 79 Me. 493, 10 A. 495; Ellis v. Telegraph Co., 13 Allen, 232—which hold them to the use of due and reasonable care, and liable for the consequences of their negligence in the conduct of their business to those sustaining loss or damage thereby; Breese v. Telegraph Co., 48 N. Y. 141; Leonard v. Telegraph Co., 41 N. Y. 571; Baldwin v. Telegraph Co., 45 N. Y. 751; De Rutte v. Telegraph Co., 1 Daly, 547; Telegraph Co. v. Dryburg, 35 Pa. 298; Telegraph Co. v. Graham, 1 Colo. 230; Sweatland v. Telegraph Co., 27 Iowa, 433; Telegraph Co. v. Carew, 15 Mich. 525; Telegraph Co. v. Neill, 57 Tex. 283; Telegraph Co. v. Hobson, 15 Grat. 122; Pinckney v. Telegraph Co., 19 S. C. 71; Smithson v. Telegraph Co., 29 Md. 167; Telegraph Co. v. Davis, 41 Ark. 79.

A more stringent rule, however, was at first suggested in two early cases. The earliest one in which the question of the liability of telegraph companies arose was that of MacAndrew v. Telegraph Co., 17 C. B. (84 E. C. L.) 3, decided in England in 1855. This case, by implication, can only be said to be authority for holding them to the liability of insurers. It was soon followed in this country by the case of Parks v. Telegraph Co., 13 Cal. 422, decided in 1859—the only case to be found in which telegraph companies have been expressly held to be common carriers, and subject to the same severe rule of responsibility. With this exception, all the American courts which have expressed any decided opinion upon this question have concurred in the doctrine above stated. The degree of care which these companies are bound to use is to be measured with reference to the kind of business in which they are engaged. As compared with many other kinds of

business, the care required of them might be called "great care." While meaning really the same, it is variously stated by different courts in the decisions to which we have referred—"due and reasonable care;" "ordinary care and vigilance;" "reasonable and proper care;" "reasonable degree of care and diligence;" "care and diligence adequate to the business which they undertake;" "with skill, with care, and with attention;" "a high degree of responsibility." These are but the varied forms of expressing the requirement of what is known in law as ordinary care, as applied to an employment of this nature—an employment which is not that of an ordinary bailee. The public, as a general rule, have no choice in the selection of the company. They have none in the selection of its servants or agents. They have no control over the agencies or instrumentalities used in conducting the business of the company. The public must take the agencies which the companies furnish, and they have no supervision over its management or methods of performing the service which it holds itself out as willing and ready to perform. And while we do not hold that these companies are common carriers, and subject to the same severe rule of responsibility, we think that those who engage in the business of thus serving the public by transmitting messages should be held to a high degree of diligence, skill, and care, and should be responsible for any negligence or unfaithfulness in the performance of their duties. A telegraph company, which holds itself out to the public as ready to transmit all messages delivered to it, is bound to have suitable instruments and competent servants, and to see that the service is rendered with that degree of care and skill which the peculiar nature of the undertaking requires. We do not understand, however, that this duty would impose a liability upon the company for want of skill or knowledge not reasonably attainable in the art; nor for errors or imperfections which arise from causes not within its control, or which are not capable of being guarded against. White v. Telegraph Co., 14 Fed. 710; Sweatland v. Telegraph Co., 27 Iowa, 433; Leonard v. Telegraph Co., 41 N. Y. 572; Ellis v. Telegraph Co., 13 Allen, 233; Bartlett v. Telegraph Co., 62 Me. 221. * * *

Taking the facts as proved in the case now under consideration, and applying the principles of law to them, are the plaintiffs entitled to recover? They make out a prima facie case when they show that the message which the company undertook to send was not delivered and that damage has resulted. It is not necessary that they show affirmatively that the failure to deliver happened through any omission of duty by the company or its officers, or from some defect in the instrumentalities employed by the company. The failure to deliver being shown, the legal presumption is that it was caused by some one or other of these causes, or of all combined. It then becomes incumbent on the defendant, if it would relieve itself from the consequences of such presumption, to overcome that presumption by showing that in the attempted transmission and delivery of the message it exercised all proper

care and diligence commensurate with the undertaking, and that the failure is not attributable to any fault or negligence on its part, or that of any of its employes. Bartlett v. Telegraph Co., 62 Me. 221; Baldwin v. Telegraph Co., 45 N. Y. 744; Telegraph Co. v. Graham, 1 Colo. 230; Shear & R. Neg. § 559; Telegraph Co. v. Wenger, 55 Pa. 262. * * * While it is true that the message in this case was not transmitted to its destination, the defendant here has assumed the burden of proof, after the prima facie case of the plaintiffs, and by evidence, which is uncontradicted, has shown that the failure was caused by agencies over which it had no control, and for which it was not responsible. The dispatch, when received at the Chicago office during the night, was taken from the wire, and the relay copy was hung upon the stock-yards' hook, to be forwarded the following morning when the office at that place should open. This is all that could be done that night. * * *

The fire does not appear to have originated through any fault or negligence of the company or its employés, or through any imperfections in the chemicals, metals, machinery, or implements used by it, which, by any skill or knowledge reasonably attainable in the present state of telegraphy, could be guarded against. The facts proved bring the case within the decisions to which we have referred in another part of this opinion, and upon these facts and the law it is the opinion of the court that the plaintiff cannot prevail. Judgment for defendant.

PETERS, C. J., and WALTON, DANFORTH, VIRGIN, and LIBBEY, JJ., concurred.[12]

[12] Accord: Weld v. Postal Telegraph-Cable Co., 199 N. Y. 88, 92 N. E. 415 (1910); Primrose v. Western Union Tel. Co., 154 U. S. 1, 14 S. Ct. 1098, 38 L. Ed. 883 (1893); Western Union Tel. Co. v. Short, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744 (1890); Gilles v. Western Union Telegraph Co., 61 Vt. 461, 17 A. 736, 4 L. R. A. 611, 15 Am. St. Rep. 917 (1889); Western Union Tel. Co. v. Edsall, 63 Tex. 668 (1885); Pinckney v. Western Union Tel. Co., 19 S. C. 71, 45 Am. Rep. 765 (1882); Western Union Tel. Co. v. Fontaine, 58 Ga. 433 (1877); Grinnell v. Western Union Tel. Co., 113 Mass. 299, 18 Am. Rep. 485 (1873); Western Union Tel. Co. v. Carew, 15 Mich. 525, 532 (1867); Birney v. New York & Wash. Printing Tel. Co., 18 Md. 341, 81 Am. Dec. 607 (1862). In Parks v. Alta California Tel. Co., 13 Cal. 423, 73 Am. Dec. 589 (1859), it was said that a telegraph company is liable as a common carrier. But this decision no longer represents the law in California. Hart v. Western Union Tel. Co., 66 Cal. 579, 6 P. 637, 56 Am. Rep. 119 (1885). See note, Telephone and Telegraph Companies as Common Carriers, 15 Harv. Law Rev. 309. While the decisions agree that a telegraph company is not an insurer, many courts have held that proof of a mistake or delay in transmission makes out a prima facie case of negligence. See Western Union Tel. Co. v. Scircle, 103 Ind. 227, 232, 2 N. E. 604 (1885); Tyler, Ullman & Co. v. Western Union Tel. Co., 60 Ill. 421, 14 Am. Rep. 38 (1871); Rittenhouse v. Independence Line of Telegraph, 44 N. Y. 263, 4 Am. Rep. 673 (1870).

HOBOKEN LAND & IMPROVEMENT CO. v. UNITED ELECTRIC CO. OF NEW JERSEY.

(Supreme Court of New Jersey, 1904. 71 N. J. Law, 430, 58 A. 1082.)

DIXON, J. In May, 1900, Verdon applied to the North Hudson Light, Heat & Power Company to install an electric meter in the saloon of which he was tenant on the corner of Fourteenth and Hudson streets, in Hoboken, for the purpose of furnishing him with light. The company contracted with an independent and competent electrician to install the meter, and he did so on June 9, 1900. The company began at once to supply the electric current, and on July 19, 1900, a fire started in the meter box and damaged the saloon, the building in which it was located, and several adjoining buildings. An examination made afterwards disclosed a probability that the electrician had failed to drive home a small screw to bring the feed wire of the electric current into perfect and steady contact with the binding post of the meter, and that this imperfect connection had permitted the current to produce a spark, which finally caused the conflagration. The present defendant is the successor and representative of the North Hudson Company. This suit is brought by the owner of the damaged buildings, and the claim for compensation rests upon a charge of negligence against the electric company for transmitting its current through the defective apparatus.

At the trial in the Hudson circuit the presiding justice instructed the jury that three propositions must be established in order to warrant a recovery by the plaintiff: First, that the electrician failed to make a proper connection between the feed wire and the binding post; second, that the fire resulted from the improper connection; and, third, that between the time when the meter was installed and the time of the fire the company should have discovered and remedied the defect. Under these instructions a verdict for the plaintiff was rendered the propriety of which is now in question.

Respecting the first two propositions submitted to the jury there can be no dispute. Evidently they were essential to the plaintiff's claim, and there was testimony supporting the finding of the jury regarding them. But the third proposition is, on the evidence, open to debate. There was at the trial no evidence tending to show that during the 40 days which elapsed between the installation of the meter and the fire anything occurred to suggest a defect in the apparatus, or that in so short an interval the apparatus, if properly installed, was likely to become defective, or that there was any usage of electric light companies to inspect the work of independent electricians before transmitting their current through it. Under these circumstances negligence on the part of the company could be predicated only on the general hypothesis that the company was not justified in assuming that the independent contractor had properly done his work, but was charged with a direct

responsibility regarding the exercise of due care and skill in the preparation of the apparatus for use.

The question before us is, therefore, was it lawful to permit the jury to base a verdict on that hypothesis? An electric current sufficiently powerful to furnish light is so dangerous to persons and property that, if introduced into a building, and not controlled, it would ordinarily be deemed in law a nuisance. As such it would render the party introducing it responsible for all damage done by it, without regard to the degree of care and skill exercised, and even though the fault of an independent contractor had permitted the defect through which the damage resulted. Cuff v. Newark & N. Y. R. R. Co., 35 N. J. Law, 17, 10 Am. Rep. 205; Id., 35 N. J. Law, 574. But in the case of a corporation organized under our statutes (P. L. 1896, pp. 277, 322) to supply electricity for light, heat, and power this responsibility must be modified, for the introduction of the current is thus legalized, and hence cannot be regarded as per se a nuisance. Beseman v. Pennsylvania R. R. Co., 50 N. J. Law, 235, 13 A. 164; Id., 52 N. J. Law, 221, 20 A. 169. This modification, however, should go no further than is necessary to bring the rule of responsibility into harmony with the legislation. Salmon v. Delaware, L. & W. R. R. Co., 38 N. J. Law, 5, 20 Am. Rep. 356. There is nothing in the statutes which need relieve these companies from responsibility for the exercise of due care and skill in the introduction of their current, and since, outside of the statutes, that responsibility would rest directly upon the party using such an agency, notwithstanding the intervention of an independent contractor, there appears no reason why it should not still be considered an inevitable obligation. It is a general doctrine of the law that, where there is a direct personal obligation imposed upon a party, that obligation cannot be evaded by employing some one else to fulfill it. Actual fulfillment is necessary. Hole v. S. S. Railway Co., 6 H. & N. 488; Marvin Safe Co. v. Ward, 46 N. J. Law, 19, 25; Khron v. Brock, 144 Mass. 516, 11 N. E. 748; Steamship Company v. Ingebregsten, 57 N. J. Law, 400, 31 A. 619.

These considerations lead to the conclusion that the electric company was bound to exercise due care and skill either in installing the apparatus by its own agents or in examining to see that it had been properly installed by others. The New York Court of Appeals enforced this doctrine in Schmeer v. Gas Light Co., 147 N. Y. 529, 42 N. E. 202, 30 L. R. A. 653, where it was held that the defendant was required, before it permitted gas to be turned into pipes newly installed by other parties, to exercise reasonable care and skill in inspecting the pipes so as to ascertain whether they were in proper condition for use. The application of that doctrine to the case in hand sustains the verdict, for the evidence warranted the jury in finding that reasonable inspection of the apparatus, as it was left by the electrician, would have discovered the loose wire in the binding post, and reasonable care and skill would have remedied the defect at once.

The rule for a new trial should be discharged.

CANAVAN v. CITY OF MECHANICVILLE.

(Court of Appeals of New York, 1920. 229 N. Y. 473, 128 N. E. 882, 13 A. L. R. 1123.)

Action by Arthur H. Canavan against City of Mechanicville. From order of the Appellate Division (190 App. Div. 252, 180 N. Y. S. 62), reversing an order of the Special Term (108 Misc. Rep. 579, 177 N. Y. S. 808), overruling a demurrer of defendant to the second cause of action and sustaining the demurrer, plaintiff, with permission of the Appellate Division, appeals; the certified question being: "Do the allegations set forth in that portion of the plaintiff's complaint as a separate and second cause of action state facts sufficient to constitute a cause of action?"

COLLIN, J.[13] The facts constituting the alleged second cause of action in effect are: The defendant, a municipal corporation, authorized by its charter, provided, maintained, and controlled sources of water supply to furnish necessary water for drinking and domestic uses to the inhabitants of the defendant and means for conducting water from the sources through the streets and to the dwelling houses and other places where it was delivered and sold and consumed by the inhabitants of the defendant. The defendant furnished and supplied, for a compensation, water for drinking and domestic uses to the premises occupied by the plaintiff and his family, consisting of five children, which water, to the knowledge of the defendant, was customarily regularly used and drunk by them. The water contained the germs of typhoid fever, through the drinking of which the plaintiff and his children became ill with that disease, and plaintiff sustained the damages demanded. "In thus furnishing and selling such water to its inhabitants and citizens for domestic consumption and to the plaintiff's household for like use the defendant warranted the same to be pure, wholesome, and fit and proper for human consumption and for drinking purposes and free from poison and disease-breeding germs." The plaintiff relied on the warranty, and had no means of knowing and did not know the condition of the water. The warranty was broken by the defendant. The respective counsel have the identic understanding, and, correctly under the allegations, that the alleged warranty was not express, and was created, through necessary implication, in furnishing and selling the water for domestic consumption. The question we are to determine is whether or not a warranty was so created.

While the business of maintaining a municipal water system and supplying water to private consumers at fixed compensation is public in its nature and impressed with a public interest, it is not an exercise of governmental or police power. A municipal corporation in aggregating and supplying water for the extinguishment of fires discharges a governmental function. In operating a waterworks system, distribut-

[13] The dissenting opinion of Elkus, J., is omitted.

ing water for a price to its inhabitants, it acts in its private or proprietary capacity, in which it is governed by the same rules that apply to a private corporation so acting. Oakes Manufacturing Co. v. City of New York, 206 N. Y. 221, 99 N. E. 540, 42 L. R. A. (N. S.) 286; Springfield Fire & Marine Ins. Co. v. Village of Keeseville, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660, 51 Am. St. Rep. 667; Lefrois v. County of Monroe, 162 N. Y. 563, 566, 567, 57 N. E. 185, 50 L. R. A. 206. The conclusions of the text-writers and the decisions of the courts, apart from those in this case, have been uniformly that a private water company or a municipality is not an insurer nor liable as a guarantor of the quality of the water it furnishes to its customers in the customary means of pipes and faucets, and cannot be held liable for injuries caused by impure water furnished by it unless it knew or ought to have known of the impurity. Its duty is that of exercising reasonable and commensurate care and diligence in providing an adequate supply of wholesome water at all times. 1 Waters & Water Courses (Farnham) p. 829; 3 Municipal Corporations (Dillon, 5th Ed.) § 1316; Hayes v. Torrington Water Co., 88 Conn. 609, 92 A. 406; Hamilton v. Madison Water Co., 116 Me. 157, 100 A. 659, Ann. Cas. 1918D, 853; Green v. Ashland Water Co., 101 Wis. 258, 77 N. W. 722, 43 L. R. A. 117, 70 Am. St. Rep. 911; Jones v. Mount Holly Water Co., 87 N. J. Law, 106, 93 A. 860; Danaher v. City of Brooklyn, 119 N. Y. 241, 23 N. E. 745, 7 L. R. A. 592; Buckingham v. Water Co., 142 Pa. 221, 21 A. 824; Brymer v. Butler Water Co., 172 Pa. 489, 33 A. 707; Milnes v. Mayor, etc., L. R. 10 Q. B. Div. 124; L. R. 12 Q. B. Div. 443; 11 App. Cases, 511; Stein v. State, 37 Ala. 123.

These conclusions and decisions would guide and govern in the instant case without further discussion were it not for our decision in Rinaldi v. Mohican Co., 225 N. Y. 70, 121 N. E. 471. We there adjudged that as a rule of common law a retail dealer of articles of food in selling for immediate consumption impliedly warrants that the same is fit for human consumption. We further adjudged, however, that the statute (Personal Property Law [Consol. Laws, c. 41] § 96), rather than the common law, applied to such selling, and the mere purchase by a customer does by implication make known to the vendor the purpose for which the article is required and show reliance on the vendor's skill or judgment unless the vendor has not the opportunity to examine the article sold or the customer by inspection and selection affirmatively relied upon his own skill or judgment. The case here is not within the section 96 or the Rinaldi decision. The section in so far as applicable, reads:

"Subject to the provisions of this article and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows: 1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on

the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose. 2. * * * 3. * * * 4. * * * 5. * * * 6. * * *"

The statute contains the definition: "'Goods' include all chattels personal other than things in action and money. The term includes implements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale." Section 156, subd. 1.

The furnishing of water, through a system of waterworks, by a water corporation, either private or municipal, to private consumers, at a fixed compensation, is a sale of goods within the meaning of the statute. That the furnishing is without profit to the corporation is weightless. The corporation segregates the water supplied from its sources in reservoirs or pipes of its own and delivers it to those who demand and receive it at a fixed compensation or price. It is a sale of goods as fully as if the water were collected and delivered in bottles for a price. Mayor, etc., of Jersey City v. Town of Harrison, 71 N. J. Law, 69, 58 A. 100, affirmed 72 N. J. Law, 185, 62 A. 765, 65 A. 507; Oakes Mfg. Co. v. City of New York, 206 N. Y. 221, 228, 99 N. E. 540, 42 L. R. A. (N. S.) 286.

A taker of water from the pipes of a system of waterworks of a water corporation or a municipality does not by the mere taking make known, either expressly or by implication, to the seller of the water the particular purpose for which the water is required, and cause it to appear that he relies as to the wholesomeness of the water on the seller's skill or judgment. Under the allegations before us the alleged warranty springs solely from the furnishing and taking of the water. The decisions we have cited hold, in effect, that a water company cannot, has not been understood to, and is not understood to, supply wholesome water at all times under all conditions. It is a matter of common knowledge that human skill or judgment cannot unceasingly and under all conditions and circumstances see to it that no unwholesome water is furnished. It is also a matter of common knowledge that a company or municipality does not know that any particular use is to be made of any particular portion taken. Of the water taken the part not used for drinking or human consumption is much the greater. The ordinary conditions which uphold the liability of the marketman or grocer do not exist, and are commonly known not to exist, as to a water company. The former from time to time selects the meats or foodstuffs which he will offer as food. He may reject or accept. Accepting, he takes the articles into his actual possession and care, makes them inaccessible to any one other than himself and his employés or to anything objectionable or harmful. He sells them for food, as he is bound to presume in the absence of contrary information, and in selling has full opportunity to inspect and use his skill and judgment.

We are speaking of the ordinary conditions under which the seller may, in his skill and judgment, select the articles he sells, has the exclusive possession and care of them before selling, knows he is selling for food, and in selling has reasonable and adequate opportunity for inspection. A corporation furnishing a community with water for the general and ordinary purposes must get the water from sources which are practically available. It frequently is true that the corporation is organized by a few men of the community, not so much for the sake of profit as for the comfort and welfare of the people. The sources of supply are necessarily restricted; they must be the adjacent river, streams, pond, or lake. Not infrequently the sole available source is, and is known by the people to be, unceasingly unwholesome, and the water from it can be made safe for human consumption only through mechanical or chemical processes. The sources of supply necessarily drain extended watersheds, the lands of which are used for many and various purposes. Frequently, even generally, it is physically impossible to patrol and protect them from possible contamination were it financially practicable. The waters are never in the actual possession and care of the seller. Whether subjected to filtration or purification or not, they are aggregated in outdoor reservoirs. It is not possible for them to be taken into the physical possession of the corporation. They cannot while in the reservoirs be made inaccessible to the smaller or burrowing animals, reptiles, vermin, or to malicious or irresponsible persons. The possibilities of contamination are many and varied. There is no conceivable method in which the corporation can absolutely secure and maintain to the waters wholesomeness and freedom from pollution. There is no method of analysis or inspection by which the corporation can with certainty furnish and know that it is furnishing no other than wholesome water.

It is conceivable that between the time water is withdrawn from the distributing reservoir as a sample for testing through analysis and the termination of the analysis the water in the reservoir may pass from innocence to viciousness; it is quite possible that the reservoir of wholesome water in the morning may be the reservoir of harmful water in the evening. As a matter of fact, consumers of a public water supply do not, generally speaking, regard the corporation as a warrantor or insurer of the wholesomeness of the water. They expect the company to exercise a high degree of vigilance and faithfulness in their duty to furnish them with wholesome water, but realize that to some extent risk attends its consumption. Such are the facts, knowledge of the existence of which comes to ordinary intelligence through common observation and experience. The Rinaldi Case should not be applied to them. It might well be applicable to a case in which water bottled or susceptible to inspection in the bottles by the seller was sold and purchased, as a specific article, for drinking; but to apply it to a corporation operating a waterworks system in the way usual and known to all is contrary to the common law, not contemplated by the statute, op-

pressive to the corporation, and of very doubtful benefit and perhaps of serious detriment to the inhabitants of municipalities. Men will not form corporations which the court will hold obligated, at a risk which may bankrupt and destroy them, to enter into a guaranty or warranty which they cannot fulfill.

The order should be affirmed, with costs, and the questions certified answered in the negative.

POUND, J. I dissent. If we adopt, as seems inevitable, the theory that the water supplied by a municipal corporation for domestic purposes is sold as such by it to the consumers, I fail to comprehend how we can escape the application of the doctrine of implied warranty of wholesomeness. The complaint alleges that defendant furnished plaintiff water for drinking purposes. The buyer relies on the city, the seller, to furnish pure and wholesome water unless the city gives notice, as it may, for its protection, that the water supply is not warranted safe for consumption. The buyer himself does not select the article nor rely on his own skill and judgment. He takes what is offered by the city. The city, in a sense, in distributing water through its mains to consumers, is not selling a commodity so much as rendering a public service. Its duty, apart from statute, is to exercise reasonable care in performing such service. But it cannot be denied that the water in the pipes is personal property and the subject of sale. Ferens v. O'Brien, L. R. 11 Q. B. Div. 21. Personal Property Law, § 96, therefore applies to such selling, and the implied warranty attaches thereto. Rinaldi v. Mohican Co., 225 N. Y. 70, 121 N. E. 471; 5 Cornell Law Quarterly, 479.

The order appealed from should be reversed, and the order of the Special Term affirmed, with costs in this court and in the Appellate Division, and the question answered in the affirmative.

INDIANAPOLIS TRACTION & TERMINAL CO. v. KLENTSCHY.

(Supreme Court of Indiana, 1907. 167 Ind. 598, 79 N. E. 908, 10 Ann. Cas. 869.)

MONKS, J.[14] Appellee brought this action to recover damages for personal injuries alleged to have been caused by the negligence of appellant while she was a passenger upon one of its cars. A trial of said cause resulted in a verdict, and, over a motion for a new trial, a judgment in favor of appellee.

The errors assigned and not waived call in question the action of the court in overruling appellant's motion for a new trial. The causes assigned for a new trial and urged in this court as grounds for reversal of the judgment are: "(1) The verdict of the jury is not sustained

[14] Parts of the opinion are omitted.

by sufficient evidence; (2) the verdict of the jury is contrary to law; (3) the court erred in refusing to instruct the jury to return a verdict for the defendant." * * *

Appellant insists that under the evidence in this case the relation of carrier and passenger did not exist between appellant and appellee at the time she was injured, and that appellant did not owe her any duty at said time, and the motormen and conductors whose negligence caused the injury of appellee were at the time servants of the Royal Neighbors, and that appellant was not responsible for their negligence. The general verdict for appellee necessarily found that appellant had the control of said cars, conductors, and motormen, and ran and operated said cars through its said servants, and that said society of Royal Neighbors did not control said servants or manage or operate said cars, and that appellee was a gratuitous passenger on one of said cars and was injured by the negligence of the employés of appellant as alleged in the complaint. * * *

It appeared from the evidence that on May 14, 1903, the order of Royal Neighbors, composed of women, was holding a national convention in the city of Indianapolis, appellee being in attendance. A committee of said society solicited a donation from appellant, and were informed by one of its officers that it could not make a donation, but would give a free trolley ride to the members of said society attending the convention and furnish them street cars for that purpose. The committee caused an invitation to be given to the delegates, and a large number of them, including appellee, availed themselves of the invitation and boarded the cars for a ride through the city. During the progress of the ride a collision occurred between two of the cars, by reason of which appellee was injured. The three cars were in charge of the regular conductors and motormen of appellant, and appellant run and operated said cars through said employes. * * *

A passenger who is carried gratuitously by a common carrier is as much a passenger as if he were paying full fare, and the mere fact that he is carried gratuitously will not of itself deprive him of his right of action if injured by the negligence of the carrier. Russell v. Pittsburgh, etc., R. Co. (1901) 157 Ind. 305, 312, 313, 61 N. E. 678, 55 L. R. A. 253, 87 Am. St. Rep. 214, and cases cited; 2 Hutchinson, Carriers (3d Ed.) §§ 1021, 1022; 5 Am. and Eng. Ency. Law (2d Ed.) 507, 508; 6 Cyc. Law and Proc. 544.

True, when a passenger who is carried gratuitously—that is, as a favor, and without any compensation or advantage to the carrier—the carrier may lawfully contract with him that he will take upon himself all risk of personal injury from the negligence of the agents and servants of the carrier for which the carrier would otherwise be liable. 6 Cyc. Law and Proc. 579; 2 Hutchinson, Carriers (3d Ed.) § 1075; Payne v. Terre Haute, etc., R. Co. (1902) 157 Ind. 616, 62 N. E. 472, 56 L. R. A. 472, and cases cited.

There is no claim in this case that appellee entered into any such contract with appellant, or that she was carried by appellant subject to any such condition or stipulation. A judgment in favor of a member of the Royal Neighbors for injury received in the same collision was sustained by the United States Circuit Court of Appeals, in Indianapolis Traction, etc., Co. v. Lawson (1905) 143 F. 834, 74 C. C. A. 630, 5 L. R. A. (N. S.) 721, 6 Ann. Cas. 666.

Judgment affirmed.

Baggage is what the ordinary person in his station in life would carry to make the trip.

DENVER & R. G. R. CO. v. JOHNSON.

(Supreme Court of Colorado, 1911. 50 Colo. 187, 114 P. 650, Ann. Cas. 1912C, 627.)

Chief Justice CAMPBELL delivered the opinion of the court:[15]

Plaintiff was riding on a free pass from Aspen to Denver, accompanied by his son, who had a ticket which was paid for. Plaintiff was bringing his son to Denver for treatment for lameness. Before leaving Aspen, plaintiff presented to defendant's agent two bundles which purported to be baggage, which the agent received and checked through to Denver as plaintiff's own baggage. In one of these bundles were boat slats and some other articles, including a gun, all of which were covered and wrapped up in a bed quilt, and tied together with a rope. When the bundle was received by plaintiff at Denver, it was cut open, or untied, and the gun was missing. The company not being able satisfactorily to account for the loss, plaintiff brought this action to recover the value of the gun, and had judgment for $50, to review which defendant prosecutes this writ of error. * * *

Defendant was accustomed to check such bundles when they contained nothing but baggage. The plaintiff did not tell the baggage agent that this baggage contained a gun. It was the custom, or rule, of the railroad company to check guns as personal baggage when they were in cases, whenever the owner, as a sportsman, or when going on a hunting expedition, wished to take them along with him. There is no evidence that plaintiff was going on a hunting expedition, or that he needed the gun for his own comfort or convenience, protection, or defense, on the journey from Aspen to Denver. The term "baggage" includes such articles of necessity or convenience as are usually carried by passengers for personal use or comfort or protection during the continuance of a journey, and what constitutes baggage in any given sense depends, in some measure, upon its own circumstances. It has been decided that a weapon which one is in the habit of carrying or taking with him for purposes of defense or protection during a journey, may come within the term "baggage." It certainly is not an unreasonable custom for a common carrier to require guns to be carried in cases

[15] Part of the opinion is omitted.

as a condition to their transportation as personal baggage, and it is not unreasonable, or a breach of a carrier's duty, to refuse to carry a gun wrapped up as this one was. The baggage agent testifies that, under the rule of the company, he would not have checked this bundle as baggage had he known that a gun was in it. Presenting as baggage this package or bundle, which was similar to bundles containing baggage, was, by implication, a representation to the carrier that it contained nothing but baggage. There is no evidence of the carrier's knowledge of the contents, and it was not incumbent upon the agent to inquire what the package contained. He had a right to assume that it was only that which plaintiff, by his conduct, represented it to be. It would seem, therefore, under the authorities, that a recovery for its loss could not be had in such circumstances, even though plaintiff was a passenger for hire.[16] 6 Cyc. 666.

[16] It is often said "that whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered personal baggage," for the safe carriage of which the carrier is liable to the passenger as an insurer. Cockburn, C. J., in Macrow v. Great Western Ry., L. R. 6 Q. B. 612, 622 (1871). Accordingly it has been held that a wealthy woman traveling in this country might recover for 275 yards of expensive lace which she wore on occasions. New York Cent. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 25 L. Ed. 531 (1879). The view of the modern cases is that the effects carried need not necessarily be for the uses of the journey, so that a person may recover for clothing bought while on a visit and being carried home, but not for clothing bought for a stranger. Dexter v. Syracuse, Binghamton & N. Y. R. Co., 42 N. Y. 326, 1 Am. Rep. 527 (1870). And in Yazoo & M. V. R. Co. v. Baldwin, 113 Tenn. 205, 81 S. W. 599 (1904), a wife was allowed recovery for her husband's underwear which she was carrying. It is ordinarily the rule that valuable securities, money, or jewelry will not be considered as baggage. The Ionic, Fed. Cas. No. 7,059 (1867). Thus, where the plaintiff carried $400 in her pocketbook to buy a business, she could not recover for its loss. Levins v. New York, N. H. & H. R. Co., 183 Mass. 175, 66 N. E. 803, 97 Am. St. Rep. 434 (1903). But, where a traveler from Europe lost $800 carried for traveling expenses, he was permitted to recover. Merrill v. Grinnell, 30 N. Y. 594 (1864). See The Virginia (D. C.) 266 F. 437 (1920), where recovery was allowed for Liberty Bonds of small denominations carried by passengers of moderate means. So jewelry, which may be used for personal adornment by the passenger on the journey, constitutes baggage. Missouri Pac. R. Co. v. Pugh, 157 Ark. 383, 248 S. W. 897 (1923). Under the rule that recovery may be had for tools used by the traveler, a photographer recovered for the loss of his camera and extra lenses. The Virginia, supra. And a teacher recovered for the manuscript of his unpublished manual on Greek grammar. Wood v. Cunard S. S. Co., 192 F. 293, 112 C. C. A. 551 (1911), annotated in 41 L. R. A. (N. S.) 371. Recovery is generally denied for household articles carried by the passenger moving to a new abode. St. Louis, I. M. & S. R. Co. v. Miller, 103 Ark. 37, 145 S. W. 889 (1912), and cases collected in 39 L. R. A (N. S.) 634. The prevailing view, expressed in the cases, is that the samples of a traveling salesman constitute baggage, if the carrier had notice by reason of custom or otherwise. Landesman Hirshheimer Co. v. Louisville & N. R. Co., 178 Ky. 712, 199 S. W. 1050 (1918), and cases in L. R. A. 1918C, 108. But not if the goods carried were for sale. Klein v. Southern Pac. Co., 63 Cal. App. 185, 218 P. 447 (1923). For a general discussion of what constitutes baggage, see Friedman, The Bicycle and the Common Carrier, 12 Harv. Law Rev. 119.

From another viewpoint, the evidence does not warrant the judgment. The parties are in accord that, whatever may be the rule as to the liability of a carrier for injuries to a passenger who rides upon a free pass, if a passenger is carried gratuitously, the carrier is liable for his baggage only as would be any other carrier of goods without compensation; that is, for such negligence as would charge a gratuitous bailee. Among other authorities are cited: 6 Cyc. 633; Hutchinson on Carriers (3d Ed.) § 1300; Flint & P. M. Ry. v. Wier, 37 Mich. 111, 26 Am. Rep. 499; Holly v. Southern Ry. Co., 119 Ga. 767, 47 S. E. 188; 3 Thompson on Negligence (2d Ed.) §§ 3410–3466. * * *

Reversed.[17]

Mr. Justice MUSSER and Mr. Justice GARRIGUES concur.

HOLLINGSWORTH v. SKELDING.

(Supreme Court of North Carolina, 1906. 142 N. C. 246, 55 S. E. 212.)

Action to recover damages for a personal injury received by the plaintiff while a passenger on the cars of the Wilmington Street Railway Company. There was evidence tending to prove that plaintiff had one foot on the running board and the other on the floor, and was injured by an ice wagon coming in contact with him. * * *

BROWN, J.[18] His honor charged the jury that "carriers of passengers are insurers as to their passengers, subject to a few reasonable exceptions. They are held to exercise the greatest practicable care, the highest degree of prudence, and the utmost human skill and foresight which has been demonstrated by experience to be practicable. They are so held upon the ground of public policy, reason, and safety to their patrons. The exceptions are the act of God and the public enemy. If these—that is, the act of God, or of the public enemy—be the proximate cause of the injury, and without any neglect on the part of the carrier, the carrier is not liable. He is, against all perils, bound to do his utmost to protect and prevent injury to his passengers." It is due to the learned judge who tried this case to state that this instruction appears to have been given verbatim from the opinion of Faircloth, C. J., in Daniel v. Railroad, 117 N. C. 602, 23 S. E. 327. An examination of the case discloses that it is a mere dictum, a generalization, not necessary at all to the decision of the case. As a proposition of law it is not supported by authority, but, on the contrary, is against the teachings of the text-writers as well as the judgments of the courts.

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[17] Concerning the liability of a carrier for baggage not accompanied by the passenger, see Caine v. Cleveland, C., C. & St. L. R. Co., 217 Mich. 231, 185 N. W. 765 (1921), and cases in 23 A. L. R. 1446. See, also, 34 Harv. Law Rev. 326.

[18] Parts of the statement of facts and opinion are omitted. The concurring opinions of Clark, C. J., and Hoke and Walker, JJ., are omitted.

S.& D.P.UTIL.

R.R. Postal Clerk is a passenger.
(R.R. Employee is generally held not to be pass.
In N.C. it is to contrary.

It does not, therefore, meet with our approval. The rule laid down by the late Chief Justice applies to the transportation of freight and all classes of inanimate objects only.

The reasons given for this rule by Lord Holt were "to prevent the clandestine combinations with thieves and robbers to the undoing of all persons who had dealings with them." Hutchinson says this rule was never applied to carriers of passengers. Hutchinson on Carriers, § 4497. The Supreme Court of the United States in an elaborate opinion by Chief Justice Marshall refuse to apply the rule to slaves. He says: "In the nature of things and in his character he resembles a passenger, not a package of goods. It would, therefore, seem reasonable that the responsibility of the carrier should be measured by the law which is applicable to passengers, rather than by that which is applicable to the carriage of common goods." Boyce v. Anderson, 2 Pet. (U. S.) 150, 7 L. Ed. 379. When the attempt is made to hold the carrier responsible for injuries received by living human beings, negligence is the essential element in the case, and without it the injured person cannot recover. This is universally true where the common law is administered. Grote v. Railroad, 2 Exch. 251; Hale on Bailments and Carriers, 517; Fetter on Carriers, 5–8; Thompson on Carriers, § 497; 2 Wood, Railway Law, 1054–1059, and notes; 2 A. & E. Ency. (1st Ed.) 746, 747, where numerous authorities are collected. The degree required of the passenger of carriers has been the subject of much discussion by text-writers and judges. The weightiest authorities agree that this standard does not extend beyond the highest degree of a practicable care. Fetter, Carriers, § 11.

We doubt if any better definition of the duty a carrier owes the passenger can be found than that of Lord Mansfield in Christie v. Griggs, 2 Camp. 79: "As far as human care and foresight could go he must provide for their safe conveyance." In commenting upon this case Mr. Barrow says: "It must not be supposed, however, that the law requires the carrier to exercise every device that the ingenuity of man can conceive. Such an interpretation would act as an effectual bar to the business of transporting people for hire." In view of these authorities and many others we could quote, the judge erred in the instructions given, although, in doing so, he followed the language of the late Chief Justice in the Daniel Case. * * *

Reversed.[19]

[19] The insurer's liability, imposed by the common law upon common carriers of goods, was not imposed upon carriers of passengers. Aston v. Heaven, 2 Esp. 533 (1796); Christie v. Griggs, 2 Camp. 79 (1809); Stokes v. Saltonstall, 13 Pet. (38 U. S.) 181, 10 L. Ed. 115 (1839); Ingalls v. Bills, 50 Mass. (9 Metc.) 1, 43 Am. Dec. 346 (1845); Louisville & N. R. Co. v. Compiretto, 137 Miss. 766, 102 So. 837 (1925). Consequently the term "common carrier" was originally applied only to carriers of goods. See Story, Bailments (9th Ed.) § 498; 2 Greenleaf, Evidence (16th Ed.) § 211; Central of Georgia Ry. Co. v. Lippman, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673 (1900). But the business of transporting persons, like the carriage of goods, may be conducted in such a way as to incur the duty to serve all for a reasonable hire, a principle of law

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HEGEMAN v. WESTERN RAILROAD CORPORATION.

(Court of Appeals of New York, 1855. 13 N. Y. 9, 64 Am. Dec. 517.)

This action was brought to recover damages for injuries to the plaintiff, alleged to have been caused by the negligence of the defendant. The injuries were received while the plaintiff was a passenger on the defendant's road, and were caused by the breaking of an axle of the car in which he was riding. On the trial before Allen, J., at the Rensselaer County Circuit, a verdict was rendered in favor of the plaintiff for $9,900. The judgment thereon was affirmed by the Supreme Court at General Term. See 16 Barb. 353. The defendant brought this appeal.

The facts material to the decision in this court are stated in the opinion.

GARDINER, C. J.[20] It has been said that every wayfarer must take the risks incident to the mode of travel he adopts, but these risks are only those which cannot be avoided by the carrier of passengers by the utmost degree of care and skill in the preparation and management of the means of conveyance. Angell on Com. Carr. § 523. The carrier, in the language of other judges, is bound to use all precautions, as far as human care and foresight will go, for the safety of his passengers. 2 Kent (7th Ed.) 602, and cases cited. In the application of these principles, it is obvious that the same precautions will not exonerate the carrier of passengers from responsibility in every mode of travel. The foresight and preparation that would suffice to satisfy the rule in one species of navigation or conveyance would not answer in another; and the external examination, which, in connection with the reputation of the builder of a stage coach, would and ought to satisfy the scruples of the most cautious person, as to the safety and security of a vehicle

not restricted in its application to common carriers, but applied to many other callings. It is in this broader sense that the term "common carrier" is applied to carriers of persons, and really means "public carrier." Wyman, Public Service Corporations, § 188; 17 Col. Law Rev. 710. While it is often said that a common carrier of persons is required to exercise a high degree of care for the protection of passengers, 19 Col. Law Rev. 166, this duty is not unlike that imposed upon persons conducting dangerous operations which in no way involve a public service. Thus persons operating elevators and scenic railroads have been said to be liable as "common carriers" of passengers; i. e., bound to exercise a high degree of care. Johnson v. Hopkins, 213 Ala. 492, 105 So. 663 (1925); Marker v. Mitchell (C. C.) 54 F. 637 (1893), affirmed 62 F. 139, 10 C. C. A. 306, 25 L. R. A. 33 (1894); Treadwell v. Whittier, 80 Cal. 574, 22 P. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175 (1889); Grant v. Allen, 141 Ga. 106, 80 S. E. 279 (1913); O'Callaghan v. Dellwood Park Co., 242 Ill. 336, 89 N. E. 1005, 26 L. R. A. (N. S.) 1054, 134 Am. St. Rep. 331, 17 Ann. Cas. 407 (1909). Contra, Edwards v. Manufacturers' Bldg. Co., 27 R. I. 248, 61 A. 646, 2 L. R. A. (N. S.) 744, 114 Am. St. Rep. 37, 8 Ann. Cas. 974 (1905). But this does not mean that one operating an elevator, or a scenic railroad, is a "common carrier" in the sense of "public carrier."

[20] The statement of facts is rewritten and the dissenting opinions of Marvin and Denio, JJ., are omitted.

designed to run from six to eight miles the hour, would not satisfy any reasonable man as to the sufficiency of another intended to sustain a far greater weight, and to be propelled by steam thirty, forty or fifty miles in the same time.

The charge of the learned judge, at the trial, assumes and proceeds upon this distinction throughout; and in that part of it where he gives the measure of the responsibility of the defendant in the strongest terms against him, and in favor of the plaintiff, he says, "that although the defendant purchased his axles and cars of extensive and skillful manufacturers, who, in the exercise of their skill, knew of no test, and used no test to discover latent defects in axles, yet, if there were any tests known to others, and which should have been known and employed by the manufacturers, as men professing skill in their particular business, although the same may not have been used by some others engaged in the same business, defendant was guilty of negligence in not using this test, provided the injury occurred to the plaintiff by reason of a defect, which, by such test, might have been discovered. The substance of the charge was, that although the defect was latent, and could not be discovered by the most vigilant external examination, yet, if it could be ascertained by a known test, applied either by the manufacturer or the defendant, the latter was responsible.

In these instructions there was no error. Ingalls v. Bills, 9 Metc. (Mass.) 1, 43 Am. Dec. 346, cited by the defendant's counsel, was the case of a stage coach, in which the injury was occasioned by the breaking of the axle; the fracture was internal, and surrounded by sound iron, one-quarter of an inch thick; the court held, that where the accident arises from a hidden and internal defect, and which could not be guarded against by the exercise of a sound judgment, and the most vigilant oversight, then the proprietor was not liable for the injury. I concur in that decision, in the particular case presented; but the learned judge did not intimate "that a sound judgment and the most vigilant oversight" would be evidenced, by the adoption of the same methods of examination in the case of a stage coach and a car for the express train of a railroad. The mode of construction, the purposes to be subserved, and, above all, the probable consequences of a hidden defect in the two cases, are altogether different. It might as plausibly be urged, that a chain for agricultural purposes and the cable of a ship of the line should be subjected to the same tests, because both were chains and each manufactured of the same material. Keeping the distinction indicated in view, the charge was sufficiently favorable to the defendant.

Two questions were presented for the consideration of the jury. First, was there a test known to and used by others, and which should have been known to a skillful manufacturer, by which the concealed defect in the axle of the car could have been detected; and if so, then, secondly, was the injury to the plaintiff the consequence of that imperfection? There was evidence tending to establish these facts, which

the jury have found; and the question returns, can the defendant, who neither applied the test, or caused it to be applied by the manufacturer, insist that this accident could "not have been avoided by the utmost degree of care and skill, in the preparation of the means of conveyance," or "that they used all precautions, as far as human care and foresight would go, for the safety of the plaintiff, as one of their passengers"? It seems to me that there can be but one answer to the question.

It was said that carriers of passengers are not insurers. This is true. That they were not required to become smelters of iron, or manufacturers of cars, in the prosecution of their business. This also must be conceded. What the law does require is, that they shall furnish a sufficient car to secure the safety of their passengers, by the exercise of the "utmost care and skill in its preparation." They may construct it themselves or avail themselves of the services of others; but in either case they engage that all that well-directed skill can do has been done for the accomplishment of this object. A good reputation upon the part of the builder is very well in itself, but ought not to be accepted by the public or the law as a substitute for a good vehicle. What is demanded and what is undertaken by the corporation is not merely that the manufacturer had the requisite capacity, but that it was skillfully exercised in the particular instance. If to this extent they are not responsible there is no security for individuals or the public.

It is perfectly understood that latent defects may exist undiscoverable by the most vigilant examination, when the fabric is completed, from which the most serious accidents have and may occur. It is also well known, as the evidence in this suit tended to prove and the jury have found, that a simple test (that of bending the iron after the axle was formed and before it was connected with the wheel) existed by which it could be detected. This should have been known and applied by men "professing skill in that particular business." It was not known, or if known, was not applied by these manufacturers. It was not used by the defendant, nor did they inquire whether it had been used by the builders. They relied upon an external examination; which they were bound to know would not, however faithfully prosecuted, guard their passengers against the danger arising from concealed defects in the iron of the axles or in the manufacture of them. For this omission of duty or want of skill the learned judge held, and I think correctly, that they were liable.

This is the only important question in the cause. The requests of the defendant's counsel to the judge for instructions to the jury were intended to present this principal point in its strongest aspect for the defendant; and all the exceptions are determined, if the above suggestions are well founded.

The evidence of the utility and use of the safety beam was properly admitted. It had been used in New Jersey eleven years before this

accident and upon some of the Albany and Buffalo roads from the latter part of the year 1846; and in 1851 was introduced upon the road of the defendant. Whether the adoption of this improvement, under all the circumstances, was a necessary or proper precaution on the part of the defendant, was correctly submitted to the jury.

The judgment of the Supreme Court should be affirmed.[21]

GRAND RAPIDS & I. R. CO. v. HUNTLEY.

(Supreme Court of Michigan, 1878. 38 Mich. 537, 31 Am. Rep. 321.)

CAMPBELL, C. J.[22] Suit was brought by Mrs. Huntley for personal injuries suffered on the 5th day of November, 1874, by reason of an accident caused by a passenger car being thrown from the track and upset. The testimony showed that the mischief was caused by the breaking of an axle containing a large flaw, within the wheel or near its edge. Those witnesses who made any actual examination found the flaw entirely within the axle, and covered by a small thickness of sound metal. The suit was tried in April, 1877, about two years and a half after the accident. Mrs. Huntley was injured in the shoulder, and claimed that the injury was permanent.

Testimony was introduced bearing upon the condition of the cars and track, and the speed of the train, as well as concerning the character of the injury. The principal questions arise upon the medical testimony and upon the charge; although some other points are presented. * * *

The principal remaining questions arise out of the rules of liability established by the charge.

The primary cause of the accident was the broken axle. Some stress seems also to have been laid on the condition of the track and the rate of speed. So far as appears upon the record, we have not discovered any proper evidence to authorize these matters to be considered. There is no testimony from such persons as are qualified to give opinions on the subject that either the condition of the road or the speed indicated negligence. Whether the structure of a road is such as to warrant fast travel is not a question which usually belongs to ordinary

21 Accord: Western R. Co. of Alabama v. Turrentine, 197 Ala. 603, 73 So. 40 (1916); Louisville & N. R. Co. v. Cheatham, 118 Tenn. 160, 100 S. W. 902, (1907); Morgan v. Chesapeake & O. R. Co., 127 Ky. 433, 105 S. W. 961, 15 L. R. A. (N. S.) 790, 16 Ann. Cas. 608 (1907); Moss v. Lancaster & York F. Street R. Co., 218 Pa. 601, 67 A. 869 (1907); Murray v. Lehigh Valley R. Co., 66 Conn. 512, 34 A. 506, 32 L. R. A. 539 (1895); Carrico v. West Virginia Cent. & P. R. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50 (1894); Virginia Cent. R. Co. v. Sanger, 15 Grat. (Va.) 230 (1859); McElroy v. Nashua & L. R. Corp., 4 Cush. (Mass.) 400, 50 Am. Dec. 794 (1849); Sharp v. Grey, 9 Bing. 457, 131 Reprint, 684 (1833). For a further collection of cases, see note, 29 A. L. R. 736.

22 Part of the opinion is omitted.

witnesses, and it would be dangerous to allow a jury to act on its own suspicions or prejudices in such a matter. The road, if in such a condition as would be regarded as safe by railroad men of usual intelligence and experience, could not be complained of for any possible deficiencies which would not be regarded by competent persons as existing, nor could the rate of speed be properly held excessive without similar evidence from men of experience. It is a matter of daily occurrence in many parts of the country, and of occasional occurrence everywhere, for cars to be run at very high rates of speed on railway tracks. No particular rate can be assumed, without proof, to be dangerous.

The main question, however, relates to responsibility for the condition of the axle. It was held by the court below that no diligence or care in the railroad company could exempt them from want of care in the manufacturers of the cars and axles.

This doctrine is we think entirely incorrect. Carriers of freight are liable whether careful or not, for any act of damage not caused by the act of God or of the public enemy. Their liability, therefore, does not arise from negligence or want of care. It arises from their failure to make an absolutely safe carriage and delivery, which they insure by their undertaking. The analogies of carriers of freight have nothing to do with passenger carriers. These are liable only when there has been actual negligence of themselves or their servants. If they exercise their functions in the same way with prudent railway companies generally, and furnish their road and run it in the customary manner which is generally found and believed to be safe and prudent, they do all that is incumbent upon them. M. C. R. R. v. Coleman, 28 Mich. 440; G. R. & I. R. R. v. Judson, 34 Mich. 506; Ft. Wayne, J. & S. R. Co. v. Gildersleeve, 33 Mich. 133; M. C. R. R. v. Dolan, 32 Mich. 510. This general doctrine the court below laid down very clearly, but qualified it so as to make them absolutely responsible for the omissions or lack of skill or attention of the manufacturers from whom they made their purchases of stock, however high in standing and reputation as reliable persons.

There is no principle of law which places such manufacturers in the position of agents or servants of their customers. The law does not contemplate that railroad companies will in general make their own cars or engines, and they purchase them in the market, of persons supposed to be competent dealers, just as they buy their other articles. All that they can reasonably be expected to do is to purchase such cars and other necessaries as they have reason to believe will be safe and proper, giving them such inspection as is usual and practicable as they buy them. When they make such an examination, and discover no defects, they do all that is practicable, and it is no neglect to omit attempting what is impracticable. They have a right to assume that a dealer of good repute has also used such care as was incumbent on him, and that the articles purchased of him which seem right are right

in fact. Any other rule would make them liable for what is not negligence, and put them practically on the footing of insurers. The law has never attempted to hold passenger carriers for anything which they could not avoid by their own diligence.

The case of Richardson v. Great Eastern Railway Co., L. R. 1 C. P. Div. 342 (Court of Appeals), is quite in point and establishes the doctrine as it has been fixed by the general understanding since the carrying of passengers has been the subject of legal discussion. That was a passenger case, depending on the doctrine of negligence as applied to defective trucks. The axle of a truck belonging to another company, brought on the line of the respondents to be forwarded, was broken by reason of a flaw which might have been discovered by a minute examination, but which was not discovered in fact by such an examination as was customary and reasonably practicable. It was held no negligence could be imputed for not making a more minute examination than was made. In that case the court also held that it was not within the province of a jury to lay down rules after their own opinion, which imposed duties beyond the usual practice of prudent railways. See also Daniel v. Metropolitan Railway Co., L. R. 5 H. of L. 45, upon the right of a railway company to assume there is no negligence in others over whom they exercise no control.

The injustice and illegality of holding passenger carriers to anything like a warranty of their carriages was very fully discussed and asserted in Readhead v. Midland R. Co., L. R. 4 Q. B. 379. The New York cases which were relied on upon the argument of the present cause were considered in the light of a large number of decisions, and disapproved, as we think correctly. They entirely ignore the true ground of responsibility as depending on the actual negligence of the carrier. There is no such thing as implied negligence, when there is none in fact.

We think the judgment erroneous, and it must be reversed with costs and a new trial be granted.[23]

The other Justices concurred.

ORMANDROYD v. FITCHBURG & L. ST. R. CO.

(Supreme Judicial Court of Massachusetts, 1906. 193 Mass. 130, 78 N. E. 739, 118 Am. St. Rep. 457.)

Action by Sarah E. Ormandroyd against the Fitchburg & Leominster Street Railroad Company. A verdict was directed in favor of defendant, and plaintiff brings exceptions.

Plaintiff was a passenger on defendant's street car on July 4, 1905, and as she was passing the premises of one Ouellet, who was not an

[23] Accord: Murray v. Pawtuxet Valley Street R. Co., 25 R. I. 209, 55 A. 491 (1903).

employé or officer of the defendant, she was struck by the wadding of a cannon which Ouellet was discharging as a part of his Fourth of July celebration from his premises.

HAMMOND, J. The evidence did not warrant a finding of negligence on the part of the defendant. The accident happened about half past 5 in the afternoon, on July 4, 1905. With the exception of one or two rests, each lasting less than an hour, one Ouellet, who seems to have devoted the day to a patriotic celebration, had been discharging the cannon "practically all day since 4 o'clock in the morning until the time of the accident, as often as it could be loaded, which took from 5 to 15 minutes." Ever since half past 5 in the morning the cars of the defendant had been passing by this locality, so that up to the time of the accident several hundred cars had passed. It was a day for fireworks of every description. The cannon was loaded with blank cartridges, and was in Ouellet's yard, quite a distance from the street, sending out "a jet of flame and a volume of smoke as far as the sidewalk," several feet short of the defendant's car tracks. The defendant had no reason to anticipate any danger to its passengers from such a source. Nor was it bound to stop its car and investigate for the purpose of seeing whether the cannon was properly loaded or pointed. The firing had been going on all day and, in the absence of any indication to the contrary, the defendant had the right to assume that it was not a hostile demonstration against the travelers upon the highway, but was a simple ebullition of patriotic emotion, and as such was harmless. To require a street railway corporation to have a general oversight of the details of such exhibitions along the line of the highway on the anniversary of the Declaration of Independence, and to hold it responsible for the consequences to its passengers of any neglect of the exhibitors would be unreasonable. Such care would be inconsistent with the proper transaction of the business. It might keep the passengers safe, but the cars would practically be at a standstill most of the time and their proper efficiency would be greatly impaired. The case widely differs from those cases where the railway corporation has reason to anticipate danger from a crowd of rioters or other outside parties or causes.

Exceptions overruled.[24]

[24] The following cases held the carrier was not responsible for injuries inflicted upon passengers by other passengers or outsiders, there being no evidence of negligence on the carrier's part in failing to anticipate or take active measures to prevent the harm. Thompson v. Monongahela Ry. Co., 99 W. Va. 207, 128 S. E. 110 (1925); Lige v. Chicago, B. & Q. R. Co., 275 Mo. 249, 204 S. W. 508, L. R. A. 1918F, 548 (1918); Hoff v. Public Service Ry., 91 N. J. Law, 641, 103 A. 209, 15 A. L. R. 860 (1918); Fewings v. Mendenhall, 88 Minn. 336, 93 N. W. 127, 60 L. R. A. 601, 97 Am. St. Rep. 519 (1903); Bosworth v. Union R. R. Co., 26 R. I. 309, 58 A. 982, 3 Ann. Cas. 1080 (1904); Tall v. Baltimore Steam Packet Co., 90 Md. 248, 44 A. 1007, 47 L. R. A. 120 (1899); Sullivan v. Jefferson Ave. Ry. Co., 133 Mo. 1, 34 S. W. 566, 32 L. R. A. 167 (1895); Franklin v. Atlanta & C. A. L. R. Co., 74 S. C. 332, 54 S. E. 578 (1906), semble.

Brittain v. R. R. 88 N.C. 576

GLENNEN v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, 1911. 207 Mass. 497, 93 N. E. 700, 32 L. R. A. [N. S.] 470.)

Action by Katherine Glennen against the Boston Elevated Railway Company. Verdict for defendant, and plaintiff excepts.

RUGG, J. A common carrier of passengers is required to exercise the utmost care consistent with the nature and extent of its business to carry its passengers to their destination in security and enable them to alight there with safety. This extraordinary vigilance is owed, not only as to its own instrumentalities and employés, but also as to other passengers or strangers, so far as any harmful misconduct on their part may be foreseen and guarded against. The highest degree of prudence and circumspection is exacted of the carrier in anticipating and suppressing violence to passengers from all outside sources. The precautions which the carrier must take in the performance of this duty depend upon the facts of each case. No positive regulation or absolute usage has been or can be defined as a final standard for the discharge of its obligation. The natural turbulence of a multitude of people to be expected at a public celebration may require provision against unusual occurrences. The kind of assembly and the character of people likely to attend it, the place from which they have come and to which they are going, the hour of the day and the normally accompanying impatience of restraint, the probable temper and disposition of a crowd in view of the causes which bring it together are all circumstances to be regarded in determining whether in any instance the carrier has performed the highly onerous and stringent obligation imposed on it. Kuhlen v. Boston & Northern St. Ry. Co., 193 Mass. 341, 79 N. E. 815, 7 L. R. A. (N. S.) 729, 118 Am. St. Rep. 516, and cases cited; Beverley v. Boston Elevated Ry., 194 Mass. 450, 80 N. E. 507.

On the other hand, a common carrier does not insure to its passengers immunity from harm. It is engaged in a public service which must be managed in such a manner as to be practical and adapted to the needs of contemporary society, both as to expense, convenience, comfort, and rapidity. Hence it cannot be held responsible for manifestations of lawlessness, heedlessness, impetuosity or force which a high degree of prevision and sagacity could not reasonably be expected to forestall. Injury arising from the sporadic act of an individual or the aggregated impulses of a throng, if outside the limits of conduct reasonably to be apprehended by one under a strong legal duty to be most keenly sensitive to guard against preventable wrongs, affords no ground of liability. The carrier is not bound to adopt all possible precautions nor every conceivable safeguard for the safety of passengers, nor to exercise the utmost diligence which human ingenuity can imagine to avert injury. Simmons v. New Bedford Vineyard & Nantucket Steam-

boat Co., 97 Mass. 361, 93 Am. Dec. 99; Joy v. Winnisimmet Co., 114 Mass. 63; O'Neil v. Lynn & Boston St. Ry. Co., 180 Mass. 576, 62 N. E. 983; Pitcher v. Old Colony St. Ry., 196 Mass. 69, 81 N. E. 876, 13 L. R. A. (N. S.) 481, 124 Am. St. Rep. 513; Lyons v. Boston Elevated Ry., 204 Mass. 227, 90 N. E. 419; McCumber v. Boston Elevated Ry., 93 N. E. 698. These principles are well settled and have been steadily adhered to. It is not necessary to cite or review the many other cases by which they are illustrated, but only to apply them to the facts before us.

The plaintiff was a passenger upon one of the defendant's open cars, and reached the terminus of the route near a portion of the Charles River reservation, between 5 and 6 o'clock on a Sunday afternoon in May. She was accompanied by her son 2½ years old. It was customary at this terminus, which was on a public street, for the trolley to be reversed, the seats turned over, and for the car to start to return on the same track. At the time of the events to be narrated the conductor was on the rear platform. The motorman was at his post on the front platform, and there was a starter in the employ of the defendant 8 or 10 feet away from the car. A great many people were in the habit of going to this reservation, and a boathouse was near by, where canoes were kept. When the car came to a stop at its terminus the plaintiff's description of what happened was as follows:

"I started to get out of the car. * * * There was a crowd of people there. There seemed to be about 100 people or more. There was a great crowd rushed onto the car and started turning over the seats. There was a great confusion. I started to get out of the car and I was pushed back * * * into my seat again. * * * I grasped hold of the stanchion, but I was forced back again into my seat. * * * [The child] was in my arms. I was going to step down off the car. I had my arm on the back of the seat * * * waiting for a chance to get out of the car when this seat in back was turned over and pinned my arm between the backs of the two seats. * * * Passengers [were] getting onto the railing and on the outside on the right hand and on the left hand as well. * * * Right around me it seemed that most of [the seats] were turned over." She further testified that no employé of the defendant said or did anything to restrain the crowd or assist her, and that the events she had described happened within a period of two or three minutes. The plaintiff offered to show that on preceding Sundays of 1907 and 1906, at about the same hour, there had been rushing and crowding and jostling by passengers in getting upon the cars at this place, but this line of inquiry was excluded subject to her exception.

Evidence as to what has been the custom of a crowd at a particular place or under special circumstances in boarding the defendant's cars was competent, because a railway company has reasonable cause to know what has been habitually done respecting its cars. It bore upon the care which the defendant ought to have exercised and the protec-

tion which it ought to have furnished to its passengers who were entitled to alight even in the face of a large number of people desiring to become passengers. Nichols v. Lynn & Boston, 168 Mass. 528, 47 N. E. 427. The evidence as to the conduct of crowds of the year before the accident at the same season of the year, when it may be fairly inferred that conditions as to the reservation, boathouses and use of canoes were substantially the same, had some tendency in the same direction. The plaintiff appears to have gone far enough to bring herself within the operation of this rule. The fact that the superior court excluded the line of inquiry excused her from making so complete an offer of proof as would otherwise have been necessary.

It is also to be observed that the plaintiff was a woman incumbered with a small child and entitled to protection commensurate with the impaired capacity to care for herself resulting from this burden. Hamilton v. Boston & Northern St. Ry. Co., 193 Mass. 324, 79 N. E. 734. Her own testimony as to the length of time elapsing after the car stopped and before her injury and the facts that she had once risen from her seat and been forced back into it by the violence of the crowd and having risen again was compelled to pause for opportunity to step and that while thus waiting the seat was thrown against her tend to show that the boisterousness was not an instantaneous act without forewarning, but was of appreciable duration and might be found to have afforded in connection with all the other attendant conditions a premonition such as to call for action on the part of the conductor or starter. That this occurred upon a public street rather than in a station under the exclusive control of the defendant is not decisive in its favor. It is not a question of policing the public way, but of shielding its passenger while in the car. Evidence of unruly conduct of crowds at this place on prior occasions when the circumstances were similar should have been received and the case submitted to the jury.

Exceptions sustained.[25]

[25] In the following cases the carrier was held responsible for injuries inflicted upon passengers by other passengers or outsiders, there being evidence that the carrier was negligent in not anticipating or taking active measures to prevent the harm: Terre Haute, Indianapolis & Eastern Traction Co. v. Scott (Ind. App.) 148 N. E. 335 (1925); Abernathy v. Missouri Pac. R. Co. (Mo. App.) 217 S. W. 568 (1920); Washington Railway & Electric Co. v. Perry, 47 App. D. C. 90 (1917); St. Louis, I. M. & S. R. Co. v. Hatch, 116 Tenn. 580, 94 S. W. 671 (1906); Spangler v. St. Joseph & G. I. R. Co., 68 Kan. 46, 74 P. 607, 63 L. R. A. 634, 104 Am. St. Rep. 391 (1903); Chicago & A. R. Co. v. Pillsbury, 123 Ill. 9, 14 N. E. 22, 5 Am. St. Rep. 483 (1887); Britton v. Atlanta & C. A. L. R. Co., 88 N. C. 536, 43 Am. Rep. 749 (1883); King v. Ohio & M. Ry. Co. (C. C.) 22 F. 413 (1884); Pittsburgh, F. W. & C. Ry. Co. v. Hinds, 53 Pa. 512, 91 Am. Dec. 224 (1867). For a collection of cases on the carrier's liability where a passenger is injured by the rush or crowding of passengers, see 32 A. L. R. 1315. For cases dealing with the liability of a carrier for an assault by a fellow passenger, see L. R. A. 1918F, 555; 32 L. R. A. (N. S.) 1206. For cases dealing with the liability of a carrier for injury to a passenger inflicted by outsiders, see notes, L. R. A. 1915C, 681; 55 L. R. A. 713; 15 A. L. R. 868. See, also, comment in 19 Colum. Law Rev. 240, and 35 Harv. Law Rev. 467, on the duty of a carrier to protect passengers from assaults.

Hall v. R R. 93 South. 557

Robert D. Holleman

HALL et al. v. PULLMAN CO.

(District Court of the United States, S. D. Florida, 1918. 253 F. 297.)

At Law. Action by Florence M. Hall and another against the Pullman Company. On demurrer to declaration. Demurrer overruled as to first count, and sustained as to second and third counts.

CALL, District Judge. The first count of the declaration charges that the plaintiff was assaulted while in her berth in a sleeping car by a passenger, and that the porter conspired and colluded with said passenger in the making of the assault. The second count charges that the plaintiff and the passenger making the assault were passengers on the sleeping car, and that by his acts and demeanor he indicated that he intended making the assault, whereupon she rang the bell for the porter, but that the porter failed to respond, whereupon the assault was committed, and that, had the porter responded to the call, he could have prevented the assault. The negligence charged in this count is the porter's failure to answer the bell. The third count charges substantially the same facts, but substitutes the conductor for the porter.

In Scheffer v. Washington City, V. M. & G. S. R. Co., 105 U. S. 249, 26 L. Ed. 1070, Justice Miller says: "To warrant a finding that negligence * * * is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence, * * * and that it ought to have been foreseen in the light of the attending circumstances."

In Ball v. C. & O. R. Co., 93 Va. 44, 24 S. E. 467, 32 L. R. A. 795, 57 Am. St. Rep. 786, Judge Keith quotes approvingly from Britton v. A. & C. Air Line R. Co., 88 N. C. 536, 43 Am. Rep. 749, as follows: "The liability of the defendant to the plaintiff grows not out of the fact that she was injured, but out of the failure of its servants to afford her protection, after they had reasonable grounds for believing that violence to her was imminent."

Testing this declaration by these principles, I am of opinion that the first count is not vulnerable to the attack by demurrer, but that the second and third counts are. The rule of liability in a case of loss of baggage and damage resulting from an assault by a fellow passenger is, as I understand the cases, different, and this difference is based upon the fact that larceny may and ought to be expected and guarded against by the sleeping car company or its agents and servants, while an assault by a fellow passenger is not to be expected, and the company cannot be held for negligence in not protecting the passenger, unless the company or its servants had reasonable grounds for believing that violence was imminent, either through the circumstances surrounding the injured person within the knowledge of the company's servants or by being informed of such circumstances. A criminal assault upon a female passenger, although there are only two passengers on the sleeping car, is not within the rule enforced in cases of

larceny of the passenger's baggage, nor is the failure of the porter or conductor to answer the call bell the natural and probable cause of the injury complained of, which ought to have been foreseen in the light of the attending circumstances set out in the second and third counts of the declaration.[26]

The first count is, I think, good under the decision in Pullman Palace Car Co. v. Campbell, 154 U. S. 513, 14 S. Ct. 1151, 32 L. Ed. 1069. If an assault by the porter makes the company liable, then the assault by a passenger conspiring with the porter would equally make the company liable.

KORNER et al. v. COSGROVE.

(Supreme Court of Ohio, 1923. 108 Ohio St. 484, 141 N. E. 267, 31 A. L. R. 1193.)

Action by Gladys Cosgrove against C. H. Korner and Clayton Korner, doing business under the firm name of C. H. Korner & Son. Judgment for plaintiff was affirmed by the Court of Appeals, and defendants bring error.

MARSHALL, C. J.[27] The plaintiff in this action, a passenger in a public taxicab, sued to recover damages from Korner & Son, as owners and operators of a line of public taxicabs then being operated for hire in the city of Bucyrus, Ohio. It was alleged in the petition and admitted in the answer that the defendants did at the time complained of own and operate a line of taxicabs for hire. It was claimed that plaintiff, at about the hour of 12 o'clock at night, went to the place of business of defendants in Bucyrus, and applied for a taxicab to take her to her home in a remote part of the city, and found Edward Driscoll, an employé of defendants, who started to take her to her home in a taxi, but who instead of going directly to her home, drove the machine into the country, where he assaulted and ravished her. * * *

While it was not seriously questioned that the defendants were common carriers of passengers, inasmuch as there has never been an authoritative declaration by this court upon this point, it will be proper to briefly state that all the authorities without exception have declared

[26] Compare: Culbreth v. Pullman Co. (D. C.) 293 F. 402 (1923). The plaintiff in the principal case also brought an action against the railroad company in the state court, charging negligence on the part of the Pullman porter in not answering her call and protecting her against the assault. A directed verdict in favor of the defendant was affirmed by the Supreme Court of Florida. Hall v. Seaboard Air Line Ry. Co., 84 Fla. 9, 93 So. 151 (1922). See criticism of this decision in 36 Harv. Law Rev. 339. For a collection of cases dealing with the duty of a sleeping car company to use reasonable care to protect passengers from injury by third persons, see note, L. R. A. 1917F, 888. See, also, Caldwell v. Pullman Co. (S. C.) 128 S. E. 504 (1925), holding the Pullman Company liable for injuries sustained by a passenger as a result of stumbling over a suit case partially projecting in the aisle.

[27] Part of the opinion is omitted.

that public taxicabs, operated for hire, and which are offered promiscuously to the public for the service of transportation of passengers, are common carriers. This is true, without any regard to the limits of the service. Huddy on Automobiles (5th Ed.) p. 45; Berry on Automobiles (3d Ed.) § 1502. * * *

Having found that the relation of carrier and passenger exists, it only remains to determine and declare the duty owing by a common carrier to protect passengers against insults and assaults by the carrier's employés and servants during the course of the transportation.

It is claimed by counsel for the defendants that the carrier can only be held responsible for negligent and careless driving, and that the carrier is not responsible if it has exercised ordinary care in selecting drivers who are competent and skillful in operating a taxi. This court has recently declared in the case of Elliott v. Harding, 107 Ohio St. 501, 140 N. E. 338, that the owner of any motor vehicle may be held responsible for damages caused by an incompetent driver, known to be such by the owner. The instant case, however, is based upon a very different principle. The issues in this case are not confused or complicated by any such considerations as a troublesome or intoxicated passenger, or one who refuses to pay fare, or an altercation between a passenger and the servants of the carrier, neither is there any claim that the girl was the aggressor, or that her injury and damage are chargeable to her own acts or negligence. The act of the driver was unprovoked and was committed while discharging the duties of his employment, and while using the facilities and equipment of his employer, and for which the employer received the compensation usually paid for such service. The facts therefore make the strongest possible case, and the injury and damages were of a most grievous character. This case does not involve any new principle of law, and it is only novel in that it is sought to apply the same principles to motor traffic which are commonly applied to other kinds of public transportation.

Among the reported cases are found a very large number similar in kind to the instant case, and differing only in the character of the assault and the extent of damage perpetrated. Among the early cases can be found a few of a contrary tenor, but the overwhelming weight of authority, even among the earlier cases, and an unbroken unanimity among the later cases, charge the carrier with liability for unwarrantable assaults upon passengers by the servants of the carrier. The carrier's obligation is to carry the passenger safely and properly and to treat him respectfully, and if the performance of this duty is intrusted to an agent or servant the carrier is held to a strict responsibility for the assaults and insults of such servants. We will notice only a few cases which are of a very similar nature.

In the case of Dwinelle v. N. Y. C. & H. R. R. Co., 120 N. Y. 117, 125, 24 N. E. 319, 322 (8 L. R. A. 224, 17 Am. St. Rep. 611), a passenger was assaulted by the porter of a sleeping car, the porter not being employed by the railroad company, but the Pullman car was a

part of the train in which the passenger was being transported. The court in that case used the following language: "A common carrier is bound, so far as practicable, to protect his passengers, while being conveyed, from violence committed by strangers and copassengers, and he undertakes absolutely to protect them against the misconduct of its own servants engaged in executing the contract * * * from an assault committed upon a passenger by a servant intrusted with the execution of a contract of a common carrier."

In Garvik v. B., C. R. & N. Ry. Co., 131 Iowa, 415, 108 N. W. 327, 117 Am. St. Rep. 432, a brakeman followed a girl into the toilet of a day coach in the early morning, and criminally assaulted her. The following is quoted from the syllabus: "A railway company is liable in damages for a rape committed on one of its passengers by an employé."

In Campbell v. Pullman Palace Car Co. (C. C.) 42 F. 484, the Pullman Company was held responsible for an indecent assault made upon a female passenger by the porter of the car. This case was affirmed without official report by the Supreme Court of the United States.

In New Orleans, J. & G. N. Rd. Co. v. Allbritton, 38 Miss. 242, 75 Am. Dec. 98, it was held: "A railroad company impliedly warrants that its engineers, conductors, and other employés engaged in running its trains are possessed of due skill, and are competent and faithful; and it is liable under all circumstances for any injury occasioned by the misconduct, rashness, or negligence of such persons; and where an injury is caused by the gross negligence or wanton and willful misconduct of its employés, it is liable for exemplary damages."

In the case of Savannah, F. & W. Ry. Co. v. Quo, 103 Ga. 125, 29 S. E. 607, 40 L. R. A. 483, 68 Am. St. Rep. 85, the following proposition of law is stated in the syllabus: "It is a carrier's duty to protect passengers from injury, violence, insult, and ill treatment at the hands of its employés, during the course of transportation. * * * If a person employed by a railroad company as a baggagemaster upon one of its trains assaults a female passenger thereon, with intent to commit a rape upon her, the company is answerable in damages to her for the act."

In all of the foregoing cases it is very clear that the employés went far beyond the regular duties incumbent upon them as servants of the carrier, but the carriers were nevertheless held liable to respond in damages for such acts.

The text-writers have laboriously reviewed a large number of authorities and have deduced therefrom rules in accord with the principles herein stated. 3 Thompson on Negligence, §§ 3184 and 3185; 2 Shearman & Redfield on Negligence (6th Ed.) § 513.

So far as rail transportation is concerned, the rule may be regarded as firmly established that carriers insure passengers against unwarrantable assaults and insults at the hands of the carrier's agents and servants while in the course of the journey under a contract of carriage.

Upon what principle should a different rule apply to motor vehicles? Motor vehicles to-day occupy a larger place in the social, industrial, and economic fabric than any other factor of twentieth century civilization. The automobile is contributing very largely to the pleasure of the people, while at the same time the reckless use of same is taking a tremendous toll of life and limb. More and more each year it is increasing as a factor in commercial transportation of freight and passengers, and in many communities is driving electric traction from the field. More important and more dangerous is the fact that motor vehicles are used as the instrumentalities of crime, especially the crimes of robbery and rape, and as a means of escape and thwarting the administration of justice. All these facts are known and recognized by the public, and the courts would be grossly remiss in the discharge of their duties if they failed to recognize them and guard against them by declaring rules and principles calculated to overcome the well-known evil tendencies.

In many of our larger cities, where public officials are notoriously failing and refusing to enforce certain laws because of their antipathy to such laws, thereby causing a general increase of crime and permitting lawlessness to progress beyond control, the public taxi has been utilized as means of safety to those who are compelled to traverse the streets of such localities after nightfall. This last resort of safety will have been lost, if the public cannot have the assurance that drivers of public taxicabs are men of integrity and character.

This assurance can only prevail if the owners of such vehicles employed in public transportation of passengers are held to a strict accountability for unwarrantable assaults and insults at the hands of employés in charge of such passengers.

Therefore, upon principle, as well as analogous authority, it is the judgment of this court that the judgments of the lower courts should be affirmed.

Judgment affirmed.[28]

WANAMAKER, ROBINSON, JONES, MATTHIAS, DAY, and ALLEN, JJ., concur.

[28] The following cases held the carrier responsible for an injury to a passenger wrongfully inflicted by an employee while acting outside the scope of his employment: Yellow Cab Co. of Atlanta v. Carmichael, 33 Ga. App. 364, 126 S. E. 269 (1925), assault; Garvik v. Burlington, C. R. & N. R. Co., 131 Iowa, 415, 108 N. W. 327, 117 Am. St. Rep. 432 (1906), rape; Savannah, F. & W. Ry. Co. v. Quo, 103 Ga. 125, 29 S. E. 607, 40 L. R. A. 483, 68 Am. St. Rep. 85 (1897), attempted rape; Pine Bluff & A. R. R. Co. v. Washington, 116 Ark. 179, 172 S. W. 872 (1915), assault; St. Louis, I. M. & S. Ry. Co. v. Dowgiallo, 82 Ark. 293, 101 S. W. 413 (1907), assault; Hayne v. Union St. Ry. Co., 189 Mass. 552, 76 N. E. 219, 3 L. R. A. (N. S.) 605, 109 Am. St. Rep. 655 (1905), assault; Lampkin v. Louisville & N. R. Co., 106 Ala. 287, 17 So. 448 (1894), assault; Atlanta & W. P. R. R. v. Condon, 75 Ga. 51 (1885), assault; Stewart v. Brooklyn & Crosstown R. Co., 90 N. Y. 588, 43 Am. Rep. 185 (1882), assault; Craker v. Chicago & N. W. Ry. Co.,

ROMMEL v. SCHAMBACHER.

(Supreme Court of Pennsylvania, 1887. 120 Pa. 579, 11 A. 779, 6 Am. St. Rep. 732.)

Action on the case by William Rommel against Jacob Schambacher for personal injuries. The trial court directed a nonsuit, and plaintiff brings error.

GORDON, C. J. From the evidence in the case we gather the following facts: On the evening of the ninth of August, 1884, the plaintiff, William Rommel, a minor, entered the tavern of the defendant, Jacob Schambacher, and there found one Edward Flanagan. They both became intoxicated on liquor furnished them by Schambacher. While the plaintiff was standing on the outside of the bar, engaged in conversation with the defendant, who was on the inside thereof, Flanagan pinned a piece of paper to Rommel's back, and set it on fire. The consequence was that Rommel's clothes were soon in flames, and before they could be extinguished he was very badly injured. He brought the present suit to recover damages from the defendant for the injury thus sustained.

The court below adjudged the facts as stated above to be insufficient to sustain the plaintiff's case, and directed a nonsuit. In this we think it made a mistake. There is no doubt that the defendant, from the position he occupied, had a full view of the room outside of the bar, and did see, or might have seen, all that was going on in it. If, in fact, he did see Flanagan setting fire to the plaintiff, and did not interfere to protect his guest from so flagrant an outrage, his responsibility for the consequences is undoubted. If, on the other hand, he was guilty of making Flanagan drunk, or if he came there drunk, and Schambacher knew that fact, he was bound to see that he did no injury to his customers. All this is a plain matter of common law and good sense, and does not depend on the act of 1854, or any other statute. Where one enters a saloon or tavern, opened for the entertainment of the public, the proprietor is bound to see that he is properly protected from the assaults or insults, as well of those who are in his employ, as of the drunken and vicious men whom he may choose to

36 Wis. 657, 17 Am. Rep. 504 (1875), assault; Goddard v. Grand Trunk Ry. of Canada, 57 Me. 202, 2 Am. Rep. 39 (1869), assault.

For a further collection of cases dealing with the liability of a carrier for the willful torts of a servant, see 40 L. R. A. (N. S.) 999. As to whether the carrier is liable for exemplary damages in such cases, see note, 48 L. R. A. (N. S.) 35. See Wheat, The Liability of the Carrier to Passengers for Injuries by its Servants, 14 Mich. Law Rev. 626. Concerning the liability of a railroad for an assault upon a passenger by a Pullman porter not in the employ of the railroad see Dwinelle v. New York Cent. & H. R. R. Co., 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611 (1890).

But a railroad is not liable for a tort committed by a Pullman employee upon one who is not a passenger. Louisville & Nashville R. Co. v. Marlin, 135 Tenn. 435, 186 S. W. 595, L. R. A. 1917A, 417 (1916). See comment, 30 Harv. Law Rev. 81.

harbor. To illustrate the principle here stated, we need go no further than the case of Railroad Co. v. Pillow, 76 Pa. 510. In the case cited, a drunken row occurred on board one of the defendant's cars, and during the quarrel a bottle was broken, and a piece of the glass struck the plaintiff, a peaceable passenger, in the eye, and put it out. Held, that the company was responsible for the injury thus done. In the opinion of this court, the following language was used: "The plaintiff lost his eye through the quarrel of a couple of drunken men, who should not have been permitted aboard the cars, or, if so permitted, should have been so guarded or separated from the sober and orderly part of the passengers that no injury could have resulted from their brawls." If, then, a railroad company is liable for the conduct of drunken men who may chance to board its cars, much more the tavern keeper who not only permits drunken men about his premises, but furnishes liquor to make them drunk, and who is thus instrumental in fitting them for the accomplishment of just such an insane and brutal trick as that disclosed by the evidence of the case in hand.

The judgment of the court below is now reversed, and a new venire ordered.[29]

RAHMEL v. LEHNDORFF.

(Supreme Court of California, 1904. 142 Cal. 681, 76 P. 659, 65 L. R. A. 88, 100 Am. St. Rep. 154.)

BEATTY, C. J.[30] This is an action by a guest against an innkeeper, to recover damages for an assault and battery by a servant of defendant. The cause was tried in the superior court without a jury, and plaintiff had judgment. Defendant appeals from the judgment, and from a subsequent order denying his motion for the entry of a different judgment on the findings. * * *

The facts found and admitted are few and simple: The plaintiff was a guest in the defendant's hotel, and while seated at the dinner table was assaulted and beaten by a dining-room waiter. Damage, $200. The question is whether, upon these facts, the defendant was liable for compensatory damages. The respondent's contention is that he was so liable, upon either of two grounds: First, under the general rule that a master is liable for the torts of his servant committed in the course of his employment, and within the real or supposed scope of his duties; and, second, upon the ground that an innkeeper is bound

[29] Accord: Curran v. Olson, 88 Minn. 307, 92 N. W. 1124, 60 L. R. A. 733, 97 Am. St. Rep. 517 (1903), assault by third party; Clancy v. Barker, 71 Neb. 83, 98 N. W. 440, 103 N. W. 446, 69 L. R. A. 642, 115 Am. St. Rep. 559, 8 Ann. Cas. 682 (1904), assault by employee. Similarly the proprietor of a restaurant was held liable for an assault upon a patron by a disorderly person, whose presence was known to the proprietor. Molloy v. Coletti, 114 Misc. Rep. 177, 186 N. Y. S. 730 (1921).

[30] Part of the opinion is omitted.

to protect his guests from acts of violence on the part of his servants, just as a common carrier is bound to protect his passengers, while in transit, from molestation by its servants.

We think it clear that the defendant incurred no liability on the first ground. By the general law of master and servant, the master is not liable for the malicious torts of the servant committed outside the scope of his employment. The wrongful act must be one which the servant is empowered under some circumstances to do. It must be something which his employment contemplated—as, for instance, the ejection of a passenger or intruder from a railroad car. Conductors and brakemen have authority to eject disorderly passengers, or persons who refuse to pay their fare, and it is left to their discretion when such authority shall be exercised. In a proper case they may eject a passenger without incurring any liability themselves or imposing any liability upon their employer, but, if they eject him wrongfully and maliciously, the carrier is liable upon the general ground that the act is one which, if lawfully done, could be done in the employer's name, and justified by his authorization. The law on this point is very clearly stated in Cooley on Torts, star pages 535 et seq., and in none of the decisions of this court has a stricter rule been enforced than as above stated. Under that rule, the defendant cannot be held liable, because there is no finding and no reason to presume that defendant ever authorized his servants to assault his guests or any other person under any circumstances.

Neither do we think he was liable on the second ground. The law seems to be pretty well settled that a common carrier of passengers, whether a shipowner or a railway company, owes to a passenger while in transit the duty of protection, absolute as against its servants in charge of ship or train, and equally as against fellow passengers when, on account of intoxication or acts of violence, they should not have been admitted, or when they have been allowed to remain after such misbehavior as justifies their expulsion. But the industry of counsel and our own researches have not resulted in the discovery of more than a single case in which this rule of liability has been extended to innkeepers. In Rommel v. Schambacher, decided in 1887, by the court of common pleas of Philadelphia, it was said to be a plain matter of common law that, "where one enters a saloon or tavern opened for the entertainment of the public, the proprietor is bound to see that he is properly protected from assaults or insults, as well of those who are in his employ, as of the drunken and vicious men whom he may choose to harbor." To sustain this conclusion but one case was cited in the opinion of the court, and that a case of carrier and passenger. So that in fact there was a complete begging of the question presented here, viz., whether there is a rule as to protection of guests of an innkeeper equally stringent with the rule affecting common carriers.

The fact that no case was then cited or can now be found in which an English or American court has sustained the conclusion stated in

the Philadelphia case warrants more than a doubt of the correctness of that conclusion. But in truth the language above quoted, when construed and qualified by reference to the facts of the case, does not mean all that it seems broadly to assert. The facts of that case were that the defendant, the proprietor of a saloon, had himself supplied two or three young men with drinks at his bar, by which they were made intoxicated. While in that condition one of them, in plain view of the defendant, pinned a paper to the clothes of another (the plaintiff), and set fire to it. The fire was communicated to plaintiff's clothes, and he was severely burned. The gist of the decision holding the defendant liable for the injury is contained in these words at the close of the opinion: "If, then, a railroad company is liable for the conduct of drunken men who may chance to board its cars, much more the tavern keeper, who not only permits drunken men about his premises, but furnishes liquor to make them drunk, and who is instrumental in fitting them for the accomplishment of just such an insane and brutal trick as that disclosed by the evidence of the case in hand." This, considering the facts, is in reality the whole of the decision. The proprietor was held liable for a tort in which he was personally a participant, and what else was said, so far as it may seem to apply to a malicious assault by a servant, wholly unauthorized and unobserved by the master, may be regarded as dictum.

An innkeeper is, no doubt, guilty of negligence if he admits to his hotel, or permits to remain there, whether as guest or servant, a person of known violent and disorderly propensities, who will probably assault or otherwise maltreat his guests, and for the consequence of such negligence he may be liable in damages. But the plain ground of his liability in such case would be his negligence in harboring persons dangerous to the peace and comfort of those for whose comfort he is bound to provide. And if, as in the Philadelphia case, he stands by while a guest is exposed to the violence of a person who has been made dangerous by his fault, and sees an injury inflicted without any effort to prevent it, he may be regarded as particeps criminis. This case, however, presents no such features. There is neither allegation nor finding that the defendant was negligent in employing or retaining the waiter who committed the assault. So that there is no ground upon which this judgment can be sustained unless we are prepared to hold that, to the same extent that a common carrier is an insurer of his passengers, an innkeeper is an insurer of his guest against the torts of his servants.

We cannot discover any safe ground for such a conclusion. No statute of California imposes such a rule, and no evidence is to be found in the reports of decided cases that such was the rule at common law. Indeed, it was said in Calye's Case, decided in the King's Bench in 26 Elizabeth (Coke, pt. 8, *63), that, "if the guest be beaten in the inn, the innkeeper shall not answer for it"; he being liable, as such, only for damages to the guest's goods and chattels. Since that time no

other rule seems to have existed in England or in this country, unless the Philadelphia case is an instance to the contrary. We do not regard it as a case strictly in point, but one resting upon grounds peculiar to itself, and sufficient to sustain the conclusion of the court without reference to the proposition to which it has been cited here.

The judgment and order of the superior court are reversed.[31]

We concur: ANGELLOTTI, J.; LORIGAN, J.; MCFARLAND, J.; HENSHAW, J.

DUNN v. WESTERN UNION TELEGRAPH CO. et al.

(Court of Appeals of Georgia, 1907. 2 Ga. App. 845, 59 S. E. 189.)

POWELL, J.[32] Dunn brought his action against the Western Union Telegraph Company and the Southern Railway Company by a petition which, omitting formal parts, is substantially as follows: Defendants are, the one a telegraph company, the other a railway company, doing business in Floyd county, and by their acts done in said county have injured the plaintiff in the sum of $1,000, for that "on August 13, 1906, the petitioner and one Walter Jeffries went to the office of the said Western Union Telegraph Company at said Lindale, which said office is in the depot of the said Southern Railway Company at said Lindale, said office of the said Western Union Telegraph Company being the usual place for the reception and sending of telegraph messages at said Lindale, for the purpose of delivering and having sent a message for two minor and orphan children by the names of Yeager; said message being for the uncle of said children, and announcing the death of said children's mother, and requesting that their uncle come and bury their dead mother. After arriving at said depot of the said Southern Railway Company and office of said Western Union Telegraph Company, petitioner informed the agent in charge of said office and depot of his desire to send a message to Yeager, the aforesaid uncle of said Yeager children, for the said Yeager children, announcing the death of their mother.

Petitioner had a right to be in said depot and at said office, and it was the duty of defendants to allow petitioner to remain in said depot and at said telegraph office to transact his said business, and until he had transacted his business. While in said depot and at said office, and before petitioner had transacted his business, or before petitioner had had time to transact said business, the agent in charge of said office and depot willfully, wantonly, malignantly, maliciously, and illegally evicted petitioner from the office of the said Western Union Telegraph Com-

[31] In Duckworth v. Appostalis (D. C.) 208 F. 936 (1913), it was held that an innkeeper was liable for an assault by an employee upon a guest, where it appeared that the innkeeper retained the employee in his service with knowledge of his violent and quarrelsome disposition.

[32] Part of the opinion is omitted.

pany and the depot of the said Southern Railway Company. In evicting the petitioner as aforesaid by the agent aforesaid, said agent was brutal, inhuman, and insulting, in that said agent told petitioner, when he tried to get said agent to send said message, to "Go to hell with your God damn message." Petitioner then told said agent that his message was one of necessity, and begged said agent to receive and send same, whereupon said agent said: "God damn you, get out from here. Leave, God damn you; git." Whereupon petitioner, fearing bodily harm, immediately left said depot and office, and said agent did not receive said message.

The conduct of the said agent was wanton, willful, malicious, and illegal, and, being done by said agent so willfully and wantonly, entitles petitioner to punitive damages, for which he sues. By amendment the petition further alleges that "the telegraph office of the Western Union Telegraph Company at said Lindale was located in the depot and office of the Southern Railway Company, and the agent in charge of said depot was also the agent of said telegraph company, and the acts hereinafter complained of were committed at the time and place where said agent was the agent of both defendants. The said Yeager children had no father, their mother had just been killed by lightning, and it was at the request of these children that plaintiff went to said office to send the telegram as herein set out." * * *

1. For the conceded misjoinder, the judgment of the lower court will be affirmed; but since this is not a matter going to the merits of the transaction, and since the general demurrer of the telegraph company was also sustained, it will be necessary for us to look further into the case, that such direction may be given as will be proper under the circumstances. Civ. Code 1895, § 5498, par. 2. See, also, Jarrell v. American Pipe Bending Machine Co., 2 Ga. App. 764, 59 S. E. 186.

2. The grave question remaining in the case is whether the petition sets forth a cause of action against the telegraph company. The gist of the action is not the failure or refusal of the telegraph company to transmit a message tendered to it, but the alleged disrespectful, humiliating, and insulting treatment by its agent of a member of the general public, lawfully in its office on business with the company. The contention is that the entire damage alleged is such as affects only the feelings of the plaintiff, and that damages for mental suffering cannot be recovered, unless there is a concomitant injury to person or purse. The further contention is made that no breach of duty to the plaintiff is shown. We will dispose of these contentions in inverse order.

A telegraph company is a private corporation performing a public duty; and whether it is a common carrier, a bailee, or a person engaged in business sui generis, is immaterial. It is a public-service company, one engaged in a business of such nature as to clearly distinguish it from those purely private persons and corporations who may conduct their own business in their own way. All such corporations, on account of the interest which the public has in the manner in which

their business is conducted, as well as on account of the special franchises enjoyed by them, must observe certain rules of dealing with the public. These rules, and the corresponding duties which are implied from the nature of the calling, are not always declared by specific statute, but are frequently enforced by the courts as a part of the general law or of the common law. "Upon each person, in every position he occupies, peculiar duties are imposed, each demanding its discharge with an emphasis accentuated or modified by the attendant circumstances." Ray, Negligence (Imposed Duties, Personal), § 1. "One of the great requirements which the government demands of every institution impressed with a public interest, and one which is thrown over every citizen as a great and protective shield, is the duty to act impartially with all. They are under obligations to extend their facilities to all persons, on equal terms, who are willing to comply with their reasonable regulations, and to make such compensation as is exacted for others in like circumstances." Jones, Telegraph and Telephone Companies, § 236.

From this principle, universally recognized, springs the corollary that all such persons, natural and artificial, shall afford to such members of the public as have occasion to transact with them business of the nature they are holding themselves out as being accustomed to do safe and decent access to the places opened up for the transaction of the business in question. This safety does not mean mere physical safety, nor this decency mere absence of obscenity; but by the employment of the expression "safe and decent access" it is intended to connote also the notion of freedom from abuse, humiliation, insult, and other unbecoming and disrespectful treatment. A member of the public is not to be deterred from transacting or offering to transact the business which the law compels a telegraph company to accept impartially from every person by reason of the fact that he cannot enter the public office without being subjected to insult or personal affront. A violation of this duty has occurred whenever a person entering the telegraph office for the purpose of sending a message has been met with disrespectful or insulting treatment at the hands of the company's agents.

It is immaterial that the person thus injured had no personal interest in the message, or that he was the mere agent of another; for there is no such requirement as that persons desiring to transact business with public utility corporations shall do so in person. The fact that the right of respectful treatment, while attempting to do business with a public service company, follows as the natural sequence from the right to be served impartially and at all reasonable times, seems to render the citation of authority as to the existence of this right of respectful treatment unnecessary. We do, however, call attention to the Georgia cases of Gasway v. Atlanta & West Point R. Co., 58 Ga. 216, 221, and Georgia R. Co. v. Richmond, 98 Ga. 495, 502, 25 S. E. 565. It will be noted that, while these were actions against carriers, in neither

case did the liability depend upon the fact that the plaintiff was a passenger. In Gasway's Case he was attempting to check baggage as agent for his wife. In Richmond's Case he had called at the passenger station to see about certain trunks, and the court in deciding the case took pains to call attention to the fact that the relation of carrier and passenger did not exist at that time. We might multiply citation of precedents, but these are sufficient.

3. The telegraph company, therefore, violated its duty towards the plaintiff, in that it did not afford him safe and decent access to its office. The plaintiff suffered the injury of humiliation and wounded feelings. Is it a case of damnum absque injuria, because no injury to purse or person also ensued? That damages for mental suffering are compensatory in character can hardly be open to question. "Wounding a man's feelings is as much actual damage as breaking his limbs. The difference is that one is internal and the other external; the one mental, the other physical." Head v. Ga. Pac. R. Co., 79 Ga. 358, 360, 7 S. E. 217, 218, 11 Am. St. Rep. 434; Smith v. Overby, 30 Ga. 241, 248. Such damages may in the very nature of things be just as proximately and naturally the consequence of the defendant's wrong as any other damage; so that there is no legitimate objection to their allowance for any lack of this element. Of course, there may be cases where mental suffering is not a proximate and natural result of an injury; but this is true as to any other form of damage. Nor can it be justly said that an allowance for mental suffering is any more speculative or conjectural than damages for physical pain and suffering. Those cases which preclude recovery of damages for mental suffering, when no other injury is shown, cannot fairly rest on any of these grounds, but must be based upon the theory presented by Allen, J., in the case of Spade v. Lynn, etc., R., 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393, that the rule is purely arbitrary, though actually existent in certain classes of cases. See, also, Homans v. Boston Elevated Ry. Co., 180 Mass. 456, 62 N. E. 737, 57 L. R. A. 291, 91 Am. St. Rep. 324, wherein the court, through Holmes, J., says that the rule, being arbitrary, is not to be extended.

This arbitrary rule is generally applied only to those cases where the injury is the result of mere neglect. The leading case of Chapman v. Western Union Tel. Co., 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183, as well as the cases which have followed it, puts this state in line with those that hold that, in actions on account of wrongs merely negligent, mental suffering unaccompanied by other injury cannot be the basis of a recovery. Those courts, however, who assert this doctrine even most strenuously, do not extend its application to those intentional injuries of which insult, humiliation, and mental suffering are the natural consequences. As Allen, J., in the Spade Case, supra, says: "It is hardly necessary to add that this decision does not reach those classes of actions where an intention to cause mental distress or to hurt the feelings is shown or is reasonably to

be inferred." By this distinction there can be seen between the case of Chapman v. Telegraph Company, supra, and that of Cole v. Railway Company, 102 Ga. 474, 31 S. E. 107, a clear, logical discrimination. The holding in the Cole Case is undoubtedly the law, and is unequivocally supported by authority. There a railway conductor intentionally and wantonly insulted a passenger, not by using slanderous language to him, as the court intimates in the opinion (for the language was not per se slanderous, and there were no allegations stating it to be so for any special reason), but by using to him insulting and humiliating language. The whole injury was to the plaintiff's feelings. The court says that case is distinguishable from the Chapman Case; and it is, not because the plaintiff in the Cole Case was slandered, but because that was an action upon a malicious and intentional tort, the other upon a merely negligent, though wrongful, omission. See Watson on Damages, § 399; Burdick, Law of Torts, 101; Wilkinson v. Downtown, [1897] 2 Q. B. 57 (wherein a recovery was upheld in favor of a wife for mental shock on account of defendant's falsely and maliciously telling her that her husband had been seriously wounded); Rice v. Rice, 104 Mich. 371, 62 N. W. 833 (where a recovery by a wife for mental suffering occasioned by the alienation of her husband's affections was held proper, though no financial loss in the matter of support was shown). See, also, Barbee v. Reese, 60 Miss. 906; Conklin v. Thompson, 29 Barb. (N. Y.) 218.

As against the telegraph company the petition sets out a cause of action. We do not think the special demurrer is well founded, so far as it calls for the hour at which the alleged wrong occurred. Therefore the judgment is affirmed, with direction that the dismissal may be avoided and the case reinstated, provided the plaintiff, within 20 days from the time the remittitur of this court is filed in the office of the clerk of the trial court, shall file an amendment striking the Southern Railway Company as party defendant.

Judgment affirmed, with direction.[33]

[33] Accord: Payne v. Combs, 198 Ky. 749, 249 S. W. 1031 (1923); Cave v. Seaboard Air Line Ry., 94 S. C. 282, 77 S. E. 1017, L. R. A. 1915B, 915, Ann. Cas. 1915A, 1065 (1913); Gillespie v. Brooklyn Heights Ry. Co., 178 N. Y. 347, 70 N. E. 857, 66 L. R. A. 618, 102 Am. St. Rep. 503 (1904); Cole v. Atlanta & West Point R. R., 102 Ga. 474, 31 S. E. 107 (1897). Contra: St. Louis, I. M. & S. Ry. Co. v. Taylor, 84 Ark. 42, 104 S. W. 551, 13 L. R. A. (N. S.) 159 (1907). Similarly a carrier has been held liable for its negligent failure to protect a passenger from humiliation and insult by a third party. Lucy v. Chicago Great Western Ry., 64 Minn. 7, 65 N. W. 944, 31 L. R. A. 551 (1896). See note on Liability of an Innkeeper for Employee's Insults to Guests, 17 Yale Law J. 45. For a collection of cases dealing with the liability of carriers and others engaged in public service for insulting conduct towards passengers and customers, see notes, L. R. A. 1918A, 600; 13 L. R. A. (N. S.) 159; Ann. Cas. 1914A, 20. See, also, comments, 35 Harv. Law Rev. 747; 15 Harv. Law Rev. 670.

STILES, GADDIE & STILES v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky, 1908. 129 Ky. 175, 110 S. W. 820, 18 L. R. A. [N. S.] 86, 130 Am. St. Rep. 429.)

BARKER, J. This action was instituted for the purpose of recovering the value of 30 head of horses shipped from East St. Louis, Ill., to New Haven, Ky., over the railroad of defendant, and which were destroyed by fire in Louisville, Ky. There is no allegation in the petition of any negligence on the part of the carrier, and a general demurrer to the petition was sustained by the court. The plaintiffs declining to amend their petition, it was dismissed, from which judgment this appeal is prosecuted.

The sole question arising on the record is whether or not, in Kentucky, the common-law rule as to the liability of a common carrier for inanimate freight delivered to it prevails as to live stock; it being conceded that if this rule does prevail the petition states a cause of action, and if it does not the judgment of the trial court is correct. It is not denied that at common law the common carrier of inanimate freight was an insurer of its safe delivery, except where the loss was from the act of God or the public enemy, or resulted from the inherent infirmity of the goods. That this rule prevails in Kentucky is quite beyond question. The question for adjudication is: Does the same rule apply as to consignments of live stock? In the case of Hall & Co. v. Renfro, 3 Metc. 51, there was involved the loss of a jack by a public ferryman while it was being transported across a river. After stating that the keeper of the ferry was a common carrier, his responsibility for the loss of the jack was thus stated: "Did he thereby subject himself to the obligations and liabilities of a common carrier? The authorities are conclusive of this question. * * * The general rule is that common carriers are responsible for the goods which they undertake to carry, unless the loss or damage is the result of inevitable accident, as lightning, tempests, and the like (which are usually termed the acts of God), or is occasioned by the public enemies. See the authorities cited. This rule, however, must be understood with certain qualifications. For instance, it is said that the liability of the carrier would not cover losses arising from the ordinary deterioration of goods in quantity or quality in the course of transportation, or from their inherent infirmity or tendency to decay. So, although a carrier is liable for the safety of animals delivered to him for transportation, yet, if an animal is injured by the peculiar risks to which it is exposed, the carrier is clearly excusable. He would not be liable for any accident arising from the animal's own viciousness or want of temper. Angell on Carriers, §§ 210, 214, and the cases there cited. 'Such a case,' says the author, 'would seem to be analogous to the case of the loss of merchandise owing to some inherent defect which caused the destruction of it while in transit.'" The court then goes on to clearly

recognize the exception to the general rule as above stated that the carrier was not liable for the loss of the jack if it, without negligence on the part of the carrier, fell out of the boat, or was thrown out of it, in consequence of its own restiveness or viciousness of temper, or the restiveness or viciousness of the other animals on board with it at the time.

In the case of C., N. O. & T. P. Ry. Co. v. Sanders & Russell, 118 Ky. 115, 80 S. W. 488, the following rule is quoted with approval as being the law in Kentucky: "And the rule as now established by the great weight of modern authority is that railroad companies are common carriers of live stock, with substantially the same duties and responsibilities that existed at common law with respect to the carriage of goods, except that they are not liable as insurers against loss and injury resulting from the inherent nature, propensities, or proper vices of the animals themselves." And in Cleveland, C., C. & St. L. Ry. Co. v. Druien, 118 Ky. 237, 80 S. W. 778, 66 L. R. A. 275, in discussing the loss of live stock by fire, we said: "At the common law, which obtains in Illinois, as well as in this state, a common carrier is liable for loss of freight in its charge occurring by fire, whether or not caused by its own negligence; its liability being that of an insurer."

The cases cited by the appellee in support of the judgment of the court are not apposite to the question before us. They are cases where the stock was killed or injured by reason of its inherent propensity, and the loss may be said to have resulted from the infirmity or vice of the animals; and while the court, perhaps, used general language in regard to the negligence or nonnegligence of the carrier, which, if disassociated from the particular loss that was being discussed, might seem to modify the general rule, yet it was clearly not the intention of the court so to do. Undoubtedly, where the result may have arisen from the natural infirmity or vice of the animal, then the question of the negligence or care of the carrier arises; but that principle has no application here. Appellants' horses were burned by a conflagration in Louisville, Ky., while in charge of the carrier. This was a loss in no wise connected with or growing out of the infirmity of the animals themselves, but falls under the common-law rule which makes the carrier an insurer of the safe delivery of the goods committed to it for transportation.

It results, therefore, that the court erred in sustaining a demurrer to appellants' petition, and the judgment is reversed for proceedings consistent with this opinion.[34]

[34] In Boyce v. Anderson, 2 Pet. 150, 7 L. Ed. 379 (1829), it was held that a common carrier was not liable as an insurer for a slave. Upon somewhat similar grounds it has been held that a railroad is not liable as an insurer of live stock. Michigan S. & N. I. R. Co. v. McDonough, 21 Mich. 165, 4 Am. Rep. 466 (1870); Lake Shore & M. S. R. Co. v. Perkins, 25 Mich. 329, 12 Am. Rep. 275 (1872); Heller v. Chicago & G. T. R. Co., 109 Mich. 53, 66 N. W. 667, 63 Am. St. Rep. 541 (1896); McKenzie v. Michigan Cent. R. Co., 137 Mich. 112, 100 N. W. 260 (1904). But the overwhelming majority of decisions agree with the principal case. See collection of cases in 18 L. R. A. (N. S.) 86.

SECTION 2.—LIABILITY AS INSURER

WHITE v. WINNISIMMET CO.

(Supreme Judicial Court of Massachusetts, 1851. 7 Cush. 155.)

This was an action on the case against the proprietors of a ferry for an injury to the plaintiff's property, occasioned by his horse and loaded wagon falling overboard from one of the defendants' boats, while passing from Boston to Chelsea. The facts are sufficiently stated in the opinion.

DEWEY, J.[35] To a certain extent, persons keeping and maintaining a ferry are common carriers, and subject to the liabilities attaching to common carriers. It would be so, if a bale of goods or an article of merchandise was delivered by the owner to the agent of a ferry company, to be carried from one place to another for hire. Upon receiving such goods for transportation, the ferry company stipulate to carry them safely, and subject themselves to strict liability for the safe carriage and delivery of such goods; being only exempted for losses occasioned by those acts, which are denominated "acts of God, or of a public enemy." The principle above stated would embrace the case of a horse and wagon received by a ferryman to be transported by him on a ferry-boat, the ferryman accepting the exclusive custody of the same for such purpose, and the owner having, for the time being, surrendered the possession to the ferryman.

But if the traveller uses the ferry-boat as he would a toll bridge, personally driving his horse upon the boat, selecting his position on the same, and himself remaining on the boat; neither putting his horse into the care and custody of the ferryman, nor signifying to him or his servants any wish or purpose to do so; and the only possession and custody, by the ferryman, of the horse and vehicle to which he is attached, is that which necessarily results from the traveller's driving his horse and wagon, or other vehicle, on board the boat, and paying the ordinary toll for a passage; in such case, the ferry company would not be chargeable with the full liabilities of common carriers of merchandise. The liability in this case would be one of a different character; and if the proprietors of the ferry were chargeable for loss or damage to the property, it would be upon different principles. In reference to persons thus using the ferry, the company have responsible duties to perform; the neglect of which may charge them for the loss of goods and property placed on board their boat, when the loss has been occasioned by their default. It is the duty of a

[35] Part of the opinion is omitted.

ferry company to provide a good and safe boat, suitable for the business in which they are engaged; and they are required to have all suitable and requisite accommodations for the entry upon, the safe transportation while on board, and the departure from the boat, of all horses and vehicles passing over such ferry. They are required to be provided with all proper and necessary servants and agents requisite for the safe and proper conducting of the business of the ferry, and with all proper and suitable guards and barriers on the boat, for the security of the property thus carried on the boat, and to prevent damage from such casualties as it would naturally be exposed to, though there was ordinary care on the part of the traveller. For neglect of duty in these respects, they may be charged, but the liability is different from that of common carriers. The case of such a traveller, though not entirely similar, much more resembles that of a traveller upon a toll bridge or turnpike road; who, while he uses the easement of another, yet retains the possession and custody of his horse and wagon. The party, thus driving his own horse upon the boat, and retaining the custody of him, is bound, like the traveller on the toll bridge or the turnpike road, to use ordinary care and oversight in respect to his horse while on the boat, and if he does not use such ordinary care and oversight in respect to him, and for want thereof, the horse leaps overboard, or receives on the boat some injury, all which might and would have been avoided, if the party had used proper care and diligence, such party must himself bear the loss which has thus been occasioned by his own neglect.

In deciding upon the nature and extent of the liability of ferrymen, and how far they are to be charged as common carriers, regard is to be had to the nature of the employment, and especially to the thing to be transported. This principle is practically applied in the well known distinction relating to the liability of the proprietors of stage coaches and other vehicles, as to the carriage of persons. No person thus carried in a public vehicle can recover damages for an injury to his person, if his own want of ordinary care contributed to the injury. Such carriers are not common carriers, with all the liabilities as such. One reason for the distinction is, that persons thus carried are not and cannot be placed under the same custody and control as bales of goods. Being intelligent beings, and having the power of locomotion, and having the opportunity on the one hand, by their own voluntary acts, of exposing themselves to greater hazard, and on the other of guarding to some extent against perils, the law properly requires a person thus carried to exercise ordinary care and vigilance to avoid exposure to danger; and if this is not exercised, and an injury is sustained, the carrier is not liable therefor.

The same principle is also further illustrated in the various decisions of the courts, in cases of actions instituted for the purpose of charging the carriers of slaves as common carriers of merchandise. It was suc-

cessfully, and certainly most properly contended, as to the carriage of slaves, that in those states where slavery is allowed by law, and where slaves are to some purposes treated as chattels, yet as they are human beings, and cannot and ought not to be stowed away and confined like bales of goods, and placed under the absolute control of the carrier, the principle of the common law applicable to common carriers of merchandise could not be applied to the carriers of slaves. This was so held in Boyce v. Anderson, 2 Pet. 150, 7 L. Ed. 379; McDonald v. Clark, 4 McCord (S. C.) 223.

As having some bearing also on this question, we may allude to the modification of the principle of general liability as common carriers, in those cases where the owner of goods accompanies them in their transit, retaining a certain control over them, as in Brind v. Dale, 8 Car. & P. 207, where it was held, that if the owner of goods accompanies them to take care of them, and is himself guilty of negligence, he is not entitled to recover. This case also affirms, as a rule of law, a principle often found elsewhere, and which bears directly, as we think, upon the case before us, "that a party cannot recover, if his own negligence was as much the cause of the loss as that of the defendant."

Thus we perceive that a modification of the liability attached to common carriers occurs, as the nature of the thing to be carried, and the extent of the custody and control over it, by the carrier, varies. We think that the propriety of such a modification of what is certainly a very stringent rule of liability, in reference to cases where the entire custody and control of the property is not with the carrier, is quite obvious.

The case of a traveller conveyed by means of a ferry-boat, where the traveller enters upon the boat driving his horse attached to a wagon, or other vehicle, selecting his own place upon the boat, and continuing to retain under his own custody his horse and wagon, neither committing it to the care of the ferryman or his servants, or signifying any wish or purpose so to do, presents another instance where the liability of the carrier must be considered as of a restricted character; and, as in the case of a carrier of persons, duties devolve upon the traveller, and he is bound to use ordinary care and diligence in respect to his horse and vehicle, in order to prevent, as far as he can, by such care, any injury occurring from fright, or from other cause immediately resulting from the movements of the horse. When such horse or other animal is not surrendered into the custody of the ferryman, the driver is bound to do all that can be effected by reasonable diligence and supervision, to prevent a loss of his property occasioned by his horse becoming restless or affrighted. If the traveller wholly neglects his duty in this respect, leaving his horse without any oversight, and the horse, without the fault of the ferryman, becomes affrighted and throws himself and the vehicle to which he is attached overboard, when, by proper

care and attention of the driver, this casualty would in all reasonable probability have been avoided, the loss must fall upon the traveller. * * *

Judgment for the defendants.[36]

BORDEN v. NEW YORK CENT. R. CO.

(City Court of New York, Trial Term, 1917. 98 Misc. Rep. 574, 162 N. Y. S. 1099.)

RANSOM, J.[37] This case turns upon a novel and interesting question—unadjudicated, so far as I can find, in any court—as to a common carrier's liability for the loss of baggage, under the highly organized and perfected conditions of modern railway travel. The plaintiff passenger carried with her upon an interstate journey three rings and a lavaliere. She left the jewelry momentarily upon a table in the defendant's dining car, with waiter employés and other persons near by. When she returned to reclaim it, no trace could be found. Upon the pleadings and the opening of plaintiff's counsel, I was of the opinion that, inasmuch as the passenger voluntarily retained custody of the property and herself left it exposed to theft or loss, the carrier could not be held liable, in the absence of proof warranting the inference that it had been stolen by an employé, or that the carrier had been derelict in the duty owed even as to property thus inadvertently left behind.[38] Accordingly I dismissed the complaint, but indicated willing-

[36] Accord: Bean v. Hinson (Tex. Civ. App.) 235 S. W. 327 (1921); Frierson v. Frazier, 142 Ala. 232, 37 So. 825 (1904); Gillette v. Goodspeed, 69 Conn. 363, 37 A. 973 (1897); Wyckoff v. Queens County Ferry Co., 52 N. Y. 32, 11 Am. Rep. 650 (1873); Yerkes v. Sabin, 97 Ind. 141, 49 Am. Rep. 434 (1884); Harvey v. Rose, 26 Ark. 3, 7 Am. Rep. 595 (1870); Evans v. Rudy, 34 Ark. 383 (1879). Proceeding upon the assumption that the ferryman had the custody and control of the vehicle, although accompanied by the owner, the ferryman was held responsible as a common carrier in Wilson v. Alexander, 115 Tenn. 125, 88 S. W. 935 (1905); Powell v. Mills, 37 Miss. 691 (1859); Fisher v. Clisbee, 12 Ill. 344 (1851); Wilson v. Hamilton, 4 Ohio St. 722 (1855); Pomeroy v. Donaldson, 5 Mo. 36 (1837). In jurisdictions which follow the view taken in the principal case, the ferryman, although relieved of an insurer's liability, is clearly responsible for loss due to his negligence. See Wyckoff v. Queens County Ferry Co., supra.

[37] Parts of the opinion are omitted.

[38] "When the carrier does not take full possession of the baggage and it remains under the control of the passenger, the former, in the absence of a special agreement, does not assume the common carrier's liability of an insurer, but becomes responsible only when it is shown that the carrier has failed to exercise reasonable care to protect from loss or injury such baggage or property as the passenger has the right to bring with him into the car." Per Hall, J., in Sperry v. Consolidated Ry. Co., 79 Conn. 565, 65 A. 962, 10 L. R. A. (N. S.) 907, 118 Am. St. Rep. 169, 9 Ann. Cas. 199 (1907). See, in accord, Shaw v. Faires (Tex. Civ. App.) 165 S. W. 501 (1914); Kinsley v. Lake Shore & M. S. R. Co., 125 Mass. 54, 28 Am. Rep. 200 (1878) and cases collected in L. R. A. 1915B, 608. See notes, 6 Col. Law Rev. 527; 25 Harv. Law Rev. 178.

ness to consider, upon the present motion, the propositions of law insistently urged by the plaintiff's counsel. I now am convinced that the controversy cannot be so readily resolved, and that its just disposition requires its restoration for a retrial which will permit of the development of the full facts and the possible submission of some issues to a jury.

In the days of old, when the stagecoach rumbled through rural England, and the passenger was seated inside the chaise, with his trunk or portmanteau on top, under the driver's watchful eye, the differentiation in the handling of property carried as freight and property carried as the baggage of a passenger had not developed to present-day significance, and the stagecoach proprietor was held an insurer of the safe transportation of the property carried, against any loss not occasioned by inevitable accident, the owner's or shipper's own act, or the public enemy. Even in this country and this state, it was held, as late as 1838, that: "The fact that the owner is present, or sends his servant to look after the property, does not alter the case." Hollister v. Nowlen, 19 Wend. 234, 32 Am. Dec. 455.

Justice Bronson quoted with approval the declaration by Chambre, J., in Robinson v. Dunmore, 2 Bros. & Pull. 418, that: "It has been determined that if a man travel in a stagecoach and take his portmanteau with him, though he has his eye upon the portmanteau, yet the carrier is not absolved from his responsibility but will be liable if the portmanteau be lost," and the New York Supreme Court of Judicature added: "The liability of a carrier (as to baggage) is like that of an innkeeper, and it was said in Calye's Case, 8 Coke, 63, that: 'It is no excuse for the innkeeper to say that he delivered to the guest the key of the chamber in which he lodged, and that he left the door open; but he ought to keep the goods and chattels of his guest there in safety.'"

As the wayside inns were supplanted with more spacious hotels and the successor of the stagecoach became a whole train of steam-drawn coaches, the harshness of still holding the innkeeper or carrier to an insurer's liability led to legal sanction of workable rules for their fairer protection. The innkeeper could no longer keep a watchful eye on the personal effects of all his guests; the carrier had ceased to be a coach driver who rode with the baggage under his immediate scrutiny, beside and behind him. It was felt that these changed conditions should not be permitted to impose an insurer's liability for articles of great value which had not been placed where the proprietor's or carrier's subordinates could effectually look after it, or which the guest or passenger had at least been given fair opportunity to turn over to that kind of custody on the part of the innkeeper or carrier to be held so drastically liable. Thus, in the case of the innkeeper, sanction was given that he might provide and announce a place of deposit and safekeeping of the jewelry, money, and especially valuable property of

his guests during their sojourn, and if, despite this provision and announcement, a guest chose to retain his valuables in his possession rather than commit them to the custody of "the safe in the office," the proprietor was relieved from insurer's responsibility for their safety. This relief was, of course, held operative only as to valuables which might be actually and conveniently deposited in the safe, strong box, or place of storage, provided by the proprietor; if the latter failed to provide and give notice of facilities for this purpose, he had no exemption from his traditional liability, and it was "no excuse that he had delivered to the guest the key of the chamber in which he lodged," that the guest had the custody of the valuables, and that the guest "left the door open." Calye's Case, supra.

Similarly as to common carriers, the development of transportation brought differentiation in the handling of freight and baggage, and tended to make impracticable the carrying of quantities of baggage in the coach which conveyed the passenger. If the railroad company was not to be relieved from liability in the absence of affirmative proof of misfeasance or fault, it was obvious that means must be provided for the turning over of the baggage to the actual, undivided care and custody of the carrier. Thus the system of the "checking" of baggage and its carriage in a separate car or "luggage van" was developed; the passenger was given opportunity, through the tariffs and published notices, of "checking" his baggage, and thus having it transported at the carrier's risk, as of old. If he did not take advantage of this provision and nevertheless carried his belongings with him in the passenger coach, he could hold the carrier liable for loss only by showing that the carrier's servants stole his baggage or neglected their duty of care as to its safety. 3 Am. & Eng. Encyc. (2d Ed.) 547–548; Weeks v. N. Y., N. H. & H. R. R. Co., 9 Hun, 669, 671; Bernheim v. G. W. Ry. Co., L. R. 3 C. P. D. 223; Cohen v. Frost, 9 N. Y. Super. Ct. 335, 341; Henderson v. Louisville R. R. Co. (C. C.) 20 F. 430; Id., 123 U. S. 64, 8 S. Ct. 60, 31 L. Ed. 92; Defrier v. Nicaragua (D. C.) 81 F. 745; Knieriem v. N. Y. C. R. R. Co., 109 App. Div. 709, 96 N. Y. S. 602; Carpenter v. N. Y., N. H. & H. R. R. Co., 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759, 21 Am. St. Rep. 644.

In other words, the carrier was not relieved from its traditional liability for the safe transport of baggage, and the passenger was not deprived of his right to require the carriage of his baggage at the carrier's risk. That liability was, however, given a reasonable and workable basis. If the carrier provided and announced a system of baggage "checking," whereby the passenger's valuable belongings could be turned over to the carrier's exclusive custody during the journey, the insurer's liability continued as to the articles of baggage which were, or which might have been, so checked. If the passenger refused to avail himself of the facilities thus afforded and insisted on retain--

ing possession of such articles himself, the carrier's responsibility was relaxed, and ordinary tort rules made applicable to such articles. If the carrier did not provide and operate a system of "checking" and carrying articles of baggage in its own exclusive custody, but undertook, by rule or otherwise, to relieve itself of the necessity of thus accepting insurer's responsibility for articles properly transportable as baggage, the carrier remained, as to such articles, subject to the historic concept of its obligation, under which the carrier was held "not absolved from his responsibility * * * if the portmanteau be lost," even though the passenger "takes his portmanteau with him" in the stagecoach and "has his eye upon the portmanteau." Thus in Munster v. S. E. Ry. Co., 4 C. B. (N. S.) 676; 140 Eng. Reprint, 1257, the carrier promulgated and undertook to enforce a rule that certain articles of "luggage" should not be "checked" and carried in the "luggage van," at the carrier's risk, but should be transported, if at all, in the carriage with the passenger, in his custody and at his risk, in the absence of affirmative proof of the carrier's dereliction. The passenger demanded that the carrier "check" and assume full responsibility; the carrier refused to "check"; the goods were not placed in the "luggage van" and were lost; and the learned judges of Common Pleas held that such a regulation and refusal could not absolve the carrier from full liability. The carrier, not the passenger, had the election as to where the articles of baggage should be transported, but not as to the carrier's liability. The passenger had no right to choose the place of their carriage, but had a right to have them transported at the carrier's risk. The carrier's responsibility attached to them wherever carried, unless the carrier elected to have them carried in a separate van and permitted them to be so "checked" and carried, and the passenger nevertheless insisted on retaining possession and taking them into the passenger coach. In other words, the carrier could require the "checking" of baggage, as a mode of requiring commission to its custody as condition of its full liability; it could latterly, by a prescribed procedure, limit the amount of its liability for baggage in connection with the transportation of the passenger at a given rate, so long as it afforded a method by which it carried all the baggage desired by the passenger and by which the passenger, on paying an additional sum, could hold it to a full liability therefor; but it could not, by rule or otherwise, refuse to accept exclusive custody of articles properly transportable as baggage, as means of avoiding liability.

If these fundamentals of historical setting are correctly stated, what of the instant case? Did the defendant carrier provide and announce a method by which articles of baggage, such as those lost, could be turned over to its exclusive custody? Did the plaintiff disregard proffered facilities for safe-keeping, and nevertheless insist on retaining custody and possession of the articles herself, in the coach? Or did the carrier provide and announce that as to these articles of

baggage, it would not accept custody or responsibility for them in the baggage coach during the trip? The quantity of jewelry carried by the plaintiff was reasonable in kind and value, for the purposes of the journey. As a matter of law, under the authorities reviewed by the learned Appellate Term in Sherman v. Pullman Co., 79 Misc. Rep. 52, 139 N. Y. S. 51, these articles of personal jewelry, contained in a suitable hand bag or mode of carriage, were articles of "baggage," which the plaintiff was entitled to have transported in safety by the defendant, under the contract of her own transportation. She had a right to hold the defendant to an insurer's liability for the safety of this jewelry during her journey; the carrier had a right, as we have seen, to require her to turn it over to the carrier's exclusive custody; if the carrier promulgated a tariff regulation affording such a system of "checking" and custody, the carrier was absolved if the passenger nevertheless insisted on retaining or sharing custody. The defendant, however, instead of promulgating such a rule, filed, published and put in force a rule explicitly refusing to accept such custody or responsibility at all. Its tariffs provided that: "Jewelry * * * should not be inclosed in baggage to be checked. The carriers issuing and concurring in this tariff will not be responsible for such articles in baggage."

The defendant did not, as it might do upon present-day trains, provide a safe or other receptacle, for custody of "baggage," such as jewelry, which it refused to "check" and carry in the ordinary manner; on the contrary, the carrier stood upon its explicit, affirmative refusal to accept custody of, or responsibility for, articles which the plaintiff was entitled to have transported as baggage. Of the provisions of this filed tariff, the plaintiff was, of course, charged with full knowledge and notice, and was not only entitled, but bound, to proceed upon the assumption of their conclusiveness as to what she might or might not do, or require the carrier to do, until such tariff rule was altered by the carrier or competent regulative authority. Atchison, etc., Ry. Co. v. Robinson, 233 U. S. 173, 180, 34 S. Ct. 556, 58 L. Ed. 901; Great Northern Ry. Co. v. O'Connor, 232 U. S. 508, 515, 34 S. Ct. 380, 58 L. Ed. 703. The carrier having thus not only failed to provide a method whereby she might commit her parcel of jewelry to its custody during transit, but having even notified her and all prospective passengers that it would not accept custody of such baggage at all, she of necessity reverted to the method of the traveler of the olden times and "took her portmanteau with her in the coach," and "kept a watchful eye upon it," until an inadvertent moment in the dining car brought about its unexplained loss.[39] * * *

There is therefore here no question of the plaintiff's election, in-

[39] The court next pointed out that the determination whether such a regulation as to the inclusion of jewelry in trunks or cases "checked" as baggage should be continued or modified in the public interest is a regulative inquiry, within the province of the Interstate Commerce Commission, rather than, in the first instance, of a court.

sistence, or choice, to keep her jewelry in her own possession; the carrier affirmatively refused to take custody or responsibility. She did not "voluntarily" take her jewelry with her on the train; the carrier had refused to let her do anything else. By the same method through which it effectually notified her that she must "check" other articles of baggage or release the carrier from insurer's liability therefor, the carrier had notified her that she could not turn over the jewelry to its custody. There was then no need that she formally and affirmatively demand that the carrier do what it had notified her of its explicit refusal to do, for her or any other passenger; it was not necessary that, before packing her trunk, she could go to the carrier and demand that it disregard, in her case, its published rule, nor need she tender for "checking" her trunk with the jewelry included. As we have seen, she was bound by the tariff provisions and their legal consequences, and was entitled to act on the basis of them and their consequences. The carrier could have reduced its responsibility only by similarly notifying of willingness to "check," and the regulation of refusal would seem, as in the Munster Case, supra, to put in operation again the common-law rule.

Nor do I think that, under the authorities, it can be said that, as a matter of law, the loss of the plaintiff's jewelry was due to the passenger's "own act," within the purview of the historic exception to the carrier's liability for loss of freight. The circumstances of the loss of this "baggage" are plainly distinguishable from those of familiar cases where freight damage or loss was directly caused by faulty packing, the inclusion of destructive substances, the presence of the shipper's employé with the lantern which caused the fire by which the car's contents were destroyed, and similar acts disclosing the shipper's causal relationship. Under the authorities, a passenger who inadvertently or even voluntarily, leaves baggage exposed in a place under the oversight of the carrier's employés, from which place it is stolen or lost, has not been regarded as having caused the theft or loss by his or her "own act," even where the passenger's retention of custody of articles "checkable" as baggage was wholly voluntary. Bonner v. De Mendoza (Tex. App.) 16 S. W. 976; Pullman Car Co. v. Matthews, 74 Tex. 654, 2 S. W. 744, 15 Am. St. Rep. 873; Root v. Sleeping Car Co., 28 Mo. App. 199; Illinois Central R. R. Co. v. Handy, 63 Miss. 609, 56 Am. Rep. 846; Van Horn v. Kermit, 4 E. D. Smith, 453. See, also, Carpenter v. N. Y., N. H. & H. R. R. Co., Munster v. S. E. Ry. Co., and other cases cited supra. Even under those circumstances, the carrier is held liable, by the authority of the above cases, if any want of care is shown, on the part of its employés, as to property thus left exposed; and this could hardly be the rule if the passenger's inadvertent act were looked upon as having as a matter of law, a causal relationship to the theft or loss. At least, the question as to just what the plaintiff did with her jewelry and whether

such act or neglect on her part was a violation of such duty, if any, of care as she owed concerning "baggage" which the carrier had compelled her to retain in her custody would seem to require the development of detailed facts by the taking of evidence.

Under the circumstances disclosed, I incline to the view that the carrier is liable for the loss of baggage of which it affirmatively refused to take custody and thereby required the passenger to retain in her own custody on the train.[40] * * *

CLARK v. BURNS.

(Supreme Judicial Court of Massachusetts, 1875. 118 Mass. 275, 19 Am. Rep. 456.)

Contract, for the value of a watch, against the owners of a steamship as common carriers, with counts in tort for negligence, and also counts charging them as innkeepers. The case was submitted to the Superior Court on an agreed statement of facts in substance as follows:

The defendants are the owners of the Cunard line of steamers, so called, which run between Boston and Liverpool, and New York and Liverpool, and are common carriers of passengers and freight between those places. On November 28, 1871, the plaintiff left Liverpool on board the steamship Calabria, one of the Cunard line, for New York as a first-class passenger. The plaintiff paid for his ticket, by which he became entitled to the usual accommodation on board the ship for sleeping and lodging, and to be supplied with proper food. He took with him and wore on his person in the daytime the watch referred to in the declaration. He occupied a state room with two berths, one of which was occupied by another passenger, placed there by the defendants, and it is admitted that the watch was not taken by him. The state room had a lock but no key or other fastening. When the plaintiff went to bed on Sunday evening, December 3, at nine o'clock, he put his watch in the pocket made for it in his waistcoat which he hung by the arm-holes on a hook in his state room, intended for clothes to be hung on. He did not fasten his state room door having no means to do so. The lamp in the state room was so placed that the steward had to come into the state room and go to the farther end thereof to light it and to put the light out, and was in the habit of doing so at

40 See Railroad v. Lillie, 112 Tenn. 331, 78 S. W. 1055 (1903), in which the court held that, although a railroad company was not an insurer of baggage taken by a passenger into a day coach, it was an insurer of baggage which the passenger was permitted to take into a sleeping car. As to the liability of a sleeping car company for loss of a passenger's baggage, see Pullman Palace Car Co. v. Lowe, supra, p. 602; Whicher v. Boston & Albany Railroad Co., supra, p. 605; Goldstein v. Pullman Co., supra, p. 608; and footnotes.

the time appointed, by the rules and regulations of the ship, for lighting the lamps and putting out the lights. Passengers are not allowed to light or put out the lamps. The lamps are put out at ten o'clock, P. M. When the plaintiff first arose to dress himself at the usual hour on Monday morning, his watch was missing. He notified the captain immediately of his loss, and the purser made a thorough search of the state room, and then a careful examination of the plaintiff's trunk and the trunk of the gentleman who occupied the other berth in the state room, but without success.

The plaintiff had the usual accommodations given to first-class passengers on board the defendants' steamers, and it is the usual custom of the defendants not to permit the locking of state room doors, nor to permit passengers to control the lamps in their state rooms or the windows thereof, but to give the stewards access at all times to the state rooms in order that passengers may not, by the use of matches, or by imprudently opening their windows, incur the risk to themselves, their fellow-passengers and the ship and cargo, of fire, and of the entrance of water through the windows, and also that they may be accessible in case of accident or danger, or of their own helplessness from sickness or other causes.

When the plaintiff reached Boston he called on the defendants' agent, Mr. Alexander, of whom he purchased his ticket, and requested of him payment for the loss sustained by him, and at the same time complained that the state rooms were not allowed to be locked, to which Alexander replied, giving as a reason for the rule, that the state rooms must be accessible for the safety of the ship, cargo and passengers. The plaintiff had crossed the ocean three times before in boats of the Cunard line and had never had a key or fastening to his state room, and understood that it was against the rule or custom of these ships. The watch was worth one hundred and twenty-five dollars. The pleadings may be referred to.

If upon the foregoing facts the plaintiff was entitled to recover, judgment was to be rendered for $125, and interest from date of the writ, with costs; otherwise judgment for the defendants, with costs.

Upon the facts agreed, Brigham, C. J., ruled that the plaintiff could not maintain this action, and ordered judgment for the defendants; and the plaintiff alleged exceptions.

Gray, C. J. The liabilities of common carriers and innkeepers, though similar, are distinct. No one is subject to both liabilities at the same time, and with regard to the same property. The liability of an innkeeper extends only to goods put in his charge as keeper of a public house, and does not attach to a carrier who has no house and is engaged only in the business of transportation. The defendants, as owners of steamboats carrying passengers and goods for hire, were not innkeepers. They would be subject to the liability of common carriers for the baggage of passengers in their custody, and might per-

haps be so liable for a watch of the passenger locked up in his trunk with other baggage. But a watch, worn by a passenger on his person by day, and kept by him within reach for use at night, whether retained upon his person, or placed under his pillow, or in a pocket of his clothing hanging near him, is not so intrusted to their custody and control as to make them liable for it as common carriers. Steamboat Crystal Palace v. Vanderpool, 16 B. Mon. (Ky.) 302; Tower v. Utica Railroad, 7 Hill (N. Y.) 47, 42 Am. Dec. 36; Abbott v. Bradstreet, 55 Me. 530; Pullman Palace Car Co. v. Smith, 7 Chicago Legal News, 237.

Whether the defendants' regulations as to keeping the doors of the state room unlocked, the want of precautions against theft, and the other facts agreed, were sufficient to show negligence on the part of the defendants, was, taking the most favorable view for the plaintiff, a question of fact, upon which the decision of the court below was conclusive. Fox v. Adams Express Co., 116 Mass. 292.

Exceptions overruled.[41]

ADAMS v. NEW JERSEY STEAMBOAT CO.

(Court of Appeals of New York, 1896. 151 N. Y. 163, 45 N. E. 369, 34 L. R. A. 682, 56 Am. St. Rep. 616.)

Appeal, by permission, from a judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered August 1, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial made upon the minutes.

This action was brought to recover a sum of money alleged to have been lost by plaintiff when a passenger upon one of defendant's steamboats.

The facts, so far as material, are stated in the opinion.

O'BRIEN, J. On the night of the 17th of June, 1889, the plaintiff was a cabin passenger from New York to Albany on the defendant's steamer Drew, and for the usual and regular charge was assigned to a stateroom on the boat. The plaintiff's ultimate destination was St. Paul, in the state of Minnesota, and he had upon his person the sum of $160 in money for the purpose of defraying his expenses of the journey. The plaintiff, on retiring for the night, left this money in his clothing in the stateroom, having locked the door and fastened the windows. During the night it was stolen by some person who apparently reached it through the window of the room.

41 Accord: The Humbolt (D. C.) 97 F. 656 (1899); American S. S. Co. v. Bryan, 83 Pa. 446 (1878); Crystal Palace v. Vanderpool, 16 B. Mon. (Ky.) 302 (1855). For a collection of earlier decisions on this question, see note to 20 F. 430, at page 432.

The plaintiff's relations to the defendant as a passenger, the loss without negligence on his part, and the other fact that the sum lost was reasonable and proper for him to carry upon his person to defray the expenses of the journey, have all been found by the verdict of the jury in favor of the plaintiff. The appeal presents, therefore, but a single question, and that is, whether the defendant is in law liable for this loss without any proof of negligence on its part. The learned trial judge instructed the jury that it was, and the jury, after passing upon the other questions of fact in the case, rendered a verdict in favor of the plaintiff for the amount of money so stolen. The judgment entered upon the verdict was affirmed at General Term, and that court has allowed an appeal to this court.

The defendant has, therefore, been held liable as an insurer against the loss which one of its passengers sustained under the circumstances stated. The principle upon which innkeepers are charged by the common law as insurers of the money or personal effects of their guests originated in public policy. It was deemed to be a sound and necessary rule that this class of persons should be subjected to a high degree of responsibility in cases where an extraordinary confidence is necessarily reposed in them, and where great temptation to fraud and danger of plunder exists by reason of the peculiar relations of the parties. Story on Bailments, § 464; 2 Kent's Com. 592; Hulett v. Swift, 33 N. Y. 571, 88 Am. Dec. 405. The relations that exist between a steamboat company and its passengers, who have procured staterooms for their comfort during the journey, differ in no essential respect from those that exist between the innkeeper and his guests.

The passenger procures and pays for his room for the same reasons that a guest at an inn does. There are the same opportunities for fraud and plunder on the part of the carrier that was originally supposed to furnish a temptation to the landlord to violate his duty to the guest.

A steamer carrying passengers upon the water, and furnishing them with rooms and entertainment, is for all practical purposes, a floating inn, and hence the duties which the proprietors owe to the passengers in their charge ought to be the same. No good reason is apparent for relaxing the rigid rule of the common law which applies as between innkeeper and guest, since the same considerations of public policy apply to both relations.

The defendant, as a common carrier, would have been liable for the personal baggage of the plaintiff unless the loss was caused by the act of God or the public enemies, and a reasonable sum of money for the payment of his expenses, if carried by the passenger in his trunk, would be included in the liability for loss of baggage. Merrill v. Grinnell, 30 N. Y. 594; Merritt v. Earle, 29 N. Y. 115, 86 Am. Dec. 292; Elliott v. Rossell, 10 Johns. 7, 6 Am. Dec. 306; Brown on Carriers, § 41; Redfield on Carriers, § 24; Angell on Carriers, § 80.

Since all questions of negligence on the part of the plaintiff, as well as those growing out of the claim that some notice was posted in the room regarding the carrier's liability for the money, have been disposed of by the verdict, it is difficult to give any good reason why the measure of liability should be less for the loss of the money under the circumstances than for the loss of what might be strictly called baggage.

The question involved in this case was very fully and ably discussed in the case of Crozier v. Boston, N. Y. & Newport Steamboat Co., 43 How. Prac. 466, and in Macklin v. New Jersey Steamboat Co., 7 Abb. Prac. (N. S.) 229. The liability of the carrier in such cases as an insurer seems to have been very clearly demonstrated in the opinion of the court in both actions upon reason, public policy and judicial authority. It appears from a copy of the remittitur attached to the brief of plaintiff's counsel that the judgment in the latter case was affirmed in this court, though it seems that the case was not reported.

It was held in Carpenter v. N. Y., N. H. & H. R. R. Co., 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759, 21 Am. St. Rep. 644, that a railroad running sleeping coaches on its road was not liable for the loss of money taken from a passenger while in his berth, during the night, without some proof of negligence on its part. That case does not, we think, control the question now under consideration. Sleeping-car companies are neither innkeepers nor carriers. A berth in a sleeping car is a convenience of modern origin, and the rules of the common law in regard to carriers or innkeepers have not been extended to this new relation.

This class of conveyances are attached to the regular trains upon railroads for the purpose of furnishing extra accommodations, not to the public at large nor to all the passengers, but to that limited number who wish to pay for them. The contract for transportation and liability for loss of baggage is with the railroad, the real carrier. All the relations of passenger and carrier are established by the contract implied in the purchase of the regular railroad ticket, and the sleeping car is but an adjunct to it only for such of the passengers as wish to pay an additional charge for the comfort and luxury of a special apartment in a special car. The relations of the carrier to a passenger occupying one of these berths are quite different with respect to his personal effects from those which exist at common law between the innkeeper and his guest, or a steamboat company that has taken entire charge of the traveler by assigning to him a stateroom. While the company running sleeping cars is held to a high degree of care in such cases, it is not liable for a loss of this character without some proof of negligence. The liability as insurers which the common law imposed upon carriers and innkeepers has not been extended to these modern appliances for personal comfort, for reasons that are stated quite fully in the adjudged cases and that do not apply in the case at bar. Ulrich v. N. Y. C. & H. R. R. R. Co., 108 N. Y. 80, 15 N. E. 60, 2 Am. St. Rep. 369; Pullman P.

C. Co. v. Smith, 73 Ill. 360, 24 Am. Rep. 258; Woodruff S. & P. C. Co. v. Diehl, 84 Ind. 474, 43 Am. Rep. 102; Lewis v. N. Y. S. C. Co., 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135.

But aside from authority, it is quite obvious that the passenger has no right to expect, and in fact does not expect, the same degree of security from thieves while in an open berth in a car on a railroad as in a stateroom of a steamboat, securely locked and otherwise guarded from intrusion. In the latter case, when he retires for the night, he ought to be able to rely upon the company for his protection with the same faith that the guest can rely upon the protection of the innkeeper, since the two relations are quite analogous. In the former the contract and the relations of the parties differ at least to such an extent as to justify some modification of the common-law rule of responsibility. The use of sleeping cars by passengers in modern times created relations between the parties to the contract that were unknown to the common law, and to which the rule of absolute responsibility could not be applied without great injustice in many cases. But in the case at bar no good reason is perceived for relaxing the ancient rule and none can be deduced from the authorities. The relations that exist between the carrier and the passenger who secures a berth in a sleeping car or in a drawing-room car upon a railroad are exceptional and peculiar. The contract which gives the passenger the right to occupy a berth or a seat does not alone secure to him the right of transportation. It simply gives him the right to enjoy special accommodations at a specified place in the train. The carrier by railroad does not undertake to insure the personal effects of the passenger which are carried upon his person against depredation by thieves. It is bound, no doubt, to use due care to protect the passenger in this respect, and it might well be held to a higher degree of care when it assigns sleeping berths to passengers for an extra compensation than in cases where they remain in the ordinary coaches in a condition to protect themselves. But it is only upon the ground of negligence that the railroad company can be held liable to the passenger for money stolen from his person during the journey. The ground of the responsibility is the same as to all the passengers, whether they use sleeping berths or not, though the degree of care required may be different. Some proof must be given that the carrier failed to perform the duty of protection to the passenger that is implied in the contract before the question of responsibility can arise, whether the passenger be in one of the sleeping berths or in a seat in the ordinary car. The principle upon which the responsibility rests is the same in either case, though the degree of care to which the carrier is held may be different. That must be measured by the danger to which the passenger is exposed from thieves and with reference to all the circumstances of the case. The carrier of passengers by railroad, whether the passenger be assigned to the

ordinary coaches or to a berth in a special car, has never been held to that high degree of responsibility that governs the relations of innkeeper and guest, and it would perhaps he unjust to so extend the liability when the nature and character of the duties which it assumes are considered.

But the traveler who pays for his passage, and engages a room in one of the modern floating palaces that cross the sea or navigate the interior waters of the country, establishes legal relations with the carrier that cannot well be distinguished from those that exist between the hotelkeeper and his guests. The carrier in that case undertakes to provide for all his wants, including a private room for his exclusive use, which is to be as free from all intrusion as that assigned to the guest at a hotel. The two relations, if not identical, bear such close analogy to each other that the same rule of responsibility should govern.

We are of the opinion, therefore, that the defendant was properly held liable in this case for the money stolen from the plaintiff without any proof of negligence.

The judgment should be affirmed.

All concur.

Judgment affirmed.[42]

THE NEAFFIE.

(Circuit Court of the United States, D. Louisiana, 1870. 1 Abb. U. S. 465, Fed. Cas. No. 10,063.)

WOODS, J. The case was this: On May 28, 1866, the steam tug Neaffie undertook to tow a flat or barge laden with hay from Jefferson city to the flat-boat wharf in the city of New Orleans—a distance of three or four miles. She made fast to the flat and towed her down the stream to said wharf, the master and crew of the flat remaining aboard of her. As she was about landing the flat, the latter collided with another flat made fast to the wharf. In a short time after the collision, the flat towed by The Neaffie sunk. The damage sustained by the sinking of the flat is agreed to be thirty-one hundred and fifty dollars.

[42] Accord: St. George v. Hamburg-American Line, 198 Ill. App. 96 (1916); Holmes v. North German Lloyd S. S. Co., 184 N. Y. 280, 77 N. E. 21, 5 L. R. A. (N. S.) 650 (1906). In McKee v. Owen, 15 Mich. 115 (1866), the judges were evenly divided concerning the liability of proprietors of a steamboat for goods stolen from a stateroom. In Gleason v. Goodrich Transportation Co., 32 Wis. 85, 14 Am. Rep. 716 (1873), the court held that the steamboat company was not liable for goods stolen from a stateroom which was unlocked, but intimated that the company would have been liable had the stateroom been locked. Would the rule announced in the principal case be applicable to a passenger whose pocket was picked while on the deck or in the saloon? See the discussion of this question by Christiancy, J., in McKee v. Owen, supra, at page 128.

The libelants charge that the sinking of the flat was in consequence of the collision, and that the collision was brought about by the carelessness of Cook, the master of The Neaffie; and in argument they allege that The Neaffie was a common carrier, and responsible for all damages to the flat not occasioned by the act of God or the public enemy.

The claimants answer, that when The Neaffie approached the flat for the purpose of towing down to the flat-boat wharf, they found her in a leaky condition, and refused to take her in tow except at the risk of her owners, to which the captain and part-owner of the flat assented. They deny any carelessness on the part of the master of The Neaffie, and deny that there was any collision whereby the flat was damaged; or that the sinking of the flat was the consequence of any damage received by her collision with the other flat lying at the wharf. They allege that the slight impingement of the one flat against the other was caused by a sudden eddy or boil in that part of the river.

In the view I have taken of this case, these are the only facts alleged on either side which it is necessary to recite.

The naked fact that the flat of the libelants, while in tow of The Neaffie, did impinge upon the flat made fast to the wharf, and that in a very short time thereafter she sunk, raises a presumption of mismanagement and negligence on the part of the captain of the steamtug, and fixes a liability for damages sustained upon her owners, unless contrary proof is adduced showing ordinary care and diligence. I have searched the testimony in this case in vain to find any act of carelessness or negligence on the part of the captain of The Neaffie. On the contrary, the proof shows, to state the result in the mildest form, reasonable care and diligence. No witness speaks of any act done or omitted showing want of skill or care on the part of The Neaffie.

Under this state of facts The Neaffie cannot be held liable for the damage suffered by the flat and cargo, unless she is made responsible as a common carrier.

The business of The Neaffie, as the evidence shows, is to tow flats and other water craft from one point to another in and about the harbor of the city of New Orleans. The hire for her services varies according to the bargain made at the time the service is rendered.

A common carrier is often defined to be: "One who undertakes for hire to transport the goods of such as choose to employ him from point to point."

This definition is very broad, and in its application to facts is subject to certain limitations. A better and more precise definition is, "One who offers to carry goods for any person between certain termini

or on a certain route, and who is bound to carry for all who tender him goods and the price of carriage."

Was The Neaffie a common carrier under either of these definitions?

Chief Justice Marshall, in Boyce v. Anderson, 2 Pet. 150, 7 L. Ed. 379, says: "The law applicable to common carriers is one of great rigor. Though to the extent to which it has been carried, and in cases to which it has been applied, we admit its necessity and its policy, we do not think it ought to be carried further or applied to new cases." So unless the case of steam-tugs towing boats and their cargoes can be brought strictly within the definition of common carriers, I am not disposed to apply to them the great rigor of the law applicable to common carriers.

Can it be said that the tug boats plying in the harbor of New Orleans undertake to transport the goods found on the water craft which they take in tow? It appears to me that it is the boat in which the goods are put that undertakes to transport them. The tug only furnishes the motive power. It is like the case of the owner of a wagon laden with merchandise hiring another to hitch his horses to the wagon to draw it from one point to another, the owner of the wagon riding in it, and having charge of the goods. In such a case, could it be claimed with any show of reason that the owner of the team was a common carrier? The reason of the law which imposes upon the common carrier such rigorous responsibility fails in such a case.

The tug boats plying in New Orleans harbor do not receive the property into their custody, nor do they exercise any control over it other than such as results from the towing of the boat in which it is laden. They neither employ the master and hands of the boat towed, nor do they exercise any authority over them beyond that of occasionally requiring their aid in governing the flotilla. The boat, goods, and other property remain in charge and care of the master and hands of the boat towed. In case of loss by fire or robbery, without any actual default on the part of the master or crew of the tow boat, it can be hardly contended they would be answerable, and yet carriers would be answerable for such loss.

That tow boats are not common carriers has been held in the following cases: Caton v. Rumney, 13 Wend. (N. Y.) 387; Alexander v. Greene, 3 Hill (N. Y.) 9; Wells v. Steam Navigation Co., 2 N. Y. 204; Pennsylvania, Delaware & Maryland Navigation Co. v. Dandridge, 8 Gill & J. (Md.) 248, 29 Am. Dec. 543; Leonard v. Hendrickson, 18 Pa. 40, 55 Am. Dec. 587.

In Vanderslice v. The Superior [Fed. Cas. No. 16,843] Mr. Justice Kane held a steam tow boat liable as a common carrier; but when the case came before the circuit court, Mr. Justice Grier said he could not assent to the doctrine.

Fed. rule is that tugboats, generally are not common carriers.

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I am aware that a contrary doctrine has been applied by the supreme court of Louisiana to steam-tugs towing between the city of New Orleans and the mouth of the Mississippi river. These tow boats are distinguishable from those plying in the harbor of New Orleans; but if it were otherwise, I think the weight of authority and reason is with those who hold tow boats not to be common carriers.

Holding, then, that The Neaffie was not a common carrier, and that she was bound only for ordinary diligence and care, and that the testimony shows such diligence and care on the part of the master of The Neaffie, it follows that the libel must be dismissed at the costs of libelant.

The cross libel of claimants, not being supported by any proof, is also dismissed.

Libels dismissed.[43]

BUSSEY & CO. v. MISSISSIPPI VALLEY TRANSPORTATION CO.

(Supreme Court of Louisiana, 1872. 24 La. Ann. 165, 13 Am. Rep. 120.)

HOWE, J. The plaintiffs, a commercial firm, sued the defendants, a corporation, whose business is to transport merchandise in their own model barges, and to tow the barges of other parties for hire between St. Louis and New Orleans.

The bill of lading, given by defendants to plaintiffs, recites the receipt from plaintiffs of one barge loaded with hay and corn, "in apparent good order in tow of the good steamboat Bee and barges," "to be delivered without delay in like good order (the dangers of navigation, fire, explosion and collision excepted) to Bussey & Co. at New Orleans, Louisiana, on levee or wharf boat, he or they paying freight at the rate annexed, or $700 for barge, and charges $267 50." * * * "It is agreed with shippers," the bill continues, "that the Bee and barges are not accountable for sinking or damage to barge, except from gross carelessness."

It was alleged by plaintiffs that defendants had neglected to deliver the barge and her valuable cargo according to their contract. The defendants answered by a general denial, and by a recital of what they claimed to be the circumstances of the loss of the barge and

[43] Accord: The Margaret, 94 U. S. 494, 24 L. Ed. 146 (1876); The Mercury (D. C.) 291 F. 797 (1923); The Eastern (C. C. A.) 280 F. 711 (1922); Ten Eyck v. Director General of Railroads (C. C. A.) 267 F. 974 (1920); Berry v. Ross, 94 Me. 270, 47 A. 512 (1900); Varble v. Bigley, 14 Bush (77 Ky.) 698, 29 Am. Rep. 435 (1879); Brown v. Clegg, 63 Pa. 51, 3 Am. Rep. 522 (1869). So, in Knapp, Stout & Co. v. McCaffrey, 178 Ill. 107, 52 N. E. 898, 69 Am. St. Rep. 290 (1899), it was held that one engaged in towing a barge did not acquire a carrier's lien.

cargo, in which they contended they were without blame; and that the loss did not result from gross carelessness on their part, and they were not liable under the bill of lading. Other defenses were raised by the answer which have been abandoned.

The court a qua gave judgment for plaintiffs for the amount claimed as the value of the barge and cargo, $15,272 60, with interest from judicial demand, and defendants appealed.

The appellants contend, as stated in their printed argument,

"First—That they are not common carriers, or rather that their undertaking in this, or like cases, is not that of a common carrier.

"Second—That they are liable, if liable at all, only in case of gross carelessness.

"Third—That the restriction of liability contained in the agreement to tow the barge in question exonerates them, except in case of gross carelessness—as the appellants were bound to use but ordinary prudence, even if they were common carriers.

"Fourth—That the judgment rendered is for a larger amount than the testimony will authorize."

The question whether a towboat under the circumstances of this particular case is a common carrier has been long settled in the affirmative in Louisiana; and the reasoning by which Judge Mathews supported this conclusion in the leading case of Smith v. Pierce, 1 La. 354, is worthy of the sagacity for which that jurist was pre-eminent. The same opinion was clearly intimated by the Supreme Court of Massachusetts in the case of Sproul v. Hemmingway, 14 Pick. 1, 25 Am. Dec. 350, in which Chief Justice Shaw was the organ of the court.

In the case also of Alexander v. Greene, 7 Hill, 533, the Court of Errors of New York seem to have been of the same opinion. Four of the senators in giving their reasons distinctly state their belief that the towboat in that case was a common carrier, and Judge Mathews' decision is referred to in terms of commendation as a precedent. It is true that Mr. Justice Bronson, whose opinion was thus reversed, in a subsequent case declares (2 N. Y. 208) that nobody could tell what the Court of Errors did decide in Alexander v. Greene, but the facts remain as above stated, and the effect of the case can not but be to fortify the authority of the decision in [Smith v. Pierce] 1 La. 354.

In addition to these authorities we have the weighty opinion of Mr. Kent who includes "steam towboats" in his list of common carriers, 2 Kent, 599, and of Judge Kane in 13 Law Reporter, 399. On the other hand, Judge Story seems to be of a different opinion (Bailments, § 496), and Mr. Justice Grier differed from Judge Kane.

So, too, the Supreme Court of New York, in Caton v. Rumney, 13 Wend. 387, and Alexander v. Greene, 3 Hill, 9; the Court of Appeals of the same State in Wells v. Steam Nav. Co., 2 N. Y. 207; the Supreme Court of Pennsylvania in Leonard v. Hendrickson, 18 Pa. 40, 55 Am. Dec. 587; and Brown v. Clegg, 63 Pa. 51, 3 Am. Rep. 522; and the Supreme Court of Maryland, in Penn. Co. v. Dandridge, 8

Gill & J. 248, 29 Am. Dec. 543, decided that tugboats in these particular cases were not common carriers. We are informed that the same decision was made in the case of the Neaffie, lately decided in the United States Circuit Court in New Orleans.

Such conflict of authority might be very distressing to the student, but for the fact that when these writers and cases cited by them are examined the discrepancy, except in the decision in 63 Pa. is more imaginary than real. There are two very different ways in which a steam towboat may be employed, and it is likely that Mr. Story was contemplating one method and Mr. Kent the other. In the first place it may be employed as a mere means of locomotion under the entire control of the towed vessel; or the owner of the towed vessel and goods therein may remain in possession and control of the property thus transported to the exclusion of the bailee; or the towing may be casual merely, and not as a regular business between fixed termini. Such were the facts in some form as stated or assumed in Caton v. Rumney, 13 Wend. and Alexander v. Greene, 3 Hill, cited by Judge Story in the case of the Neaffie, and in the cases above quoted from 2 N. Y., 18 Pa., and 8 Gill & J., and it might well be said that under such circumstances the towboat or tug is not a common carrier. But a second and quite different method of employing a towboat is where she plies regularly between fixed termini, towing for hire and for all persons, barges laden with goods, and taking into her full possession and control, and out of the control of the bailor the property thus transported. Such is the case at bar. It seems to satisfy every requirement in the definition of a common carrier. Story on Bail. § 495. And it was probably to a towboat employed in this way that Mr. Kent referred in the passage quoted above; and that the Supreme Court of Massachusetts had in mind in the 14 Pick.; and see also Davis v. Houren, 6 Rob. (La.) 259, and Clapp v. Stanton, 20 La. Ann. 495, 96 Am. Dec. 417. We must think that in all reason the liability of the defendants under such circumstances should be precisely the same as if, the barge being much smaller, it had been carried, cargo and all, on the deck of their tug.

But conceding that this case as a contract of affreightment must be determined by the law of Missouri ([Hampton v. Brig Thaddeus] 4 Martin, 584), and that by that law the defendants are not common carriers as to the plaintiffs, we think it clear from the evidence of the defendants' own witnesses that they were guilty of "gross carelessness" in their attempt to deliver the plaintiffs' barge with its cargo at the port of New Orleans, and that by this gross carelessness she was sunk, and, with her cargo, destroyed.

What is "gross carelessness?" In an employment requiring skill, it is the failure to exercise skill. New World v. King, 16 How. 475, 14 L. Ed. 1019. The employment of the defendants certainly required skill. A lack of that dexterity which comes from long experience only, might be swiftly fatal, for but a single plank intervenes between the

costly cargo and instant destruction. We have but to read the testimony of defendants' own witnesses, and especially Conley, Turner, Burdeau, and Sylvester, to see that the attempt to land the barge was made without skill, and that it might easily have been effected with entire safety.

We are of opinion that the judgment was correctly rendered in favor of plaintiffs, but that the amount is somewhat excessive. We find the value of the property lost at this port, less the freight and charges, and a small amount realized from the wreck to be $13,268.50.

It is therefore ordered that the judgment appealed from be amended by reducing the amount thereof to the sum of $13,268.50 cents with legal interest from judicial demand and costs of the lower court, and that as thus amended it be affirmed, appellees to pay costs of appeal.[44]

PEORIA & P. U. RY. CO. v. CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Illinois, 1884. 109 Ill. 135, 50 Am. Rep. 605.)

This action was brought by the Chicago, Rock Island & Pacific Railway Company, against the Peoria & Pekin Union Railway Company, to recover the value of a freight car destroyed by fire. In the first count of the declaration defendant is charged with having borrowed the car, and with a failure to return, on request, and by the second and third counts defendant is charged as a common carrier; the delivery of the car, the obligation to return, and the failure to do so, being alleged with the usual formality. * * * On the trial in the circuit court plaintiff recovered a judgment for $410.14, which was afterwards affirmed in the Appellate Court for the Second District. * * *

Mr. Justice SCOTT delivered the opinion of the Court.[45]

The defendant in this case is a railroad corporation existing under the laws of this state. * * *

It appears from the evidence, defendant's principal business is switching cars for other railroad companies having their terminal points at Peoria, together with some work of that class on its own account. Its tracks are situated in the lower part of the city, and thence connecting by lines of track with mills, elevators and manufactories in and about the city. Other companies desiring to have cars switched by defendant would place such cars on its transfer switch, and defendant would transfer them to the consignees whose places of business were on its

44 While one undertaking to tow a vessel is not generally regarded as being a common carrier, nevertheless one operating a tow boat may, by contracting to carry and deliver goods, assume a carrier's liability, notwithstanding that the goods are actually transported by towing a barge upon which they are loaded. Bassett & Stone v. Aberdeen Coal & Mining Co., 120 Ky. 728, 88 S. W. 318 (1905); The Nettie Quill (D. C.) 124 F. 667 (1903).

45 Parts of the statement of facts and opinion are omitted.

tracks, as they should be ordered to do by the company placing them there. When such cars were unloaded by the consignees, it was the duty of defendant to return them to the company from which it received them. Most generally such cars were returned empty. There is evidence, however, that tends to show it was the common understanding among the companies doing business at this point, if other shippers desired cars, defendant, without any specific order to that effect, was at liberty to place them at their places of business to be loaded, and when loaded they would be returned to the company owning such cars, to be shipped. At all events it appears cars were so handled, and the companies concerned seem to have acquiesced in that mode of doing business. On the 25th day of October, 1881, a car belonging to plaintiff was brought to the city of Peoria loaded by the Peoria & Rock Island Railroad—a railroad operated by plaintiff—and was placed on the transfer track, and the agent who acted for the Rock Island roads ordered it to be switched to the Monarch mills, or distillery. On the 27th day of that month it was taken by defendant to the distillery, where it was unloaded by the consignees, and on the same day it was taken by defendant from the distillery to the Peoria sugar refinery, on an order from the refinery, to be loaded and then switched to the transfer track for shipment by the Chicago, Rock Island & Pacific Railway Company. In the afternoon of the same day the refinery was burned, and also this car, which was standing in close proximity. There was no order from plaintiff to take this car to the sugar refinery for any purpose, and it is not shown it had any knowledge defendant intended to do so.

The propositions of law certified by the Appellate Court, when resolved, involve the single inquiry whether defendant in the transaction out of which this action arose bore to plaintiff the relation of a common carrier, or was it that of a bailee, or that of a warehouseman. When the true relation of the parties shall be ascertained, the law fixes the extent of defendant's liability, if any exists. Unless it shall be found defendant was a common carrier as to this car, no liability would rest upon it for the loss, as no negligence is imputed to defendant.

The question presented is one of first impression in this court. Nor have counsel cited any case where the exact question involved has been considered by any court of last resort. It leaves this court free to determine the law on principle, as shall be thought to best subserve public interests as well as the private interests of corporations concerned. No proof is needed to show the extent and the importance of the interests involved in the decision. It is a matter of so much public concern, that judicial notice may be taken of the fact that cars belonging to different companies are interchangeably used on all the principal railroads in the United States, and that no company could do any considerable freighting business that did not conform to this general usage. Without such usage it would be difficult, if, indeed, it would be possible, to transact the commercial business of the country. Freights for

shipment across the continent could not well be stopped at the terminus of each carrier's line, and reshipped in cars of the connecting carrier. That would occasion more delay than the necessities of commerce would tolerate. The extent of the usage in regard to the exchange and transportation of cars among so many different railroads would seem to require such exacting rules and regulations as would insure the strictest accountability on the part of companies that may transfer or haul cars over their respective roads.

The statute of this state that forbids "extortion and unjust discrimination" by railroad companies would seem by its provisions to recognize that railroad corporations may be common carriers of "cars," as well as of freights, for such a corporation is not only forbidden to make any unjust discrimination in its charges for the transportation of passengers or freights, of any description, but for the use and "transportation of any railroad car" upon its road. And why may there not be such a thing as a common carrier of cars, either with or without its load of freight? As to the freight the car contains, it will be conceded such carrying roads are common carriers, and are subject to the strict liability of such carriers, and, as has been seen, by a constitutional provision all the rolling stock and other movable property belonging to a railroad corporation in this state shall be considered personal property. What reason exists for discriminating against this class of "personal property," and for holding that railway companies carrying it shall not be regarded as common carriers? The mode of moving it, whether on wheels or in carriages, ought not to be the foundation for any distinction. In either case the property is in the exclusive care and control of the carrier, and there is as much reason arising from public considerations why such a carrier should be held to the strict liability of an insurer for the safety of the property, in the one case as in the other.

The facts in the present case show a strong necessity for imposing the liability attaching to a common carrier. The car in question was delivered to defendant, to be carried over its road to the warehouse of the consignees of the freight it contained. A charge for the service to be rendered was made and was paid by the consignees. The undertaking was also to return the car to the company from which it had been received, and the charges collected, or to be paid, included the latter service. Thus it is seen defendant had the exclusive control of the car while on its track while in course of transportation to the consignees, and that control would seem to be as absolute as over any package of freight it might have to carry or otherwise deliver. Plaintiff had parted with the care and custody of the car, and could not, at any point on defendant's road, interfere for its safety. Its care was intrusted to defendant as fully as was the freight it contained. The undertaking of defendant in regard to moving the car was within the scope of the general business it had engaged to do for the public, and it would seem no reason exists why the liability

for the safe delivery of the car should not be the same as to the freight it contains, which, it is conceded, is that of a common carrier. On what principle may defendant be considered a common carrier as to freights on its road and not as to the car containing it, which it is moving over its road with its own propelling power? * * *

The only case to which the attention of the court has been directed having any features like the one being considered, is Mallory v. Tioga R. R. Co., 39 Barb. (N. Y.) 488. In that case the defendant company, which, it is conceded, was a common carrier as to freights and passengers, engaged to furnish plaintiff the motive power to draw his cars, loaded with his property, over its road, the plaintiff being obligated to load and unload his cars, and furnish brakemen to accompany them, but who were subject to the control of defendant's conductor, and it was held defendant assumed the liability of a common carrier, and consequently was liable for injuries to plaintiff's cars and property not caused by inevitable accident or the public enemies.

But aside from authority, the conclusion reached on principle is, defendant occupied the relation of a common carrier as to the car of plaintiff in its possession, as well as the freight it contained, and as such was liable for its safe return to plaintiff, unless its loss occurred from causes which exempt common carriers, which is not claimed in this case.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.[46]

ST. PAUL & S. C. R. CO. v. MINNEAPOLIS & ST. L. RY. CO.

(Supreme Court of Minnesota, 1879. 26 Minn. 243, 2 N. W. 700, 37 Am. Rep 404.)

CORNELL, J. As appears by the complaint, this action is to recover the value of eight freight cars belonging to plaintiff, which were con-

[46] The following cases held a railroad company liable as an insurer of loaded freight cars received for transportation: Mallory v. Tioga R. Co., 39 Barb. (N. Y.) 488 (1862); Pennsylvania R. Co. v. New Jersey R. & Transp. Co., 27 N. J. Law, 100 (1858); Vermont & M. R. Co. v. Fitchburg R. Co., 14 Allen (Mass.) 462, 92 Am. Dec. 785 (1867); Missouri Pac. Ry. Co. v. Chicago & Alton Ry. Co. (C. C.) 25 F. 317 (1885); Pittsburg C. C. & St. L. R. Co. v. City of Chicago, 242 Ill. 178, 89 N. E. 1022, 44 L. R. A. (N. S.) 358, 134 Am. St. Rep. 316 (1909). But it has been held that the carrier is not an insurer of the car after delivery to the consignee. Peoria & P. Union Ry. Co. v. United States Rolling Stock Co., 136 Ill. 643, 27 N. E. 59, 29 Am. St. Rep. 348 (1891); Missouri Pac. Ry. Co. v. Chicago & Alton Ry. Co., supra. However, it was decided in East St. Louis Connecting Ry. Co. v. Wabash St. L. & P. Ry. Co., 123 Ill. 594, 15 N. E. 45 (1888), that the insurer's liability reattached after the car was unloaded and redelivered to the carrier for the purpose of returning it to the owner. Compare Central of Georgia R. Co. v. Milledgeville Ry. Co., 138 Ga. 434, 75 S. E. 614 (1912), in which the carrier was held to be liable only as a warehouseman. As to the liability of a carrier which undertakes to haul private cars, or rolling stock which it is not bound to haul. See notes, 30 L. R. A. 162, and 48 L. R. A. (N. S.) 990.

sumed, while in the possession of the defendant, in the great fire that occurred in the milling district of Minneapolis, on the evening of the 2d day of May, 1878. The circumstances connected with the loss, as stated in the complaint, are briefly these: Soon after noon of that day, defendant, under a prior special agreement between the companies, first took possession of these cars from the plaintiff at Merriam Junction, where its line of railroad had a rail connection with that of the plaintiff. When received, they were already loaded with wheat, consigned to parties in Minneapolis, to which place they were hauled by the defendant, over its line of road, during the afternoon of the same day, and in the same train.

When the fire first broke out in one of the mills, known as the Washburn mill, which was about seven o'clock in the evening, all the cars were near by, three of them having been unloaded and left standing to await the return train to Merriam Junction—one on the track of defendant's road, and two on a side track of the consignee, connected therewith, to facilitate the delivery of freight. The other five were still unloaded, and were then standing where they had been left by defendant for the purpose of being unloaded, awaiting the convenience of the consignee of the wheat to receive the same, one being upon the track of defendant's road, and the other four upon an extension of such track belonging to the consignee, and also built to facilitate the delivery of freight. It is alleged that the fire was not caused by any act or omission of the defendant, and there is no averment of any negligence on its part in leaving the cars where it did, or in connection with the loss. It is further alleged that the defendant came into possession of the cars in question by delivery from the plaintiff at said Merriam Junction, under and in pursuance of an agreement then existing between them, which is set out in the complaint in these words:

"It has been and still is the custom, understanding and agreement between said companies, (plaintiff and defendant,) as to business common to both roads, that cars belonging to or furnished by one of said companies, when loaded with freight at points on the road of that company, or of a connecting company, consigned to a point on the road of the other company, shall be taken charge of at said Merriam Junction, and controlled exclusively by said other company, on and over whose road said freight was consigned, and transported to the point of destination and delivered; that said cars shall be returned, loaded or empty, at the option of said latter company to said Merriam Junction, and there restored and redelivered to the former company owning or furnishing the same, in the same condition as when received, ordinary wear and tear excepted; that in all such cases the compensation charged for transporting such freight, as per bill of lading, was agreed to be and was divided between said companies upon a percentage to each of said gross sum. And it is further understood and agreed that each company over whose road the other company's cars shall run shall pay to the company owning or furnishing the same, as compensation for

the use thereof in transporting said freight, one cent for each car per mile for every mile said cars shall run, loaded or empty, from and to said Merriam Junction, over the road of the company so using the same."

The question presented concerns the liability of the defendant, upon the facts as thus stated in the complaint. It is contended that it is liable as a common carrier, but if not, as a bailee for hire. As respects its undertaking as to the cars under the agreement, the defendant cannot be regarded as a common carrier, within the definition of that term to be found in any text-book or authority. It neither contracted nor undertook to perform any service as a carrier in transporting them from one place to another, nor was it entitled to receive any compensation whatever for what it agreed to do in the way of taking and using them upon its road, and redelivering them to the plaintiff at Merriam Junction. It did not receive the cars for transportation for hire, but for use on its line of road in doing a business of transportation which was common to both roads, and in the profits of which both companies were to share. The compensation agreed upon was to be paid by the defendant to the plaintiff for such use, and not by the latter to the former as a reward for transportation. These facts alone show that the defendant's liability, if any, was not that of a common carrier.

Upon the assumption—which is undoubtedly correct—that the contract between the parties for the use of the cars was one of bailment for hire, for their mutual benefit, no recovery can be had, for the reason that it not only appears affirmatively that the fire was the proximate cause of the loss, and that it occurred through no fault of defendant, but no negligence whatever is attributed to it in connection with the loss by any direct averment, or by any allegation of fact from which, as matter of law, it can be inferred. As the bailment was reciprocally beneficial to both parties, no liability could attach to the defendant by reason of the destruction of the property intrusted to it as bailee, unless it occurred through some negligence on its part amounting to want of ordinary care. This essential fact must be averred or shown in the complaint, for it is the very ground of the action. Its existence cannot be presumed. Story on Bailments (8th Ed.) §§ 23, 410, and 410a.

Judgment affirmed.[47]

[47] Similarly, where equipment, such as ice cars or sleeping cars, are leased by a railroad for use on its lines, it would follow that the railroad is not an insurer of such equipment unless the terms of the contract so specified. See Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co., 139 U. S. 79, 11 S. Ct. 490, 35 L. Ed. 97 (1891).

BACON v. CLEVELAND, C., C. & ST. L. RY. CO.

(Appellate Court of Illinois, 1910. 155 Ill. App. 40.)

Mr. Presiding Justice BAUME delivered the opinion of the court.[48]

The plaintiffs recovered a verdict and judgment against the defendant in the circuit court of Edgar county for $229.44, as damages for the alleged failure of defendant to carry four carloads of cattle from Ridge Farm to Chicago within a reasonable time, whereby said cattle were caused to shrink in weight, and were necessarily sold for a less price than that which prevailed in the market on the day when said cattle should have arrived in Chicago if they had been transported within a reasonable time. From such judgment the defendant prosecutes this appeal. * * *

In the absence of a special contract with the carrier, whereby such carrier agrees to deliver a shipment within a specified time,[49] mere delay in transportation does not create a liability on the part of the carrier to respond in damages, but when the delay is prolonged beyond the time within which a like shipment is usually and customarily transported between the point of shipment and the point of delivery, the burden is cast upon the carrier to explain such delay,[50] and to show that it did not result from its negligence, or the negligence of its connecting carrier, in cases where it is held responsible for the negligence of its connecting carrier. Shoot v. Cleveland, C., C. & St. L. Ry. Co., 145 Ill. App. 532. In the case at bar the defendant offered evidence tending to show that the alleged unreasonable delay in the carriage of the cattle was without its fault and without the fault of its connecting carrier, the Chicago & Eastern Illinois Railroad Company, of Danville, Ill., which evidence was erroneously excluded by the court. * * *

By the second instruction given at the instance of the plaintiffs the jury were told that "when a common carrier for pay received cattle to be transported it must deliver them within a reasonable time at their destination, and nothing will excuse such delivery within a reasonable time except the act of God or the public enemy." This instruction was clearly erroneous. The rule that only an act of God or the public enemy can excuse the nondelivery of goods entrusted to a common carrier for transportation is not applicable to the duty of a common carrier with reference to the time of delivery. A common carrier

48 Parts of the opinion are omitted.

49 Where a carrier contracts to deliver goods within a specified time, it is no defense that the carrier was without fault in failing to perform the contract. Vittucci Co. v. Canadian Pac. R. Co., 102 Wash. 686, 174 P. 981 (1918); unless the contract was illegal, Chicago & Alton Ry. v. Kirby, 225 U. S. 155, 32 S. Ct. 648, 56 L. Ed. 1033, Ann. Cas. 1914A, 501 (1912).

50 Concerning the burden of proof in such cases, see and compare New England Fruit & Produce Co. v. Hines, Director General of Railroads, 97 Conn. 225, 116 A. 243 (1922), and Barnet v. New York Cent. & H. R. R. Co., 222 N. Y. 195, 118 N. E. 625 (1918).

is bound to deliver goods without unreasonable delay,[51] but the failure of a common carrier to deliver goods within a reasonable time involves a consideration of the question of negligence by the carrier, and a delay however long cannot be said to be unreasonable if the carrier can show that it was free from any negligence which contributed to such delay.[52] Ill. Cen. R. R. Co. v. McClellan, 54 Ill. 70; Mich. Cen. R. R. Co. v. Curtis, 80 Ill. 324; Adams Ex. Co. v. Bratton, 106 Ill. App. 563; Wabash R. R. Co. v. Johnson, 114 Ill. App. 545. * * *

For the reasons indicated the judgment of the circuit court will be reversed and the cause remanded.

Reversed and remanded.[53]

BOTTUM v. CHARLESTON & W. C. RY. CO.

(Supreme Court of South Carolina, 1905. 72 S. C. 375, 51 S. E. 985.)

WOODS, J. On May 16, 1903, the plaintiff, Mrs. Bertha C. Bottum, had a lot of her household goods packed by H. B. Graves, a large dealer in furniture and pictures, and shipped by him from Rochester, N. Y., to Greenwood, S. C. One box containing a pastel portrait of Mrs. Bottum's deceased husband and a valuable landscape painting was lost

[51] As to whether a carrier may be charged with unreasonable delay, where delivery is made within the time schedules in force at the time of shipment, the courts are in disagreement. In the following cases it was held that delivery within schedule time was a compliance with the carrier's duty: Janesville Live Stock & Shipping Ass'n v. Hines, 146 Minn. 260, 178 N. W. 739 (1920); Payne v. Chicago, M. & St. P. Ry. Co., 99 Neb. 699, 157 N. W. 613 (1916); Johnson v. New York, N. H. & H. R. R. Co., 111 Me. 263, 88 A. 988 (1913); Pine Bros. v. Chicago, B. & Q. R. Co., 153 Iowa, 1, 133 N. W. 128, 39 L. R. A. (N. S.) 639 (1911); Burns v. Chicago, M. & St. P. Ry. Co., 104 Wis. 646, 80 N. W. 927 (1899). In the following cases it was held that a jury might find unreasonable delay, although the goods were delivered within schedule time: St. Louis & S. F. R. Co. v. Shepard, 40 Okl. 589, 139 P. 833 (1914); Buel v. St. Louis & S. F. Ry. Co., 65 Okl. 108, 163 P. 536 (1916); St. Louis, S. F. & T. Ry. Co. v. Armstrong (Tex. Civ. App.) 166 S. W. 366 (1914).

[52] Likewise, a carrier of passengers is not liable for damages caused by delay unless the delay is due to its negligence. See Cormack v. New York, N. H. & H. R. Co., 196 N. Y. 442, 90 N. E. 56, 24 L. R. A. (N. S.) 1209, 17 Ann. Cas. 949 (1909).

[53] "The general rule is that the carrier is liable for the negligence of its servants during the course of their employment, and therefore, if its employees go on a strike, abandoning the performance of their duty and causing the delay in the transportation of goods, the carrier is liable." Per Hart, J., in Jonesboro, L. C. & E. R. Co. v. Maddy, 157 Ark. 484, 490, 248 S. W. 911, 28 A. L. R. 498 (1923). For same conclusion, see Read v. St. Louis, K. C. & N. R. Co., 60 Mo. 199 (1875). But in Warren v. Portland Terminal Co., 121 Me. 157, 116 A. 411, 26 A. L. R. 304 (1922), the court pointed out that while a carrier, under its insurer's liability, would be liable for *loss or injury* to goods caused by a strike, it was not liable for *delay* so caused (since a carrier is not an insurer against delay), for the reason that a strike terminates the relation of master and servant, and the doctrine of respondeat superior would not apply. The court stated

on defendant's road, and this action was brought to recover the value, $377.50. Mrs. Bottum's agent, in making the shipment, marked the box containing these pictures "Glass, with Care." The bill of lading was for "household goods," but the kind of goods in each package, except "three trunks crated," was specified. The box of pictures was included in the description, "3 box glass"; the other two boxes really containing glass. The defendant's freight charge on glass was 1½ times first class. On pictures the charge was three times first class, the value being over $50 and not exceeding $200, and a special contract was required when the value was over $200. These rates and requirements, it seems, had been approved by the Interstate Commerce Commission. The packers testified they had always received from consignors pictures marked as glass, and always so marked them in shipping; but there was no evidence that the defendant or any other railroad ever acquiesced in this misdescription. The defendant denied liability for the value of pictures shipped in a box represented by the marks on the box as glass, for which it charged and received a lower rate of freight.

The circuit judge charged: "The railroad company does not contend that Mrs. Bottum made any fraudulent concealment of the contents of the box. Now, if Mrs. Bottum was not guilty of any improper concealment of the contents of the box shipped, or the value thereof, it was the right and duty of the railroad company to inquire about the nature and value of the contents of the box; and, if it failed to do so, and the box has been lost, then the railroad company is liable for the full amount of the loss." In accordance with this instruction, the verdict was in favor of the plaintiff for the value of the pictures. There are a number of exceptions, but the case turns on the soundness of the proposition just quoted from the charge. It is manifest from the context that, when the circuit judge said, "The railroad company does not contend that Mrs. Bottum made any fraudulent concealment of the contents of the box," he meant there was no intention to defraud by concealment; for the defendant's claim of exemption rested entirely on

that the extent of the carrier's obligation was to use reasonable diligence to prevent the occurrence of the strike and to minimize its injurious consequences. See, in accord, Geismer v. Lake Shore & M. S. R. Co., 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837 (1886). Accordingly it has been held that the carrier is under a duty to notify the consignee of the strike in order to give him every reasonable opportunity to protect himself from loss. Warren v. Portland Terminal Co., supra; Eastern Ry. Co. v. Littlefield, 237 U. S. 145, 35 S. Ct. 489, 59 L. Ed. 878 (1915). Likewise, if a carrier accepts goods for transportation knowing that, due to an existing emergency, it will probably be unable to transport promptly, it is absolutely liable for unreasonable delay unless notice of the probable delay was given at the time the shipment was accepted. See Florida East Coast Co. v. Peters, 72 Fla. 311, 73 So. 151, Ann. Cas. 1918D, 121 (1916); Joynes v. Pennsylvania R. R. Co., 235 Pa. 232, 83 A. 1016, Ann. Cas. 1913D, 964 (1912); Dawson v. Chicago & A. R. Co., 79 Mo. 296; Bussey v. Memphis & L. R. R. Co. (C. C.) 13 F. 330, 4 McCrary, 405. As to whether a strike will excuse a carrier for its refusal to accept goods tendered for shipment, see ante, p. ——.

the ground that it had been deceived as to the contents of the box by the untrue representation of the plaintiff's agent as to a fact recognized by the law as of great importance to the contract of carriage. More definitely, then, the question at issue is, was the circuit judge right in charging, as a matter of law, that in the absence of actual intentional fraud the carrier was liable for the value of pictures, marked "Glass" on the box and billed as "glass," because it was the duty of the railroad company to make further inquiry about the nature of the contents, and, having failed to do so, it could not avail itself of the misdescription?

It is quite true that, when a railroad company receives a package marked "Glass," and makes no inquiry as to its kind or value, it is responsible for any article received coming under the general description of glass; but by no possible stretch could a pastel portrait or landscape painting be classed as glass. They may, as in this instance, have glass over them; but the glass cover, like the frame, is incidental, and usually of insignificant value compared to the picture. In marking the box the shipper expressly represented the box to contain glass, and it was, therefore, not the duty of the carrier to ask for a repetition of the statement, nor to disbelieve it and open the box to see for itself. It is known to all that for purposes of transportation goods are classified, and that several factors enter into the consideration, such as weight, bulk, value, and the risk of loss or injury. The carrier has a clear right to know the contents of packages offered for shipment, in order that he may fix his compensation and know his risk. The statement of the shipper as to the character of an article not open to inspection is a representation as to a material factor of the contract, upon which the carrier may rely; and, if the value or character of the article actually shipped so varies from the contents of the package as represented as to materially affect the compensation of the carrier or the risk or expense of transportation, the carrier is not liable for the article of greater value received under a misapprehension caused by the shipper's untrue statement. This is merely the application of the familiar principle that a party to a contract is held only to that liability which falls fairly within the terms of the contract, and it makes no difference if an item which the other party wished to cover was omitted by his fraud or by his negligence.

It is said in Hutchinson on Carriers, § 213: "Fraud may be as effectually practiced upon the carrier by silence as by a positive and express misrepresentation. A neglect or failure to disclose the real value of a package and the nature of the contents, if there be anything in its form, dimensions, or other outward appearance which is calculated to throw the carrier off his guard, whether so designed or not, will be conduct amounting to a fraud upon him. The intention to impose upon him is not material. It is enough if such is the practical effect of the conduct of the shipper, as if a box or package, whether designedly or not, is so disguised as to cause it to resemble such a box

or package as usually contains articles of little or no value, whereby the carrier is misled. For by such deception the carrier is thrown off his guard, and neglects to give to the package the care and attention which he would have given it had he known its actual value." 6 Cyc. 380; 2 Kent, *603; Angell on Carriers, § 261; 5 Am. & Eng. Ency. Law, 345; Relf v. Rapp (Pa.) 37 Am. Dec. 528; Orange County Bank v. Brown (N. Y.) 24 Am. Dec. 129; Pardee v. Drew, 25 Wend. 458; Dunlap v. International Steamboat Company, 98 Mass. 371; Shaacht v. Illinois Central R. Co. (Tenn.) 30 S. W. 742, 28 L. R. A. 176; Humphreys v. Perry, 148 U. S. 627, 13 S. Ct. 711, 37 L. Ed. 587; Southern Express Company v. Everett, 37 Ga. 688; Id., 46 Ga. 307; Railroad Co. v. Thompson, 19 Ill. 578; Railroad Co. v. Shea, 66 Ill. 471; Railway Co. v. Collins (Ga.) 3 S. E. 416, 4 Am. St. Rep. 87; Railway Co. v. Moore (Ga.) 5 S. E. 769. These authorities, especially the leading case of Relf v. Rapp, are opposed to the instruction given by the circuit judge to the effect that marking and billing the box "Glass" was not a representation that its contents were to be classed as glass, and not as pictures.

The case of Rathbone v. Railroad Co. (N. Y.) 35 N. E. 418, relied on by respondent, is not applicable. There the bill of lading simply described the property as two boxes of marble, contents and value unknown, and contained a stipulation to the effect that no statuary would be carried by defendant, for the loss of which it would be liable, unless a memorandum was delivered, stating the character and kind of articles and their value, unless a proper extra price for the carriage and responsibility was paid. Shippers' agents informed defendant at the time of the shipment that the box contained marble statuary, and this was marked upon the box; also the words "Handle with Care." The statuary was found to be broken on delivery to the consignee, and it was held: "A nonsuit was error; that if defendant was fully and truly informed as to the character of the property, and accepted it without requiring a written memorandum or extra compensation, it might be deemed to have waived other and further observance of the conditions; and that plaintiff was entitled to a submission to the jury of the questions of waiver, of fraudulent concealment, and of defendant's negligence." There was, therefore, actual notice to the carrier of the contents of the box, which, as the court held, was obviously evidence of waiver of the conditions of the bill of lading. Here we perceive nothing to put the carrier on notice that the mark on the box did not truly state the nature of the contents; but, even if there was such evidence, it was the right of the defendant to have the question of waiver submitted to the jury.

The defendant offered evidence tending to show that the misrepresentation as to the contents of the package materially affected the burden and the consideration of the contract of carriage, and no evidence to the contrary was offered by the plaintiff. On principle, supported by the authorities above cited, the plaintiff was entitled under the evi-

dence offered to recover as for the loss of a package of glass used for household purposes, the reasonable value to be fixed by the jury;[54] and it was, therefore, error for the circuit judge to charge, as in effect he did, that the verdict should be for the plaintiff for the value of the pictures.

There was no error in admitting testimony as to the contents of the box. Without it the case could not be intelligibly tried.

The judgment of this court is that the judgment of the circuit court be reversed, and the cause remanded for a new trial.[55]

SOUTHERN EXP. CO. v. WOOD.

(Supreme Court of Georgia, 1896. 98 Ga. 268, 25 S. E. 436.)

SIMMONS, C. J. The law of this case, as announced in the first headnote, was laid down by this court in the case of Express Co. v. Everett, 37 Ga. 688, and is so fully discussed in the opinion of Chief Justice Warner in that case that we deem it unnecessary to enter into any further discussion of it here. See, also, the opinion of McCay, J., when that case was again before this court. 46 Ga. 306.

In the present case the trial judge, in his charge to the jury, seems to have followed those decisions; but we think he erred in not setting aside the verdict as not sustained by the evidence. The facts, in brief, are that a package wrapped in common manilla paper, and tied with a twine string, but not sealed, and which, it is alleged, contained the music and the libretto of an opera, the former worth $1,000 and the

[54] "Where a shipper presents an article for shipment, packed in such form and dimensions as to conceal its real nature and value, and to throw the carrier off his guard, and to cause him to receive a package for shipment at a less rate of freight than would be charged if the shipper disclosed the nature and value of the article offered for shipment, the conduct of the shipper, in failing to disclose the nature and value of the article offered for shipment, would be tantamount to a fraud on the carrier, whether the shipper so intended it or not, and in case of loss the shipper could only recover for the value of the shipment as it appeared to be." Per Wood, J., in Kansas City & M. Ry. Co. v. New York Cent. & H. R. R. Co., 110 Ark. 612, 617, 163 S. W. 171 (1914). Does this mean that, if A. shipped a diamond necklace in a box marked "wearing apparel" and the necklace were lost, the carrier would be liable for the value of a package of "wearing apparel"? If so, how is the value of the "wearing apparel" to be determined?

If A. shipped a package marked "household goods," which contained some household goods and also money or jewelry, would the carrier be responsible in any amount for the loss of the money or jewelry? Would the carrier be responsible for the loss of the household goods? See, in connection with the above problems, Harrington v. Wabash R. Co., 108 Minn. 257, 112 N. W. 14, 23 L. R. A. (N. S.) 745 (1909); Chicago & A. R. R. Co. v. Shea, 66 Ill. 471 (1873); Humphreys v. Perry, 148 U. S. 627, 13 S. Ct. 711, 37 L. Ed. 587 (1892). Concerning the effect upon the carrier's liability of false declarations as to the value of the goods shipped, see post, p. ——.

[55] But, where cigars were shipped as "smoking tobacco," it was held in Jenkins v. Railroad Co., 84 S. C. 520, 66 S. E. 407 (1909), that the carrier was liable for the value of the cigars, in the absence of actual fraud.

latter worth $50, was delivered to the agent of the defendant at Selma, Ala., for transmission to Macon, Ga. There was nothing on the package to indicate its value. According to the testimony of the person who delivered it to the agent, he told the agent that it was a package of music, but said nothing as to what kind of music it was, nor was anything said as to its value. No value was asked to be placed upon it, and none was given. He testified that the agent asked him 35 cents charges, and he replied that the package came to him for 25 cents, and after some discussion induced the agent to make a reduction in the charges. The agent testified that he first asked 40 cents charges, to which the sender replied that was too much; that the package came for 25 cents, and they ought to carry it back for the same price; and he remarked that it was nothing but printed matter or music, and the agent thereupon gave him a lower rate. There was further testimony for the defendant to the effect that, if its agent had been informed that the package was worth $1,050, the rate would have been 10 cents per $100 extra valuation, and that it would not have gone through the same channel as regular freight, but would have been put in the money department, where all valuable, sealed, and money packages were, and would have been carried in a safe in the express car instead of with the general freight therein. It appeared that the car in which the package was carried was destroyed by fire, but the packages in the iron safe in that car were not destroyed. There was considerable testimony as to the value of the opera, it appearing to have been the only copy in existence, and not capable of replacement. The jury found for the plaintiff $475.

The evidence shows that the conduct of Erhart, the person who delivered the package to the agent of the express company, was calculated to deceive the agent as to the value of the package, and it doubtless did deceive him. His higgling over the small sum charged for the freight was sufficient of itself to induce the agent to believe that the package was not valuable; and when he told the agent that it was music, without explaining anything further, the agent would naturally conclude that it was printed music, which is not very expensive. At any rate, no one would have supposed from the appearance of the package, or from what was said, that the package contained something worth a thousand dollars. If Erhart had informed the agent as to its value, it would have been placed in an iron safe, with other valuable packages; and, according to the evidence, would not have been destroyed by fire. By his higgling with the agent he got the benefit of a reduced rate, when, if the true value of the package had been known, a higher rate would have been charged for it. Such conduct on the part of the shipper, we think, amounted to a concealment of the true character of the contents of the package, and constituted such a legal fraud upon the carrier as would in law discharge it from all liability as a carrier.

The facts of the case are in this respect stronger in behalf of the carrier than were the facts in the Everett Case, supra, for in that case

nothing was said to the agent of the carrier by the person who delivered the package for shipment which could have tended to mislead the agent; while in the present case the sayings, as well as the conduct, of the shipper, were calculated to deceive the agent. In that case there were two verdicts in favor of the shipper, but both verdicts were set aside; the second upon the ground that it was contrary to law, because the evidence did not sustain it. See Code, § 2080; Wood v. Southern Exp. Co., 95 Ga. 452, 22 S. E. 535.

Judgment reversed.[56]

MOBILE, J. & K. C. R. CO. et al. v. T. J. PHILLIPS & CO.

(Supreme Court of Mississippi, 1913. 103 Miss. 536, 60 So. 572.)

COOK, J. There are numerous assignments of error, but we are of opinion that none are well taken, and only one will be noticed because of its importance.

A certain package of freight when delivered to the initial carrier was represented by the consignor to contain cotton fabrics in the original pieces. It appears that cotton fabrics in the original pieces, according to the tariff, were carried at a lower rate than the actual contents of the package for the loss of which this suit was instituted. This was not an action for damage to freight, but for the failure of the railroads to deliver the package to the consignee. After the delivery of the package to the St. Louis & San Francisco Railroad Company at Memphis, it disappears from view, and the evidence does not show, or undertake to show, what became of it. There is no evidence to justify the inference that the package was ever delivered by the initial carrier to the connecting carrier, the Mobile, Jackson & Kansas City Railroad Company—in fact, the evidence is entirely silent upon that feature of the case.

Coming now to a consideration of the point, which is of first impression in this state, so far as we have been able to ascertain, the exact point has not been decided by the courts of any of the states, or raised in any case brought to our notice. It is contended that

[56] In Harrington v. Wabash R. Co., 108 Minn. 257, 122 N. W. 14, 23 L. R. A. (N. S.) 745 (1909), it was held that, where books were shipped in a box marked "household articles," the carrier was not liable for loss of the books, although the loss was caused by the carrier's negligence. In Head v. Express Co., 60 Tex. Civ. App. 169, 126 S. W. 682 (1910), it was held that, although the shipper's fraud in misdescribing the goods would relieve the carrier of its liability as insurer, the carrier was nevertheless liable for loss due to its negligence. See, also, cases cited by the court in Humphreys v. Perry, 148 U. S. 627, 13 S. Ct. 711, 37 L. Ed. 587 (1892), to the effect that in such a case the carrier is liable only for loss due to "gross negligence." For a collection of cases dealing with the effect upon the carrier's liability of misrepresentations concerning the nature of the goods shipped, see notes 23 L. R. A. (N. S.) 745; L. R. A. 1915A, 502; 5 Ann. Cas. 120; Ann. Cas. 1912A, 369.

the misrepresentation as to the contents of the package was a gross and deliberate fraud to obtain a lower freight rate—and, inasmuch as the carrier did not undertake to carry the package actually delivered, the contract of affreightment was absolutely void and no action can be predicated thereon. In all the cases cited, and in all the authorities examined by us, the doctrine invoked to defeat a recovery in this case does not extend so far as is contended by appellants.

It seems to be, and indeed must be, the law that, if the loss or damage is caused by the act or omission of the shipper, the owner must bear the loss. This is but an application of the exact principles of justice and reason. If my silence upon or misrepresentation of the facts is the cause of my injury, it follows that I must suffer the consequences of my own fraud or folly. The failure to speak, or the false statement of the facts, must in some way contribute to the event—in this case to the loss of the package. If the omission of duty or the fraudulent representation misleads the carrier, and causes it to omit such precautions as were necessary to the safe transportation and delivery of the package, the owner must bear the burden of its agent's fraud or negligence.

To this extent the law invalidates the contract of carriage, but where it appears, as in the present case, that the statement that the package contained cotton fabrics in the original pieces could in no imaginable circumstances have misled the carrier to its prejudice, the reason for the application of the righteous doctrine invoked by appellant does not exist. To burden appellee with consequences with which the wrong charged against his agent has no connection, and which would have followed had the true character of the shipment been disclosed, would be as rank injustice as to hold the carrier responsible for a loss caused by the shipper. The entire principle invoked here and the reasons underlying its enforcement by the courts are discussed by the text-writers. See Hutchinson on Carriers (3d Ed.) § 328 et seq.; Moore on Carriers, p. 355 et. seq.

The record does not show that the Mobile, Jackson & Kansas City Railroad Company received the package, and the cause is reversed and the suit dismissed as to it, but the case is affirmed as to the St. Louis & San Francisco Railroad Company.

NEW YORK CENT. R. CO. v. GOLDBERG.

(Supreme Court of the United States, 1919. 250 U. S. 85, 39 S. Ct. 402, 63 L. Ed. 857.)

Mr. Justice PITNEY delivered the opinion of the Court.

This was an action brought by respondent against petitioner in the Supreme Court of New York to recover damages equivalent to the value of certain goods shipped in interstate commerce and lost in transit. Plaintiff had judgment in the trial court, which was affirmed

by the Appellate Division for the First Department (Goldberg v. New York Cent. R. Co., 164 App. Div. 389, 149 N. Y. S. 629), and affirmed by the Court of Appeals without opinion (221 N. Y. 539, 116 N. E. 1047).

The facts are as follows: On September 17, 1912, a firm of fur manufacturers in New York City caused to be delivered to defendant there for transportation to plaintiff at Cincinnati, Ohio, a case containing furs belonging to plaintiff of the value of $693.75. When the case left the consignors' possession it was marked with the name and address of the consignee, and with the word "furs" conspicuously displayed. It was delivered to a local expressman, whose driver delivered it to defendant and made out a bill of lading which defendant signed and upon which the action depends. This bill of lading described the goods as "One case D. G.," which admittedly means "dry goods." The misdescription was the driver's mistake, not made with any intent to fraudulently misrepresent the nature of the merchandise shipped. Defendant's clerk who signed the bill of lading relied wholly upon the representations of the driver as to the contents of the case, not seeing the case itself; and, so far as appears, no representative of defendant compared or had a convenient opportunity to compare the bill of lading with the marks on the case. At the time of the shipment the official freight classification filed with the Interstate Commerce Commission provided for a first-class rate for dry goods (65 cents per hundred pounds), and a double first-class rate ($1.30 per hundred) for furs. As a result of the misdescription in the bill of lading, freight was charged at the smaller rate applicable to dry goods, instead of the higher one applicable to furs. No valuation was placed upon the goods, and no question of limitation of liability to a stipulated value is presented.

Defendant admitted that it received the goods for transportation, and that they were stolen in transit and never delivered to the consignee.

Defendant insists that it is not liable in any amount for loss of the goods, because they were misdescribed in the bill of lading. Reliance is placed upon a line of decisions in this court relating to the limitation of liability of an interstate rail carrier where goods are shipped at a declared value at a rate based upon value and under a contract conforming to the filed tariff. Adams Express Co. v. Croninger, 226 U. S. 491, 509, 33 S. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; Kansas City Southern Ry. v. Carl, 227 U. S. 639, 650, et seq., 33 S. Ct. 391, 57 L. Ed. 683; Missouri, Kans. & Texas Ry. v. Harriman, 227 U. S. 657, 670, 33 S. Ct. 397, 57 L. Ed. 690; Great Northern Ry. v. O'Connor, 232 U. S. 508, 515, 34 S. Ct. 380, 58 L. Ed. 703; Atchison, etc., Ry. Co. v. Robinson, 233 U. S. 173, 180, 34 S. Ct. 556, 58 L. Ed. 901; Southern Railway v. Prescott, 240 U. S. 632, 638, 36 S. Ct. 469, 60 L. Ed. 836.

The Appellate Division held that these cases did not go to the

extent of relieving the carrier from all liability in case of a non-fraudulent misrepresentation as to the nature of the merchandise shipped, and that since there was no clause in the bill of lading exempting the carrier or limiting its liability in case of such a misdescription the carrier was defenseless.

Defendant's contention is that there is no responsibility for loss of the furs that were shipped because they were goods, not of the same, but of a different, character than those described in the bill of lading, and were goods for the transportation of which a higher rate was established by its filed schedules. Were there otherwise any difficulty in answering this contention, it would be wholly relieved by the fact that the precise contingency was anticipated in the preparation of the form of the bill of lading and provided for by one of its conditions, which reads as follows:

"The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped."

Clearly, the effect of this is that a misdescription of the character of the goods, not attributable to fraud, merely imposed upon the shipper or consignee an obligation to pay freight charges according to the character of the goods actually shipped, and did not affect the liability of the carrier for a failure to deliver the goods.

Judgment affirmed.[57]

CURTIS v. MURPHY.

(Supreme Court of Wisconsin, 1885. 63 Wis. 4.)

Appeal from the County Court of Milwaukee County.

The facts will sufficiently appear from the opinion. There was a verdict and judgment for the defendant, and the plaintiff appealed.

COLE, C. J.[58] The defendant in this action was the proprietor of the St. James Hotel, in Milwaukee. The plaintiff was a single man, and kept a saloon not many blocks distant from the hotel. The following facts are clearly shown by the plaintiff's own testimony: About 12 o'clock at night on the 13th of March, 1882, the plaintiff came to the hotel with a disreputable woman, whom he had met on the street, and whose name he did not know, and registered himself and the woman as "Thomas Curtis and wife," called for a room, and it was assigned him by a person or clerk who was in charge of the

[57] In Gassman v. New York Cent. R. Co., 207 App. Div. 15, 201 N. Y. S. 740 (1923), it was held that the inability of the plaintiff to recover for part of shipment innocently misdescribed, because of exemption clause in bill of lading, did not prevent a recovery for the remainder of the shipment.

[58] Parts of the opinion are omitted.

office. The plaintiff testified that before going to his room he said to this clerk that he saw on the top of the register that all moneys and jewels should be given to the proprietor; when the clerk replied that the proprietor was in bed, and that he held the position of night-clerk. Thereupon the plaintiff handed the clerk $102 for safe-keeping, and took a receipt, which read, "I. O. U. $102," signed by the clerk. That night the clerk absconded with the money. The plaintiff sues to recover it of the proprietor of the hotel.

The natural, perhaps necessary, inference from the plaintiff's own testimony is that he went to the defendant's hotel at midnight with a prostitute, and engaged a room solely for the purpose of having sexual intercourse with the woman. True, he says that he went to the hotel as a guest, and asked the clerk if he "could stay there for bed and breakfast." But he lived near by, gave no reason why he did not go to his usual lodging place, therefore we feel entirely justified in assuming that he went to the hotel for the unlawful purpose above indicated. This being the case, the question arises whether he was a guest in a legal sense, and entitled to protection as such.. * * *

If a man and woman go together or meet by concert at an inn or hotel in the town or city where they reside, and take a room for no other purpose than to have illicit intercourse, can it be that the law protects them as guests? Is the extraordinary rule of liability which was originally adopted from considerations of public policy to protect travelers and wayfarers, not merely from the negligence but the dishonesty of innkeepers and their servants, to be extended to such persons? If so, then for a like reason it should protect a thief who takes a room at an inn and improves the opportunity thus given to enter the rooms and steal the goods of guests and boarders. We do not think that the relation of innkeeper and guest can or does arise in the cases supposed. One whose status is a guest is a traveler or transient comer who puts up at an inn for a lawful purpose, to receive its customary lodging and entertainment. It is not one who takes a room solely to commit an offense against the laws of the state. So, upon the facts detailed by the plaintiff himself, we have no hesitation in saying that he was not a guest at the hotel within the legal sense of the term. The relation of landlord and guest was never established between them.

We feel the more confidence in the correctness of this conclusion when we consider the duties of an innkeeper. An innkeeper is bound to take in all travelers and wayfaring persons, and to entertain them, if he can accommodate them, for a reasonable compensation; and he must guard their goods with proper diligence. Bac. Abr. tit. "Inns and Innkeepers," (C); Story on Bailments, § 476. Now, if the defendant had been aware of the purpose of the plaintiff in applying for a room, could he not have refused to receive him into his house? Nay, more, if the plaintiff had been received by the clerk and a room

had been assigned him, could not the defendant, on learning the purpose for which the room had been taken, have incontinently turned the plaintiff and the woman with him into the street, or have called the police and had them arrested? It seems to us there can be no doubt of the right of the defendant thus to have treated the plaintiff. But if the plaintiff was a guest, and entitled to the rights and privileges of a person having that status at the hotel, he could not have been turned into the street, though his profligate conduct was outraging all decency and ruining the reputation of the hotel. * * *

BY THE COURT. Judgment affirmed.

LUCIA v. OMEL.

(Supreme Court of New York, Appellate Division, 1899. 46 App. Div. 200, 61 N. Y. S. 659.)

CULLEN, J. The action was brought to recover an amount of money stolen from the plaintiff while a guest in the defendant's hotel at Coney Island. Judgment was rendered on September 9th, and the appeal perfected on October 2d. The appeal was taken in time. Ordinarily the last day on which to appeal would have been September 29th, but that day and the following were made days of general thanksgiving and public holidays by proclamation of the Governor. The 1st day of October was Sunday. The existence of these two holidays and of Sunday extended the appellant's time until the Monday following, October 2d.

From the evidence of the plaintiff and his companions it appeared that, at about 11 o'clock in the evening, he hired a room in defendant's hotel and took a strumpet with him there for the purposes of consort. After remaining there some time the woman appears to have absconded with some of the plaintiff's money. Thereupon he went downstairs and asked the clerk or bartender to keep the remainder of his money, some $200, which the clerk refused. Then the plaintiff returned to his room by himself, went to sleep, and while so occupying his bedroom his money was stolen. No evidence was given for the defendant, and the decision of the justice was made, not on the questions of fact, but as a nonsuit.

We think that the story of the plaintiff, if credited, entitled him to recovery. An innkeeper is liable for the loss of the goods of his guest, unless the loss is caused by the act of God, by the common enemy, or by the neglect or default of the guest. Edwards on Bailments, § 462. That the plaintiff was a guest in the defendant's hotel cannot be denied, unless his taking the strumpet to his room deprived him of his rights as a guest. In Curtis v. Murphy, 63 Wis. 4, 22 N. W. 825, 53 Am. Rep. 242, it was held that where a man took a woman to a hotel for the purpose of prostitution he did not thereby acquire

the rights of a guest. Assuming this decision to be correct, it is not a bar to the plaintiff's rights in this case. If he had been robbed while occupying his room with the strumpet, the decision cited would apply. If he had been robbed by the strumpet with whom he associated, we would be entirely clear that his loss would be the result of his own negligence and misconduct, and thus preclude a recovery against the landlord within the general rule, even apart from the authority of the Wisconsin case. But the misconduct and immorality of the plaintiff had ceased before he met with his loss. We cannot see how that previous immorality affected his subsequent status as a guest in the hotel.

The judgment should be reversed and a new trial ordered, costs to abide the event. All concurred.

Judgment of the Municipal Court reversed and new trial ordered.

JUDGE v. NORTHERN PAC. RY. CO.

(Circuit Court of the United States, D. Oregon, 1911. 189 F. 1014.)

BEAN, District Judge. Action to recover damages for the death of an animal belonging to the plaintiff while being carried on defendant's train between Seattle and Portland. It appears from the complaint that in May, 1910, the plaintiff, who was the owner of a chimpanzee trained to perform in theaters and vaudeville, was under contract with Sullivan & Considine, who were operating various vaudeville theaters in the Northwest, to exhibit the animal at such theaters, and particularly at Seattle and Portland, for a stipulated sum per week, including transportation for himself and the animal; that, in order to transport their artists, actors, and vaudevillians, together with their baggage and property, Sullivan & Considine purchased of the defendant 25 or more tickets for use between Seattle and Portland, which entitled them to the use of a special baggage car suitable for the transportation of all baggage, animals, paraphernalia, and scenery of any and all of their actors and performers, but when the plaintiff, who was entitled to transportation for himself and animal on such tickets, tendered the animal to the railway company, the special baggage car provided by it was not in suitable or proper condition to convey the same, and, by arrangement with the agents of the defendant, it was put in the general baggage car, and, while en route to Portland, was killed through the negligence of the defendant's agents in placing it against the radiator and carelessly and negligently turning on the steam.

The defendant, after denying many of the material allegations of the complaint, pleads as one of its separate defenses in substance that under its tariff, as filed with the Interstate Commerce Commission and in force at the time of the alleged shipment, it was unlawful for it

to carry, as baggage, live animals, as part of theatrical paraphernalia or property, except in a special car, and then only upon the execution of a release relieving the company from liability as a common carrier and from all claims or demands whatsoever which may arise or accrue by reason of any or all loss or damages in the transportation thereof, and that the contract of carriage alleged in the complaint was in violation of this provision, and consequently of the interstate commerce act, because it granted the plaintiff special rights and privileges not accorded to other shippers similarly situated.

The plaintiff has demurred, on the ground that this matter constitutes no defense; and in my opinion the demurrer should be sustained. If the animal was delivered to and accepted by the defendant for transportation, and it undertook the performance of such carriage, it thereby assumed the duties of either a common or private carrier —a question not necessary to consider at this time—in reference thereto, and cannot escape liability for a failure to discharge its duty while the animal was in its possession, on the ground that the initial contract of carriage was illegal. Insurance Cos. v. Carriers' Co., 91 Tenn. 537, 19 S. W. 755; Pond-Decker Lmbr. Co. v. Spencer, 86 F. 846, 30 C. C. A. 430; Merchants' Cotton Ex. v. N. A. Ins. Co., 151 U. S. 368, 14 S. Ct. 367, 38 L. Ed. 195. A contract of carriage in violation of the interstate commerce law is void and cannot be enforced, and probably the carrier, after having entered upon the performance, may withdraw therefrom without being liable for breach of the contract. Melody v. Gt. Nt. Ry., 127 N. W. 543, 30 L. R. A. (N. S.) 568.

But when a carrier accepts and takes charge of property for transportation, it becomes the bailee thereof, and the law imposes upon it, in the absence of a binding contract limiting its liability, the duties of either a common or private carrier according to the facts, for a violation of which it will be liable, and this regardless of the legal sufficiency of the contract of carriage. The liability in such cases arises out of the possession of the property by the carrier under a contract of affreightment, and the duties and obligations which the law imposes upon it in reference thereto, and not wholly out of the agreement under which the property was delivered to and accepted by it. The Interstate Commerce Commission forbids rebates, special rates, preferences, etc., and makes all agreements in reference thereto void, but it does not make the contract of affreightment otherwise void, and there is nothing in the law which will excuse the carrier from liability when it has accepted property for transportation under such a contract.

The demurrer as to the third affirmative defense is therefore sustained, and in all other respects overruled.[59]

[59] Accord: Adams Express Co. v. Chamberlain-Johnson-Du Bose Co., 138 Ga. 455, 75 S. E. 601 (1912); In re Bunch Co. (D. C.) 180 F. 519 (1910). In Pond-Decker Lumber Co. v. Spencer, 86 F. 846, 30 C. C. A. 430 (1898), it was

ILLINOIS CENT. R. CO. v MESSINA.

(Supreme Court of the United States, 1916. 240 U. S. 395, 36 S. Ct. 368, 60 L. Ed. 709.)

Mr. Justice HOLMES delivered the opinion of the court.[60]

This is an action for personal injuries suffered by the defendant in error while upon a train running from Mississippi to Tennessee. He had paid no fare, but was upon the tender, as he said, by permission of the engineer. The engineer had notice that the water was high between Beatty and Sawyer and over the track at Sawyer. After passing Beatty the train was going at a rate variously put as 35 to 50 or 60 miles an hour when it ran into the water and was thrown from the track. The plaintiff was caught between the tender and a car and badly hurt.

The plaintiff got a judgment for $10,000, which was sustained by the supreme court. At the trial the jury were instructed that the defendant railroad was presumed to be negligent, and that if the evidence left it doubtful, it was their duty to find full damages for the plaintiff. The judge refused to instruct them that the engineer had no authority to permit the plaintiff to ride on the train "at the place he was in," but the request for this instruction was based upon the company's rules, not upon the act to regulate commerce. The supreme court, however, discussed the act of Congress and held that it did not apply to the case.

By section 1 of the act, as amended by the Act of June 29, 1906, c. 3591, 34 Stat. at L. 584, Comp. Stat. 1913, § 8563, and still in force, any common carrier violating the provisions against free transportation is guilty of a misdemeanor and subject to a penalty, and any person other than those excepted "who uses any such interstate * * * free transportation" is made subject to a like penalty. No doubt the enactment had somewhat more formal uses especially in view, but we see no reason for limiting the prohibition to them. The word "such," like "said," seems to us to indicate no more than that free transportation had been mentioned before. We cannot think that if a prominent merchant or official should board a train and by assumption and an air of importance should obtain free carriage,

held that the carrier was liable for misrouting, although the goods were shipped at an unlawful rate. In Merchants' Cotton Press Co. v. Insurance Co., 151 U. S. 368, 14 S. Ct. 367, 38 L. Ed. 195 (1893), and in Insurance Co. v. Carrier Cos., 91 Tenn. 537, 19 S. W. 755 (1892), it was held that the giving of an illegal rebate did not relieve the carrier from liability for loss of the goods to an insurance company which had paid the shipper's claim. But compare Payne v. Bassett (Tex. Civ. App.) 235 S. W. 917 (1921), in which the carrier was held not liable for loss of silverware which was being transported in violation of the Interstate Commerce Act. See note, 22 Col. Law Rev. 564.

[60] The dissenting opinion of Mr. Justice Hughes, in which Mr. Justice McKenna concurred, is omitted.

he would escape the act. We are of opinion therefore that the act was construed wrongly. Assuming, as it has been assumed, that the defendant's liability was governed otherwise by state law, it seems doubtful under the state decisions whether the plaintiff would have been allowed to recover had the court been of opinion that the act of Congress made his presence on the train illegal. Western U. Teleg. Co. v. McLaurin, 108 Miss. 273, L. R. A. 1915C, 487, 66 So. 739. And although there are expressions in the opinion below that raise a doubt, the fact that the supreme court thought it necessary to construe the act indicates that the construction was material to the result. For this reason the judgment must be reversed.

Judgment reversed.[61]

SECTION 3.—EXCEPTIONS TO LIABILITY AS INSURER

CENTRAL OF GEORGIA RY. CO. v. HALL et al.

(Supreme Court of Georgia, 1905. 124 Ga. 322, 52 S. E. 679, 4 L. R. A. [N. S.] 898, 110 Am. St. Rep. 170, 4 Ann. Cas. 128.)

Hall and Crawford brought suit against the Central of Georgia Railway Company to recover damages for the killing of a mare. There was no conflict in the evidence as to the following facts: One White, acting for the plaintiffs, who were the owners of the mare, shipped her from Augusta to Bishop, Ga., along with several other horses, over the defendant's railroad. The train came to a standstill, and was di-

[61] Compare Southern Pacific Co. v. Schuyler, 227 U. S. 601, 33 S. Ct. 277, 57 L. Ed. 662, 43 L. R. A. (N. S.) 901 (1913), in which the Supreme Court held that a passenger injured by the negligence of the railroad was not precluded from recovering in tort merely because he was at the time riding illegally on a free pass issued to him in violation of the Hepburn Act. The court said: "Neither the letter nor the spirit of the act makes an outlaw of him who violates its prohibition by either giving or accepting gratuitous interstate carriage. The deceased no more forfeited his life, limb, or safety, and no more forfeited his right to the protection accorded by the local law to a passenger in his situation, than the carrier forfeited its right of property in the mail car upon which the deceased rode. His right to safe carriage was not derived, according to the law of Utah, from the contract made between him and the carrier, and therefore was not deduced from the supposed violation of the Hepburn Act. It arose from the fact that he was a human being, of whose safety the plaintiff in error had undertaken the charge. With his consent he had placed his life in its keeping, and the local law thereupon imposed a duty upon the carrier, irrespective of the contract of carriage. The Hepburn Act does not deprive one who accepts gratuitous carriage, under such circumstances, of the benefit and protection of the law of the state in this regard." See note on liability for negligent injury to a person given free transportation in violation of law, 13 Mich. Law Rev. 328.

vided into two sections, with one of which the engineer proceeded. At a point on the road the engineer said that the engine was out of water, and that he must go on to the water tank. The engine was cut loose from the cars, and went on to the tank, where water was obtained. The conductor and fireman accompanied the engineer. On the return the speed at which the engineer ran the engine was 20 or 25 miles an hour. The conductor warned him three or four times that he should reduce the speed, or the engine would run into the cars. He replied that he knew where the train was. There was a collision. The car containing the mare was wrecked, and she was killed. The defendant denied negligence, and pleaded that the engineer was stricken with sudden insanity at the time and while the transaction was in progress, that his acts were due thereto, and that there was no negligence on the part of the defendant. The plaintiff demurred to the plea, but the demurrer was overruled. Evidence was introduced as to the market value of the horse. The jury found for the plaintiff $800. The defendant moved for a new trial, which was denied, and it excepted. Plaintiff filed a cross-bill of exceptions, complaining of the allowance of the plea setting up a sudden access of insanity, and the refusal to sustain the demurrer thereto. The other facts, so far as necessary, are stated in the opinion.

LUMPKIN, J.[62] In cases of loss the presumption of law is against a common carrier, and no excuse avails him unless it was occasioned by the act of God or the public enemies of the state. * * *

The defendant pleaded that its engineer in charge of its train became suddenly insane, and lost his power of mental control and discretion; that this was unknown to the defendant, or any of its agents or employés, until after said transaction, and could not have been known to it by the exercise of all the diligence required of it by law; and that all the acts of the engineer complained of were due to the sudden insanity, which developed at the time and while the transaction was going on, unmixed with any negligence of the defendant. The plaintiff demurred to this plea, and the demurrer was overruled. The court charged, in effect, that if the engineer suddenly became insane, and thereby became demented to such an extent as to lose his reason, and render him totally irresponsible for his act, such insanity, and acts growing out of it, would, in a legal sense, be the act of God. To this charge the defendant excepted. The determination of the defendant's liability in the present case does not rest upon the common-law liability of common carriers as insurers, but upon a special contract; but as the judge charged as above stated, and the question has been argued before us, the writer deems it not improper to discuss the case as it would stand at common law, in the absence of a limiting contract.

Much learning and ability has been expended on the subject of what constitutes an "act of God" which will relieve a common carrier. Lord Coke made frequent use of the expression, applying it to death, sud-

[62] Parts of the opinion are omitted.

den tempests, and the like. In Forward v. Pittard, 1 Term. R. 27–33, Lord Mansfield used the following oft-quoted language: "Now what is the act of God? I consider it to mean something in opposition to the act of man, for everything is the act of God that happens by his permission; everything by his knowledge. But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unraveled, the law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightning, and tempests." Some courts have held that the terms "act of God" and "inevitable accident" are synonymous, but others have held that there was a distinction. For interesting discussions and illustrations of acts which fall within the designation "acts of God" see Pandorf v. Hamilton, L. R. 17 Q. B. 670; Nugent v. Smith, L. R. 1 Com. Pl. Div. 423 et seq.; Hays v. Kennedy, 41 Pa. 378, 80 Am. Dec. 627. In an elaborate and able note to Coggs v. Bernard, 1 Smith's L. C. (8th Ed.) 422 et seq., the cases are reviewed, and it is said: "Upon the whole, it would seem that an act of God signifies the extraordinary violence of nature, * * * and these cases now express the more commonly recognized law, that the act of God which excuses the carrier must be a direct and violent act of nature." In these authorities are also discussed the terms "unavoidable accident," "inevitable accident," "perils of the sea," and similar expressions, frequently used in bills of affreightment. See, also, Stroud's Jud. Dict.; Bouvier's Law Dict.; Black's Law Dict.; Anderson's Law Dict.; words "acts of God," "common carrier," and citations; 3 Wood's Ry. Law, 1574; 2 Kent's Com. 598; 5 Thomp. Neg. 6456; Story, Bailm. (9th Ed.) § 25.

In Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393, the liability of common carriers and their right of defense on the ground that the injury was occasioned by the "act of God" was considered. Nisbet, J., in the opinion used the following language: "Unavoidable accidents are, in our opinion, the acts of God. The latter words express the same acts, and no more than the former; the two phrases mean the same thing. See Story on Bailm. §§ 25, 511; 2 Kent's Com. 597. What, then, are acts of God or unavoidable accidents? For it is from these only that this party is protected. By the act of God is meant any accident produced by physical causes which are irresistible, such as lightning, storms, perils of the sea, earthquakes, inundations, sudden death, or illness. Story, Bailm. § 25; 2 Kent's Com. 597. The act of God excludes all idea of human agency. McArthur & Hurlbut v. Sears, 21 Wend. 190. In this case it is said: 'No matter what degree of prudence may be exercised by the carrier or his servants, although the delusion by which it is baffled or the force by which it is overcome be inevitable, yet if it be the result of human means the carrier is responsible.' See, also, Backhouse v. Sneed, 1 Murphy, 173; Ewart v. Street, 2 Bailey, 157, 23 Am. Dec. 131; Smyrl v. Niolon, 2 Bailey, 421, 23 Am. Dec. 146." In Central Line of Boats v. Lowe, 50 Ga. 509, Judge

McCay, delivering the opinion, said: "There is, doubtless, a distinction between an 'act of God' and an 'unavoidable accident.' The former covers only natural accidents, such as lightning, earthquakes, tempests, and the like, and not accidents arising from the negligence or act of man." In Doster v. Brown, 25 Ga. 24–26, 71 Am. Dec. 153, McDonald, J., delivering the opinion, said: "While every shower of rain that falls upon the earth is the act of God in contradistinction to the act of man, yet an ordinary freshet is not the act of God, in the legal sense which protects a man against responsibility for the nonperformance of a contract like that made by this plaintiff." See, also, Cannon v. Hunt, 113 Ga. 501–509, 38 S. E. 983; Young v. Waldrip, 91 Ga. 765, 18 S. E. 23; Richmond R. Co. v. White, 88 Ga. 805, 15 S. E. 802; Carr v. Houston Warehouse Co., 105 Ga. 268, 31 S. E. 178.

In the case of McArthur v. Sears, 21 Wend. 190, which is cited as authority in the case of Fish v. Chapman, supra, a steamboat had been driven on shore by a previous gale. As a second steamboat later approached the harbor at night, the weather was hazy and snow was falling. Those in charge were misled by the light of the boat on shore, and the second boat struck the shoal. It was held not to excuse the carrier. In Merritt v. Earle, 29 N. Y. 115, 86 Am. Dec. 292, it is said: "By the 'act of God' is meant something which operates without any aid or interference from man. When the loss is occasioned or is the result in any degree of human aid or interference, the case does not fall within the exceptions of the carrier's liability." See, also, New Brunswick Steamboat, etc., Co. v. Tiers, 24 N. J. Law, 697, 64 Am. Dec. 394. The maxim that "the act of God is so treated by the law as to affect no one injuriously" (actus Dei nemini facit injuriam) has a general application, and is not limited to cases affecting common carriers. Broom's Legal Maxims (8th Ed.) 229, 230. Nevertheless, in 16 Am. & Eng. Enc. Law (2d Ed.) 622, it is said: "A lunatic is not responsible for crime, because he is not a free agent, capable of intelligent voluntary action, and therefore is incapable of a guilty intent; but in a civil action for an injury done to the person or property of another, the intent is generally immaterial, and the rule is that an insane person is liable for his torts the same as a sane person, except for those torts in which malice, and therefore intention, is a necessary ingredient. * * * In respect to this liability, there is no distinction between torts of nonfeasance and of misfeasance, and consequently an insane person is liable for injuries caused by his tortious negligence. Insane persons are held to this liability on the principle that where a loss must be borne by one of two innocent persons, it shall be borne by him who occasioned it. This position is sustained by a number of authorities. Cooley on Torts (2d Ed.) 115, m. p. 99 et seq.; Cross v. Kent, 32 Md. 581; White v. Farley, 81 Ala. 563, 8 So. 215; Behrens v. McKenzie, 23 Iowa, 333, 92 Am. Dec. 428; Avery v. Wilson (C. C.) 20 F. 856; Krom v. Schoonmaker, 3 Barb. 647; Jewell v. Colby, 66 N. H. 399, 24 A. 902 (holding that the damages recoverable are limited

to compensation for actual loss sustained by the injured party); Morse v. Crawford, 17 Vt. 499, 44 Am. Dec. 349; Williams v. Hays, 143 N. Y. 442, 38 N. E. 449, 26 L. R. A. 153, 42 Am. St. Rep. 743; Id., 157 N. Y. 541, 52 N. E. 589, 43 L. R. A. 253, 68 Am. St. Rep. 797.

When the case of Williams v. Hays was first before the Court of Appeals of New York, it was decided that: "If one of several owners of a ship is in charge thereof under a contract with the others as lessee or bailee, and on his attention being called to its peril refuses to believe in such peril, though apparent, or to take any measures to avert it, and thereby the ship is lost, he is answerable to his co-owners for his negligence, though it was induced by his insanity at the time." Earle, J., delivered a learned opinion, citing many authorities on the subject. In the course of it he made use of this expression: "If the defendant had become insane solely in consequence of his efforts to save the vessel during the storm, we would have had a different case to deal with." "When the case was before the Court of Appeals for the second time, it was held that this question should be submitted to the jury; Bartlett, J., dissenting. Indeed, a little reflection will suffice to show that the injury in this case could not fairly be considered as arising from the act of God. For this defense to be available as an excuse to a common carrier, the act of God must be proximate cause of the loss or injury. Hutchinson on Carriers (2d Ed.) §§ 179, 180 (a). If insanity were to be analogized to sudden or overpowering illness, which renders it impossible for a person to perform an act or discharge a duty, nevertheless in this case the act of God was not the immediate or proximate cause of the loss, unaffected by human agency. If insanity be treated as an act of God, it was not insanity alone which killed the horse. The engineer, conductor, and the flagman were all concerned in separating the engine from the cars, and leaving them apparently without light or warning signal upon the track. The engineer, the fireman, and the conductor all went together to the water tank. The engineer set the engine in motion at a rapid speed while returning to the cars. It is not pretended that he was stricken with illness or even insanity after he did this, so as to prevent his stopping the engine; but the contention is that, because of unsoundness of mind, he did careless or reckless acts. Suppose that, instead of having killed the horse by the collision, the engineer had stolen the horse, would it be contended that, by showing insanity on his part, the taking became the act of God? Or, if the agent of the company had made a mistake, and delivered the plaintiff's horse to some other person, whereby it was lost to the plaintiff, would it be urged that, if the agent were insane, the delivery of the horse to the wrong person was an act of God? Surely not. Sudden death or sickness of such character as to render action impossible may sometimes excuse nonaction; but tortious action does not become the act of God because the person acting may be sick. * * *

We concur with the trial judge in holding that to be an excuse the insanity must be so sudden that the principal was not charged with notice of it, or with want of proper care after its discovery, and total in character, so as to practically make the agent incapable of committing a voluntary act. So long as it is merely a partial derangement, he remains to some extent a sentient agent, acting for his principal; and it would involve a maze of uncertainty to undertake to hold the principal partially liable and partially not. Indeed, Prof. Wharton contends that an irresponsible man is not to be considered as a juridical cause, but rather like a weapon of wood or stone, incapable of intelligent choice, and acting only as it is employed or compelled. Whart. Neg. (2d Ed.) § 88. Under the law of this state, on proof of the loss a presumption of negligence arose against the railroad company, and the burden was on it to show, not only the insanity of the engineer, but also that it or its agents were not chargeable with gross negligence contributing to the injury. If they were so, the defense would fail.

From a careful examination of the evidence, we are of the opinion that it failed to show a sufficient defense. There was no evidence of any sudden insanity coming on the engineer in the midst of this transaction. So far as the evidence tended to show insanity at all at that time, it indicated that certain symptoms, such as irritability, moodiness at times, etc., had been observed before the occurrence. The engineer was not discharged because he was insane, but because he was at fault. He continued to run an engine for months after this transaction, and a considerable time had elapsed before a physician advised that he was insane, and should be sent to the asylum. Moreover, the conductor was on the engine with him, and had authority to compel him to obey orders, and spoke to him of the danger, but permitted him to proceed, when he said that he knew where the other cars were. The presiding judge submitted the issue to the jury, and they found the defendant liable. * * *

A consideration of all the grounds of the motion for a new trial satisfies us that there were no errors requiring a reversal.

Judgment on the main bill of exceptions affirmed; cross-bill dismissed. All the Justices concur, except BECK, J., not presiding.[63]

[63] For a further discussion of what is meant by "an act of God," see Cormack v. New York, N. H. & H. R. Co., 196 N. Y. 442, 90 N. E. 56, 24 L. R. A. (N. S.) 1209, 17 Ann. Cas. 949 (1909). See note, 3 Columbia Law Review, 484. Is there a distinction between "inevitable accident" and "an act of God"? See, on this question, Blythe v. Denver & Rio Grande R. R. Co., 15 Colo. 333, 25 P. 702, 11 L. R. A. 615, 22 Am. St. Rep. 403 (1890).

JOHN LYSAGHT, Limited, v. LEHIGH VALLEY R. CO.

(District Court of the United States, S. D. New York, 1918. 254 F. 351.)

Demurrer to three pleas interposed to a complaint.

The complaint alleged: That on June 17, and June 22, 1916, the plaintiff caused to be delivered to the receiver of the Missouri, Kansas & Texas Railway two carloads of spelters to be transferred from the state of Kansas to the state of New York for export, consigned to the Iola Zinc Company, New York, and that for each carload the Missouri, Kansas & Texas Railway issued a bill of lading in standard form as approved by the Interstate Commerce Commission. That the defendant as connecting carrier received these two carloads for the completion of the transportation through the states of New York, Pennsylvania, and New Jersey, and to the city of New York. That thereafter, and on the 30th day of July, 1916, while in possession of the defendant, and at the port of New York, the carloads were destroyed by fire, to the damage of the plaintiff in the sum of $15,544.23. * * *

The defendant pleaded, for a first plea: That the spelters were destroyed as the natural result of certain explosives and munitions of war, in the course of transportation in interstate and foreign commerce as a necessary incident to the great European war, and that they exploded without fault of the defendant, for reasons beyond its control. That such explosion was a great public calamity, of which both the plaintiff and the defendant were innocent victims, and for which the defendant was in no wise responsible. * * *

The third plea alleges the same facts as the second, and in addition that the damage resulted from certain explosives and munitions of war, which were not in the possession or under the control of the defendant, but were on barges lying in the waters of New York Bay in the vicinity of defendant's terminal at Jersey City, N. J., which were wholly out of the control of the defendant. * * *

LEARNED HAND, District Judge.[64] * * * The question, therefore, becomes whether the "federal law" as so understood excuses the defendant in such circumstances as the pleas allege. That the explosion of the substances carried by the defendant can be regarded as in any sense an "act of God," cannot be supported, as that phrase has always been understood. They were inherently unstable compounds, not combined by spontaneous processes of nature, but under human direction, and from no point of view could the release of energy attendant upon their resumption of stable chemical conditions fall within the definition of that phrase. Even though the conventional limits of an "act of God" be vague and irrational, and though there may be still some latitude for interpretation which did not seek to make the definition turn upon the degree of violence of the elements, there is a clear difference

[64] Parts of the statement of facts and opinion are omitted.

between the acts of the elements which all must endure, and the results of human contrivance like this. If it be urged that the affinity of the dissociated atoms of an unstable chemical compound be a force of nature, the fact is true; but it is quite irrelevant, for the laws of nature attend every action of man, including even the operation of his consciousness. The distinction was devised, not for chemists, but for common men, and must be read in their terms. So viewed, the elements had nothing to do with the calamity, but only the hand of man. Nor can the damage be attributed to any "vice" of the plaintiff's goods, however that word be construed. They were injured by the "vice" of other goods in the carrier's or others' custody, and not by their own. * * *

Demurrer sustained.

BARNET et al. v. NEW YORK CENT. & H. R. R. CO.

(Court of Appeals of New York, 1918. 222 N. Y. 195, 118 N. E. 625.)

ANDREWS, J.[65] On March 26, 1913, the plaintiffs shipped a carload of goods over the defendant's road from Rensselaer, New York, to a point in Maine. On the next morning this car was carried to the defendant's freight yard at Troy, N. Y., and left there on a switch track near a car containing unslacked lime. These yards were situated on the bank of the Hudson river. On the night of the 26th the water of the river had begun to rise. This rise was rapid, amounting to a fifth of a foot an hour until noon of the 27th, at which time it must have reached the tracks. Thereafter it continued to rise at the rate of a tenth of a foot an hour, until noon of the 28th, when the flood had reached an unprecedented height. As a result it washed into the car of lime and during the afternoon of the 28th that car was set on fire, the fire spread to the car containing the plaintiff's goods, and they were destroyed. This action is brought to recover for the loss so occasioned. Under the Carmack Amendment the carrier is made liable to the shipper of interstate freight for loss, damage, or injury caused by it, and no contract may relieve it of such liability.

This act makes uniform hitherto divergent state rules as to the effect of agreements contained in bills of lading, and state courts when considering interstate shipments are bound by it and by the interpretation put upon it by the Supreme Court of the United States. This legislation supersedes all the policies of the state upon the same subject. Adams Express Co. v. Croninger, 226 U. S. 491, 33 S. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257. This amendment does not, however, go further. It does not attempt to change the common-law rule as to the effect of an act of God in excusing the carrier where loss results proximately therefrom.

[65] Parts of the opinion are omitted.

In both the state and the United States courts where proof is given that goods are damaged in the hands of the carrier, the burden is upon him to show that the damage arose from some cause for which he was not liable. They differ, however, in this: In the United States courts where the carrier shows that the loss was occasioned by the act of God he has done all that is required. If the shipper then claims that the carrier's negligence also directly contributed to the injury, he must show that fact. In New York, on the other hand, the burden is upon the carrier to show both the act of God and his own freedom from contributing negligence. Michaels v. N. Y. C. R. R. Co., 30 N. Y. 564, 86 Am. Dec. 415; Read v. Spaulding, 30 N. Y. 630, 86 Am. Dec. 426. That is the only distinction. Both jurisdictions hold that the act of God to relieve the carrier must be the immediate, direct, and efficient cause of the loss. Neither excuses him if his own negligence also directly and proximately contributes to the result. They may have differed as to when negligence did so directly contribute, as in the case of delays. Not as to the rule, only as to its application. Condict v. Grand Trunk Ry. Co., 54 N. Y. 500; Cormack v. N. Y., N. H. & H. R. R. Co., 196 N. Y. 442, 90 N. E. 56, 24 L. R. A. (N. S.) 1209, 17 Ann. Cas. 949; St. Louis, I. M. & So. Ry. Co. v. Commcl. Un. Ins. Co., 139 U. S. 223, 11 S. Ct. 554, 35 L. Ed. 154; R. R. Co. v. Reeves, 10 Wall. 176, 19 L. Ed. 909.

As to the question of proximate cause, when we have to do with interstate shipments we must follow the United States courts. If, however, the rule as to the burden of proof is simply a rule as to procedure and evidence we should be guided by our own precedents. For some purposes it has been so held by us. Sackheim v. Pigueron, 215 N. Y. 62, 109 N. E. 109. But in determining the boundary between state and federal jurisdiction the Supreme Court has held it to be a rule of substance. Southern Ry. Co. v. Prescott, 240 U. S. 632, 36 S. Ct. 469, 60 L. Ed. 836; Central Vt. Ry. Co. v. White, 238 U. S. 507, 35 S. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252. We are bound by the federal decisions as the shipment was interstate.[66]

The case was tried upon this theory. The jury was charged that the burden was on the plaintiff to establish the defendant's negligence. This was right. The judgment must, therefore, be reversed, unless there is affirmative evidence on which the jury might base a finding of negligence which directly contributed to the loss, for concededly it was caused by an extraordinary flood, and such a flood is an act of God. * * *

Remembering that this was an interstate shipment, remembering also, the decisions of the United States courts on that subject, we must

[66] On this point, see New England Fruit & Produce Co. v. Hines, 97 Conn. 225, 116 A. 243 (1922), in which the court discussed the effect of the provision in the uniform bill of lading that the burden of proving freedom from negligence in the case of loss or damage resulting from a defect or vice in the property shall be on the carrier.

hold that any alleged delay on the part of the defendant, or any action on its part in placing the car near the car of lime, even were there evidence of negligence with regard to such delay, or with regard to placing the car, was not the proximate cause of the loss. Nor is there any evidence that the defendant knew or should have known that the car was in danger at the time it placed it in the yard or in time to have permitted its removal. The flood was unprecedented as has been said, and no such warning was given, so far as appears, and no such physical conditions existed as to allow a jury to impute this knowledge.[67]

The judgment appealed from should be reversed, and a new trial granted, with costs to abide event.

HISCOCK, C. J., and CHASE, COLLIN, CARDOZO, and CRANE, JJ., concur.

HOGAN, J., concurs in result.

Judgment reversed, etc.

LEWIS & CO. v. LUDWICK.

(Supreme Court of Tennessee, 1869. 6 Cold. 368, 98 Am. Dec. 454.)

JAMES O. SCHACKELFORD, J., delivered the opinion of the Court.[68]

This is an action brought against the defendant, for failing to deliver goods received by him as a common carrier. * * * The jury returned a verdict for the defendant, a new trial was moved for, the motion overruled, from which there was an appeal to this court.

The question presented is one of grave consideration. It is a well-settled principle in our jurisprudence, a common carrier is bound to deliver goods intrusted to him; at all events, he is only excused by the act of God and the public enemy. The responsibility imposed by the common law upon them is derived mainly from their public em-

67 Compare Porter Screen Mfg. Co. v. Central Vermont Ry. Co., 92 Vt. 1, 102 A. 44 (1917), in which the court held that, although the flood (referred to in the Barnet Case) was an "act of God," there was evidence of negligence on the part of the carrier in failing to protect the plaintiff's property after the officers, agents, and servants of the carrier knew, or, in the exercise of due care, ought to have known, of the dangers threatened by the impending flood. Where the carrier is negligent in not anticipating and avoiding "an act of God," the carrier is responsible for consequent injuries. Ithaca Roller Mills v. Ann Arbor R. Co., 217 Mich. 348, 186 N. W. 516 (1922). But courts disagree as to whether the negligence of a carrier in delaying a shipment, which, as a result, is overtaken by an unprecedented flood, is a proximate cause of the loss. See, and compare, Rodgers v. Missouri Pac. Ry. Co., 75 Kan. 222, 88 P. 885, 10 L. R. A. (N. S.) 658, 121 Am. St. Rep. 416, 12 Ann. Cas. 441 (1907), with Green-Wheeler Shoe Co. v. Chicago, R. I. & P. R. Co., 130 Iowa, 123, 106 N. W. 498, 5 L. R. A. (N. S.) 882, 8 Ann. Cas. 45 (1906). See, note, 4 Mich. Law Rev. 635. As to the effect of the Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa), upon the case where goods are injured by an act of God occurring after a negligent delay of the carrier, see 65 U. of P. Law Rev. 571.

68 The statement of facts and parts of the opinion are omitted.

ployment, and their responsibility cannot be avoided by any degree of diligence. He is regarded by the law as the insurer of the property intrusted to him. In other words, he is legally responsible for acts against which he could not provide, from whatever cause, except those embraced in his contract, and the act of God and the public enemy. * * *

By enemies, is not to be understood thieves and robbers, but open and armed enemies; those in hostility to the government. It was held in the English courts that rioters and insurgents were not public enemies in the sense of the law upon this subject. Lord Holt says, in the case of Cobbs v. Barnard, 2 Salk, 919, "though the force be never so great, as if an irresistible multitude of persons rob him, the carrier is, nevertheless, chargeable." The same principle was settled in the case of Forward v. Pittard, 1 Term Rep. 27; but where there is a regular organized force in armed hostility to the government, and the authority of the government for the time overthrown, the principle stated in the case of Cobbs v. Barnard, does not apply. Mauran v. Alliance Insurance Co., 6 Wall. 1, 18 L. Ed. 836. It appears from this record that, on the 15th of May, 1861, the boat of the defendant received her cargo at New Orleans. Before reaching the city of Memphis the military organization in the possession of that city, had been telegraphed of the approach of the vessel. A battery was planted upon the banks of the river; upon the arrival of the vessel, two shots were fired across her bow, and the defendant was compelled to land. Immediately thereafter, the vessel was boarded by armed men under the charge of an officer, who was acting under the authority of the organization in hostility to the United States, who seized the boat, and took off the property of the plaintiffs.

The people of the state of Tennessee were then in open hostility to the federal authorities; armed organizations had been formed and were forming throughout the state; the authority of the federal government was, for a time, overthrown; a league had been formed, offensive and defensive, with the other Southern States; the United States was marshaling its forces to assert its sovereignty; the territory of the state was held by a line of bayonets in hostility to the federal government; that government had not proclaimed a state of war, but in fact, as we judicially know, a civil war did exist on the 20th of May, 1861. War is simply the exercise of force by bodies politic against each other for the purpose of coercion. In the Prize Cases, 2 Black, 666, 17 L. Ed. 459, the court says: "Insurrection against a government may or may not culminate in an organized rebellion; but civil war always begins by insurrection against the lawful authority of the government. A civil war is never solemnly declared; it becomes such by its accidents; the number, power, and organizations of the persons who originate and carry it on. When the party in rebellion occupy and hold, in a hostile manner, a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies;

have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest, a war."

Such are the principles announced by the highest judicial tribunal of the nation. From the facts presented in this case, at the time of the seizure of the property of the plaintiff, war existed; and the property was taken from the possession of the defendant by the public enemies of the government. The Southern States, including Tennessee, were, by the repeated decisions of the Supreme Court of the United States, declared to be public enemies. It follows, therefore, that, on the 20th of May, 1861, at the time the property was seized, the people of the state of Tennessee were public enemies, within the sense of the term; and the defendant is excused for the nondelivery of the property, it having been taken by those in hostility to the government.

The charge of his honor is a just exposition of the law governing the case, in which there is no error; and the judgment must be affirmed.

PATTERSON v. NORTH CAROLINA R. CO.

(Supreme Court of North Carolina, 1870. 64 N. C. 147.)

DICK, J.[69] The defendant, as a common carrier, received the goods of the plaintiff for transportation to Goldsboro. As no special contract was made, limiting the common-law responsibility of common carriers, the defendant was liable for any loss or damage not occasioned by the act of God, or the public enemy. The goods were destroyed by soldiers under an order of an officer of the Confederate government.

This cannot be regarded as the act of a public enemy. The Confederate government at that time was well organized and in full operation, and, so far as its citizens were concerned, it was certainly a government de facto, performing many of the duties, and exercising more than the ordinary powers of a government de jure. Both the plaintiff and defendant were within the limits of that government, and recognized its control, and received its protection, and neither of them can properly say that any thing done by its authority was the act of a public enemy.

The defendant has no right to complain of the stringent rules of the common law in regard to common carriers; for the loss of the goods might have been prevented by the exercise of ordinary care. It was gross negligence in the defendant to leave a car loaded with leaking barrels of whisky, for a day and night in a place where it was exposed, and in a condition calculated to invite the depredations of soldiers.

Judgment affirmed.

[69] The statement of facts is omitted.

S. SELIGMAN & BRO. v. ARMIJO.

(Supreme Court of New Mexico, 1870. 1 N. M. 459.)

[This was an action in assumpsit, brought by a carrier against a shipper to recover freight charges. Among other defenses, the shipper pleaded, by way of set off, nondelivery of part of the goods shipped. The carrier denied liability for the nondelivery. From a verdict and judgment for the carrier, the shipper appealed, alleging error in the instructions of the trial judge.] [70]

PALEN, C. J. (JOHNSON, J., concurring).[71] * * * The facts of the case, as gathered from the record, are as follows: In August, 1867, plaintiff, without any prior engagement for freight, sent his train to Junction City, Kansas, for the purpose of bringing freight to New Mexico, and obtained of Chick & Co., forwarders, of Junction City, the articles for freight specified in the bill of lading produced and proven in this cause, amounting to fourteen thousand eight hundred and fifty-eight pounds including six barrels of liquor. He also had freight for several other persons in New Mexico on the trip. The bill of lading, signed by plaintiff's wagon master, specified the articles of the defendants, and that they were to be transported and delivered in good condition (unavoidable accidents excepted) to defendants at Santa Fé.

On the journey, the plaintiff's train traveled in company with two other trains. Shortly after passing Ft. Dodge, on the Arkansas river, the trains were stopped by a lieutenant and fourteen or fifteen soldiers of the United States army, who demanded all the liquor in the trains. This demand was refused, when the liquor, including the six barrels belonging to the defendants, was taken by the soldiers and spilled on the ground. The force used was such that it could not be resisted by the plaintiff's wagon master. * * * The goods, except the six barrels of liquor, were delivered to the defendants in good order. The liquor destroyed was worth $2,100.

The court, among other instructions, gave the following to the jury: "That officers and soldiers of the United States army, who, without excuse or legal right, unlawfully take by force the property of citizens, and destroy it, are the king's enemies in every sense of the term; and if they believe from the evidence that said officers and soldiers unlawfully and wrongfully took this whisky and destroyed it, then in the opinion of the court it would be such an unavoidable accident as would excuse the freighter from liability to pay for the goods so taken from the train and destroyed by said troops." To which instructions of the court the defendants excepted. * * *

It remains to consider whether the nature of the force by which the liquor was destroyed was such as to relieve the plaintiff of his liabilities as a common carrier. Were this question new and open, I

[70] Statement of facts by the authors.
[71] Parts of the opinion are omitted.

should be inclined to decide that it was, but the rule that a common carrier is liable for all losses that occur while the goods are in his possession, not caused by the act of God or the public enemies of the government, has been too long established, and too generally recognized by the courts of this and other countries, to be annulled or set aside by this court. 2 Kent, Com. 597, 609; Starkie, Ev. 334–338; Story on Bail. 489–491; Jones on Bail. 104–107; Redfield on Carriers, 19.

If the conclusion thus reached is correct, the instruction of the judge to the jury, that the destruction of the liquor by an officer and soldiers of the government of the United States, relieved the plaintiff of his liability for the same, was erroneous.

The judgment of the district court should be reversed, and a new trial granted, with costs of appeal.[72]

BENNETT v. AMERICAN EXPRESS CO.

(Supreme Judicial Court of Maine, 1891. 83 Me. 236, 22 A. 159, 13 L. R. A. 33, 23 Am. St. Rep. 774.)

FOSTER, J.[73] It is undisputed that the plaintiff was lawfully possessed and the owner of the saddles of three deer, which were legally killed under the laws of this state; that the same were closely boxed in good condition for shipment, and delivered by the plaintiff onto the platform of the Maine Central Railroad Company at Newport station, plainly marked to the consignees in Boston. The defendants' agent was notified that the box was left for transportation, and thereupon he delivered it into the defendants' car, on the arrival of the train, but no receipt or bill of lading was ever given to the plaintiff. Upon the arrival of the train at Augusta, the saddles were seized by a game-warden, and by him removed from the defendants' car, without any search-warrant or other legal process, and without objections from the defendant company or their agents, and have never since been delivered either to the consignees or the express company.

Upon the facts thus stated, the defendants' liability is fully established. The plaintiff's ownership of the property, its delivery to the defendants for transportation, and their acceptance for that purpose, and its nondelivery to the consignees, are prima facie evidence of

[72] Concerning the liability of a carrier for goods destroyed as the result of a riot, see Julius Kessler & Co. v. Southern Ry. Co. in Kentucky, 200 Ky. 713, 255 S. W. 535 (1923). Compare the following cases, dealing with the carrier's liability for delay due to a strike: Jonesboro, L. C. & E. R. Co. v. Maddy, 157 Ark. 484, 248 S. W. 911, 28 A. L. R. 498 (1923), holding the carrier liable; Warren v. Portland Terminal Co., 121 Me. 157, 116 A. 411, 26 A. L. R. 304 (1922), holding the carrier not liable; Geismer v. Lake Shore & M. S. R. Co., 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837 (1886), holding the carrier not liable. As to the carrier's liability for delay, see Bacon v. Cleveland, ante, p. 681, and footnotes.

[73] Part of the opinion is omitted.

negligence. The burden is therefore upon the defendants to show facts exempting them from liability. Little v. Railroad Co., 66 Me. 241.

The property of the plaintiff while in the hands of the defendants as common carriers, in transitu, was seized by an officer without any warrant or other legal process. Nor does it appear that any was ever obtained. The officer was therefore a mere trespasser, and the defendants were liable, under the rule of the common law, in the same manner as if they had allowed any other trespasser to take the property out of their custody. Edwards v. Transit Co., 104 Mass. 163. As against the plaintiff, the seizure was of no more validity than a trespass by an unofficial person. There has never been any adjudication from any tribunal that the property seized was contraband, or other than the lawful property of the plaintiff. The common carrier is not relieved from the fulfillment of his contract, or his liability as such carrier, any more than if the loss had occurred from fire, theft, robbery, or accident. He stands in the relation of insurer, where, as in this case, no special contract is shown, and upon grounds of public policy is liable for all losses resulting from accident, trespass, theft, or any kind of unlawful disposition of the property intrusted to him to carry, excepting only such as arise by the act of God or public enemies. Adams v. Scott, 104 Mass. 166; Kiff v. Railway Co., 117 Mass. 593; Fillebrown v. Railway Co., 55 Me. 462. * * *

Defendants to be defaulted, damages to be assessed at nisi prius.

PETERS, C. J., and LIBBEY, EMERY, HASKELL, and WHITEHOUSE, JJ., concur.[74]

ALABAMA & V. R. CO. v. TIRELLI BROS.

(Supreme Court of Mississippi, 1909. 93 Miss. 797, 48 So. 962.)

FLETCHER, J. In 1905, the city of Vicksburg was in the throes of a yellow fever panic, and the city council had by ordinance established a quarantine against all bananas from New Orleans. The ordinance further created a sanitary commission, composed of the regular sanitary committee of the board, the mayor, and city physician, and this commission was given power to enforce the quarantine regulations of the city. Appellee purchased a car load of bananas in Mobile, against which city no quarantine had been established, and the fruit reached Vicksburg over the line of appellant's railway. Upon the arrival of the bananas at Vicksburg, the railroad company was notified by the chief of police, both verbally and by formal written notice, that the bananas must not be delivered to appellee, and that appellee would not be allowed to unload and distribute the bananas, even if delivery were made. It was shown that the chief of police was acting under specific instructions from the sanitary commission as to this particular ship-

[74] Accord: Merriman v. Great Northern Exp. Co., 63 Minn. 543, 65 N. W. 1080 (1896); Nickey v. St. Louis, I. M. & S. Ry. Co., 35 Mo. App. 79 (1889).

ment. The railroad company, under these circumstances, declined to deliver the bananas; and, appellee refusing to direct any other disposition, the car was attempted to be returned to the shipper, who, however, declined to receive same. Ultimately the car was sent to New Orleans, and the fruit was wholly destroyed and lost. Tirelli Bros. brought this suit against the railroad company for the value of the bananas, and, the case being submitted to the court upon an agreed statement of facts, recovery was had for the amount sued for. Hence this appeal.

Both sides rely upon the case of Wilson v. Alabama Great Southern R. R. Co., 77 Miss. 714, 28 So. 567, 52 L. R. A. 357, 78 Am. St. Rep. 543. In that case the railroad was held liable for damages in forcing a passenger to disembark at the Mississippi state line on account of a void ordinance of the Mississippi State Board of Health. In this case no actual force was employed by the Mississippi authorities to compel obedience to their orders. The ordinance had been adopted, and notice given to the railroad companies; but it does not appear that any officers were present to enforce the orders. The only compulsion under which the railroad company acted was constructive, and not actual —such compulsion as arose from the mere promulgation of the order. But in the case at bar the chief of police at Vicksburg and his cohorts, backed by the sanction of the city authorities, were there physically and actually present, prepared to enforce obedience to their orders, and the company would have inevitably been brought into collision with them, had it persisted in its purpose to deliver the car. In our opinion, the case falls precisely within the rule laid down in the Wilson Case: "The railroad company must take the risk, as all citizens do, as to the validity of such orders, when it yields to the order alone; and when its defense is, not that it yielded obedience because only of the order, but because also of vis major—a shotgun quarantine, for example—its defense will be maintained if it shall appear that such vis major, such uncontrollable necessity, was the real cause of its action. It need not go to the extent of actual collision with force marshaled by necessity; but it must show its action was due to such force existing and capable of controlling its actions."

It is no answer to this language to say that no ordinance of the city prohibited the importation of bananas from Mobile. This is true; but the company is not bound to maintain an armed force to resist and overpower the marshaled hosts of the city police, acting under instructions from the executive department of the city government. We think the judgment should have been for the appellant.

Reversed and remanded.[75]

[75] Compare Merriman v. Gt. Northern Exp. Co., 63 Minn. 543, 65 N. W. 1080 (1896), in which the carrier was held liable for the nondelivery of goods seized by public officials acting pursuant to a statute which had been repealed. See note on the "Action of Public Authorities under the Police Power as a Defense to a Carrier for the Non-Delivery of Freight," 21 L. R. A. (N. S.) 731.

EDWARDS v. WHITE LINE TRANSIT CO.

(Supreme Judicial Court of Massachusetts, 1870. 104 Mass. 159.)

Contract against common carriers for breach of their agreement to carry safely from Cincinnati to Providence, and deliver to the plaintiffs, a car load of middlings. * * *

At the trial in the superior court, before Morton, J., without a jury, it appeared that the plaintiffs, doing business in Providence, bought the middlings in question from the firm of David Schwartz & Co. in Cincinnati; and the David Schwartz & Co. delivered them to the defendants, received from the defendants a receipt, and sent it to the plaintiffs with a sight draft for the price of the middlings, which the plaintiffs accepted. On these facts the judge ruled that the property in the middlings was vested in the plaintiffs.

It also appeared that David Schwartz & Co. bought the middlings from persons in Cincinnati, under an agreement to pay for them in cash on delivery to the defendants, but had not done so; that when the middlings, in the hands of the defendants, reached Buffalo in New York, they were attached as the property of David Schwartz & Co., by the sheriff of Erie county, upon writs issued in favor of these persons, in suits brought by them against David Schwartz & Co. for the price thereof; and that these suits were prosecuted to judgment, and the middlings sold upon executions issuing thereon. * * *

WELLS, J.[76] * * * The court held, and we think correctly, that there was a sufficient transfer and delivery from David Schwartz & Co., to vest the title in the plaintiffs; that the suit against David Schwartz & Co., the judgment therein, and levy upon the property, were sufficient to show a waiver of the condition of the sale by which David Schwartz & Co. obtained possession of it from the former owners. * * * For all purposes of this decision, therefore, we may lay out of view the claim that Schwartz & Co. had not acquired title and right to transfer the property, and regard the plaintiffs as having become the absolute owners of it before the attachment.

The judge who tried the case decided, that, "as under the attachments the goods were taken out of the possession of the defendants" without collusion, negligence or fraud on their part, "the performance of their contract to carry and deliver the goods was thus rendered impossible by the intervention of a superior power, which necessarily excused them from such performance; that, upon the attachment by the sheriff of the goods, the same came into the custody of the law; whether they were the property of the plaintiffs or of David Schwartz & Co., they were in the custody of the law for adjudication;" and that the defendants could not be held liable for not transporting and delivering goods so taken from them. This ruling is in accordance with what might seem, at first sight, to be the decision of the Supreme Court of the

[76] Parts of the statement of facts and opinion are omitted.

United States in Stiles v. Davis, 1 Black, 101, 17 L. Ed. 33. The defendants' counsel insists that to hold otherwise would be in direct conflict with that decision.

We do not so regard the matter. In Stiles v. Davis, the action was not brought upon the contract of carriage; nor for a violation, by the defendant, of his obligations as carrier. It was an action of trover for the conversion of the goods. The failure to deliver the goods at another place than that of their destination, upon a demand made there; with no denial of the plaintiffs' right, but merely for the reason that they were detained under attachment by legal process; would not be a conversion of the property. The case decides nothing more. The question, whether the same facts would constitute a good defence to a suit against the defendant for breach of his contract or obligation as common carrier, was not decided, and was not raised by the form of the action. The opinion, by Mr. Justice Nelson, does indeed assign, as a reason for the decision, that the goods "were in the custody of the law, and the defendant could not comply with the demand of the plaintiffs without a breach of it"; that "the right of the sheriff to hold them was a question of law, to be determined by the proper legal proceedings, and not at the will of the defendant, nor that of the plaintiffs." But this language must be interpreted with reference to the precise question then under consideration.

In one sense, the property was in the custody of the law; so far, at least, that the surrender of its possession to the officer claiming to attach it upon legal process was not tortious on the part of the carrier, so as to subject him to the charge of converting it to his own use. But that custody was of no effect against any one having an interest in the property, not made party to the suit in which the process issued. It was not in the custody of the law in the sense in which property that is the subject of proceedings in rem is in the custody of the law, or property actually belonging to the party against whom the suit is brought. In personal actions, the attachment of property of another than a defendant in the suit is a trespass; and, as to the true owner, the property is not regarded as in the custody of the law. It may be reclaimed by replevin, except where the replevin would bring state and federal authorities into conflict, as in Howe v. Freeman, 14 Gray, 566; s. c., 24 How. 450, 16 L. Ed. 749. The officer may always be held liable as a trespasser for its full value, notwithstanding the pendency, and without reference to the suit in which the attachment was made. This liability is expressly recognized in the closing paragraph of the opinion of Mr. Justice Nelson. See also Buck v. Colbath, 3 Wall. 334, 18 L. Ed. 257. It does not appear, from the report, how far, if at all, the decision in Stiles v. Davis was affected by the fact that the carrier was made a party to the proceedings, as garnishee.[77]

[77] "In the case of Stiles v. Davis, 1 Black, 101, 17 L. Ed. 33 (1861) the Supreme Court decided that the carrier was not liable in trover for non-

The present suit is brought against the defendants upon their contract as carriers. Assuming that the title to the property had vested in the plaintiffs, according to the finding of the facts at the trial, the attachment by the officer, in a suit against David Schwartz & Co., was a mere trespass. As against the plaintiffs, it was of no more validity than a trespass by any other unauthorized proceeding, or by an unofficial person. The carrier is not relieved from the fulfillment of his contract, or his liability as carrier, by the intervention of such an act of dispossession, any more than he is by destruction from fire, or loss by theft, robbery or unavoidable accident. In neither case is he liable in trover for conversion of the property; but he is liable on his contract, or upon his obligations as common carrier. The owner may, it is true, maintain trover against the officer who took the property from the carrier; but he is not obliged to resort to him for his remedy. He may proceed directly against the carrier upon his contract, and leave the carrier to pursue the property in the hands of those who have wrongfully taken it from him.

It will not be understood, of course, that these considerations apply to the case of such an attachment in a suit against the owner of the property. If the present plaintiffs had been defendants in the suit in which the attachment was made, the case would have stood differently.

delivery to the true owner of goods attached and taken from the carrier's possession by the sheriff under process against a third party. The decision did not turn upon the form of the action. The grounds stated in the opinion are that the goods when seized under judicial process are in the custody of the law, and that the plaintiff had mistaken his remedy as to the persons liable. 'They should have brought their action,' it is said, 'against the officer who seized the goods, or against the plaintiff in the attachment suit, if he directed the seizure.' Mr. Justice Clifford in Wells v. Steamship Co., Fed. Cas. No. 17401, 4 Cliff. 232 (1874), says that such 'clearly' was the decision." Per Brown, J., in The M. M. Chase (D. C.) 37 F. 708 (1889).

"The case of The Idaho, 93 U. S. 575, 23 L. Ed. 978 (1876), settles that a carrier, like other bailees, may set up the jus tertii; and, however the law may be elsewhere, I feel constrained, by the case of Stiles v. Davis, 1 Black, 101, 17 L. Ed. 33 (1861), to hold to the broad principle that valid legal process from a court, to which the carrier is subject, demanding the possession of the goods, is an excuse for nondelivery. It is the vis major of the law, and that public policy which demands obedience to the process of the courts overrides that other policy which requires the carrier to perform his contract under a very rigid responsibility of strict construction and guaranteed performance. And this protection is afforded, whatever the form of action for nondelivery against the carrier may be, if by the process the goods are taken from him, as in this action of replevin. * * * It is to be regretted, in view of the criticisms there have been by other courts, and the conflicting views, about the real extent of this case of Stiles v. Davis, supra, that it has not been cited or referred to, or the subject considered in any subsequent case by the same court. * * * The Massachusetts court confines the decision within very technical limits, manifestly because it did not agree, and courteously did not wish to dissent. * * * But, I think, until the Supreme Court itself restricts the case of Stiles v. Davis, supra, we should apply the principle to its full logical extent, as is done by the Indiana and other courts." Per Hammond, J., in Robinson v. Memphis & C. R. Co. (C. C.) 16 F. 57, 62 (1883). See, in accord with this view, Atchison, T. & S. F. Ry. Co. v. International Land & I. Co., 247 F. 265, 159 C. C. A. 359 (1917).

In that state of facts, the property would have been strictly in the custody of the law, so far as these parties were concerned, and the intervention of those legal proceedings would have deprived the plaintiffs of the right to require the delivery of the property to themselves until released from that custody.[78]

But it is not so upon the state of facts shown by this report; and the ruling of the court against the plaintiffs upon this branch of the case was wrong. They are therefore entitled to a new trial upon the counts of their declaration relating to the car load of "middlings," and for that purpose the

Exceptions are sustained.

PINGREE et al. v. DETROIT, L. & N. R. CO.

(Supreme Court of Michigan, 1887. 66 Mich. 143, 33 N. W. 298, 11 Am. St. Rep. 479.)

CAMPBELL, C. J.[79] This case presents a single question on facts found. Plaintiffs had a chattel mortgage against Francis M. and Myron C. Butts, which was made on August 4, 1886. The next day the two Butts made a transfer of the property to one Steere. Plaintiffs replevied from Steere, and on August 12th shipped the goods by defendant's railroad from Edmore, directed to Detroit, taking the usual bill of lading. On the same day the goods were taken by the sheriff at Stanton, on an attachment against said F. M. and M. C. Butts, in favor of John W. Fuller and others. Defendant notified plaintiffs of this seizure. Plaintiffs now sue defendant for not delivering the goods at Detroit. The question is whether the seizure by the sheriff exonerated defendant from such delivery. The court below held that it did.

There seems to be a little apparent conflict between the cases on this question, but there can be no doubt where the rule of justice lies. If the carrier could rely against all the world upon the right of the consignor to intrust him with possession, then it would be reasonable to hold him estopped from questioning that title. But there is no authority for such immunity. The true owner may take his property from a carrier as well as from any one else. If a carrier gets property from a person not authorized to direct its shipment, he has been declared

[78] If the carrier voluntarily surrenders the goods to one lawfully entitled thereto, the carrier is not liable to the consignor or the consignee. The Idaho, 93 U. S. 575, 23 L. Ed. 978 (1876). It follows that the carrier is not responsible for the nondelivery of goods lawfully seized under legal process issued in a proceeding brought by one entitled to the goods. See Bliven v. Hudson River R. Co., 36 N. Y. 403 (1867). Similarly, the carrier is excused if the plaintiff is the defendant in the action pursuant to which the goods are attached. The divergence of judicial opinion concerning the carrier's liability arises in connection with a wrongful seizure made pursuant to legal proceedings in which the plaintiff is not a party.

[79] The dissenting opinion of Sherwood, J., is omitted.

by the supreme court of this state to have no lien for his services, and no right to retain the property. Fitch v. Newbery, 1 Doug. (Mich.) 1. There is no sense or justice in enabling a consignor to compel a carrier, at his peril, to defend a title that he knows nothing about, and has no means of defending, unless the consignor gives it to him. In the present case the attachment was against plaintiffs' mortgagors, and was regular. It must have been levied on the claim that plaintiffs had no right to the goods. Defendant could not have resisted the seizure without incurring the risk of serious civil, and perhaps criminal, liability; and, if plaintiffs' claim is correct, this must have been done at defendant's own risk and expense.

This precise question was decided in favor of the carrier in Stiles v. Davis, 1 Black, 101, upon the ground that defendant was not required to resist the sheriff, and could not properly do so. This rule has been adhered to by the United States supreme court, and followed to a considerable extent. It is the only rule compatible with public order. A carrier must otherwise resist the officer, or find some one who will swear out a replevin, which a carrier usually has not knowledge enough to justify. If the carrier cannot call on the consignor to defend, and must take the risk and the loss, his position would be one of hopeless weakness. If he declines to accept custody of goods, he runs the risk of an action; and if a wrongful holder, by doubtful title, or even by theft, compels him to receive the consignment, he can get the value from the carrier who has had them seized by the true owner, unless the carrier has means of proof, that he never can be presumed to have, of the lack of interest in the shipper.

Whatever may be a carrier's duty to resist a forcible seizure without process, he cannot be compelled to assume that regular process is illegal, and to accept all the consequences of resisting officers of the law. If he is excusable for yielding to a public enemy, he cannot be at fault for yielding to actual authority what he may yield to usurped authority. I think the judgment should be affirmed.

MORSE and CHAMPLIN, JJ., concurred.[80]

[80] In Automatic Merchandising Co. v. Delaware & Hudson Co., 233 Pa. 581, 82 A. 939 (1912), a carrier was held liable for surrender of goods to an officer acting upon a warrant void on its face. But in Southern Express Co. v. Sottile Bros., 134 Ga. 47, 67 S. E. 417 (1910), a carrier was held not liable for the nondelivery of goods seized by officers of the law acting under a warrant issued pursuant to an unconstitutional statute. See comment in 23 Harv. Law Rev. 640.

CURRIE v. SEABOARD AIR LINE RY. CO.

(Supreme Court of North Carolina, 1911. 156 N. C. 432, 72 S. E. 493.)

Action by N. A. Currie against the Seaboard Air Line Railway. From a judgment for plaintiff, defendant appeals. * * *

HOKE, J.[81] * * * The testimony tended to show that the molasses was lost by reason of the bursting of the puncheon, and defendant objected to the recovery, first, that there had been no proper filing of the claim. * * * Defendant further objected that the court declined to submit or entertain the view arising on the testimony that the puncheon burst by reason of fermentation of the molasses, and for which defendant was in no way responsible.

While common carriers in the absence of valid stipulation to the contrary are held in this state to be insurers of goods intrusted to them for shipment, it is generally understood that the principle does not extend or apply to loss or damage arising from the negligence of the shipper or from vices or defects inherent in the nature of the goods. This limitation on the liability of common carriers of goods was referred to as accepted law by Allen, judge, in his concurring opinion in Peanut Co. v. Railroad, 155 N. C. 148, 71 S. E. 71, and the statement is in full accord with the authorities. Moore on Carriers, §§ 4, 5; Hutchinson on Carriers (3d Ed.) §§ 333, 334. In this last citation the author says: "So obviously the carrier, not himself at fault, cannot be held liable for losses which have been caused by the inherent nature, vice, defect, or infirmity of the goods themselves, as in the case of decay, waste, or deterioration of perishable fruits, the evaporation of liquids, the bursting of vessels, owing to the fermentation of their contents," etc. There was evidence on the part of the defendant tending to establish the conditions referred to, and we are of opinion that defendant was entitled to have the same considered by the jury under a proper charge. For the error indicated, defendant is entitled to a new trial, and it is so ordered.

New trial.[82]

[81] Parts of the statement of facts and opinion are omitted.

[82] Accord: Hardesty v. American Express Co. (Del. Super.) 119 A. 681 (1922); Nye-Schneider-Fowler Co. v. Chicago & N. W. Ry., 106 Neb. 149, 182 N. W. 967 (1921); Fort v. Denver & R. G. R. Co., 69 Colo. 441, 195 P. 109 (1921); Hines v. First Guaranty State Bank (Tex. Civ. App.) 230 S. W. 764 (1921); Brandeis v. Chicago, B. & Q. R. Co., 164 Iowa, 702, 146 N. W. 825 (1914); Presley Fruit Co. v. St. Louis, I. M. & S. Ry. Co., 130 Minn. 121, 153 N. W. 115 (1915).

CLARKE et al. v. ROCHESTER & S. R. CO.

(Court of Appeals of New York, 1856. 14 N. Y. 570, 67 Am. Dec. 205.)

[Appeal from a judgment of the General Term, affirming a judgment rendered at the Oneida circuit in favor of the plaintiff.]

The action was brought, in the Supreme Court, to recover damages for the loss of a horse, by means of the alleged negligence of the defendants as common carriers. On the trial before W. F. Allen, J., at the Oneida circuit, in October, 1853, it appeared that the plaintiffs embarked four horses on one of the defendants' cars, at Rochester, to be carried, for hire, eastward the whole length of the defendants' road, and beyond, and that when the train arrived at Auburn it was found that one of them was dead. This horse had a halter around his head and nose, which was tied to a staple driven into the side of the car. When found, he was lying upon his side, his head still held up by the halter, and blood was running from his nostrils.

On the part of the defence it was shown that one of the plaintiffs was present when the horses were put into the car, and assisted in fastening the one which was killed. * * *

DENIO, C. J.[83] * * * As to the carrier's liability respecting the transportation of this sort of property, several theories have been suggested on the argument and in our consultations upon this case.

The plaintiffs contend for the rule that the carrier is bound to transport in safety and deliver at all events, save only the known cases in which a carrier of ordinary chattels is excused, while the defendants maintain that they are not insurers at all against the class of accidents which arise from the vitality of the freight. We are of opinion that neither of these positions is well taken. A bale of goods or other inanimate chattel may be so stowed as that absolute safety may be attained, except in transportation by water, where the carrier usually excepts the perils of the navigation, and except in cases of inevitable accident. The rule, established from motives of policy, which charges the carrier in almost all cases, is not, therefore, unreasonable in its application to such property. But the carrier of animals, by a mode of conveyance opposed to their habits and instincts, has no such means of securing absolute safety. They may die of fright, or by refusing to eat, or they may, notwithstanding every precaution, destroy themselves in attempting to break away from the fastenings by which they are secured in the vehicle used to transport them, or they may kill each other. In such cases, supposing all proper care and foresight to have been exercised by the carrier, it would be unreasonable in a high degree to charge him with the loss.

The reasons stated by Marshall, C. J., in pronouncing the judgment of the Supreme Court of the United States, in Boyce v. Anderson, 2

[83] Parts of the statement of facts and the opinion are omitted.

Pet. 150, 7 L. Ed. 379, have considerable application to this case. It was there held that the carrier of slaves was not an insurer of their safety, but was liable only for ordinary neglect; and this was put mainly upon the ground that he could not have the same absolute control over them that he has over inanimate matter. Where, however, the cause of the damage for which recompense is sought is unconnected with the conduct or propensities of the animal undertaken to be carried, the ordinary responsibilities of the carrier should attach. Palmer v. Grand Junction Railway Company, 4 Mees. & Wels. 749, was the case of an action against a railway company for negligence in carrying horses, by which one was killed and others injured; but the damage was occasioned by the carriages running off the track of the road down an embankment, and the case did not turn at all on the peculiarity of the freight, but mainly on the question whether the defendants had limited their responsibility by a notice. The jury found that notice had not been given and that the defendants had been guilty of gross negligence. Mr. Baron Parke, in giving the opinion of the court, declared that the common-law duty of carriers was cast upon the defendants. The precise question now before us was not discussed, but it was assumed that the law of carriers applied to the case. There is no reason why it should not, in all cases of accident unconnected with the conduct of the animals. But the rule which would exempt the carrier altogether from accidents arising out of the peculiar character of the freight, irrespective of the question of negligence, would be equally unreasonable. It would relieve the carrier altogether from those necessary precautions which any person becoming the bailee, for hire, of animals is bound to exercise, and the owner, where he did not himself assume the duty of seeing to them, would be wholly at the mercy of the carrier. The nature of the case does not call for any such relaxation of the rule, and, considering the law of carriers to be established upon considerations of sound policy, we would not depart from it, except where the reason upon which it is based wholly fails, and then no further than the cause for the exception requires.

We cannot, therefore, assent to the position of the counsel for either of the parties in this case. The learned judge who tried this case gave to the jury the true principle of liability in such cases. Laying out of view the idea of inevitable accident, which it was not pretended had occurred, he instructed them that the defendants were responsible, unless the damage was caused by an occurrence incident to the carriage of animals in a railroad car, and which the defendants could not, by the exercise of diligence and care, have prevented. This accords with our understanding of the law.

There was sufficient evidence of negligence to be submitted to the jury. Besides what was said by the witnesses as to the size of the car, it was quite probable that if a proper watch had been kept the horse would have been saved from strangulation. It was for the jury to say whether prudence did not require that a servant of the de-

fendants should have been stationed in or about the horse-car, so as to observe the conduct and condition of the animals constantly or at short intervals.

We think no error was committed on the trial to the prejudice of the defendants, and that the judgment should be affirmed.

Judgment affirmed.[84]

GEO. B. HIGGINS & CO. v. CHICAGO, B. & Q. R. CO.

(Supreme Court of Minnesota, 1917. 135 Minn. 402, 161 N. W. 145, L. R. A. 1917C, 507.)

BUNN, J.[85] * * * First, as to the facts in regard to the St. Louis shipments. Plaintiff buys potatoes in Minnesota and ships in carload lots to points out of the state. The two shipments in question originated at Mora, Minn., on the line of the Great Northern R'lway Company. The potatoes were loaded by plaintiff in two cars furnished by the Great Northern Company. They were sacked, and each car contained 240 sacks. The cars were consigned to plaintiff at Chicago, with instructions to hold at St. Paul. On arrival at St. Paul, new bills of lading were issued by defendant, and the cars consigned to St. Louis. The potatoes were not unloaded at St. Paul, but were inspected there by plaintiff. This was in accord with the established custom observed by plaintiff in its extensive business. On the arrival of these two cars at St. Louis, it was found that the potatoes had started to decay. After they were unloaded it was discovered that the cause was that the cars had salty bottoms, due to their having been used before for shipping hides or other articles where salt or brine was used. The testimony was conclusive that this condition could not be discovered until the potatoes were unloaded, and was not observable even then on casual inspection, as the salt or brine had worked into the wood of the car floor or sides. It was stipulated between counsel on the trial

[84] Accord: Rixford v. Smith, 52 N. H. 355, 13 Am. Rep. 42 (1872); Evans v. Fitchburg R. Co., 111 Mass. 142, 15 Am. Rep. 19 (1872); Coupland v. Housatonic R. Co., 61 Conn. 531, 23 A. 870, 15 L. R. A. 534 (1892); Adams Express v. Bratton, 106 Ill. App. 563 (1902). But proof that the animal was in good condition at the time of shipment, was properly loaded (if the shipper assumed the responsibility for loading), and arrived in a damaged condition, gives rise to a presumption of negligence against the carrier which the carrier must rebut. Daily v. Chicago, St. P., M. & O. R. Co., 110 Neb. 481, 194 N. W. 676 (1923); Buck v. American Ry. Exp. Co., 195 Iowa, 1024, 192 N. W. 277 (1923); Dow v. Portland Steam Packet Co., 84 Me. 490, 24 A. 945 (1892); Smith v. Railroad, 12 Allen (Mass.) 531 (1866). Concerning the character of evidence necessary to rebut the presumption of negligence, see and compare, Talbott v. Payne, 90 W. Va. 280, 111 S. E. 328 (1922); Schaeffer v. Philadelphia & R. R. R., 168 Pa. 209, 31 A. 1088, 47 Am. St. Rep. 884 (1895); Lewis v. Pennsylvania R. Co., 70 N. J. Law, 132, 56 A. 128, 1 Ann. Cas. 156 (1903). For a further collection of cases on the liability of a carrier of live stock, see notes in 18 L. R. A. (N. S.) 86, and 29 L. R. A. (N. S.) 663.

[85] Parts of the opinion are omitted.

that the damage to these two cars was all due to the fact that the potatoes were loaded and shipped in cars with salty bottoms.

The trial court, though at first taking the view that defendant was not liable for the damage to these cars, finally directed a verdict for the plaintiff on these causes of action, the amount of the damage being admitted. Defendant moved for judgment notwithstanding the verdict, or for a new trial. The motion was denied, and this appeal taken.

1. It was apparently the position of the trial court, and the position is insisted on by plaintiff on this appeal, that defendant, though not responsible for the salty condition of the cars furnished by the Great Northern Company to plaintiff, and not negligent, is nevertheless liable as an insurer, and responsible for all damages, there being proof that the potatoes were in good condition when intrusted to its care, and in bad condition on arrival at destination, and the damage not being due to the inherent nature of potatoes to decay. Defendant claims that this proof only makes a prima facie case of negligence, which may be rebutted by proof that the damage was not caused by any negligence of the carrier, and that in the present case the presumption raised was conclusively rebutted.

Is it the law, as claimed by plaintiff, that a common carrier of perishable freight is an insurer of its delivery at destination in an undamaged condition, and can only escape liability by proving that the damage was caused by the act of God or the public enemy, or that the damage arose out of the inherent nature of the property to decay? Plaintiff insists that this is the common-law rule, and cites Minnesota cases that are claimed to declare it to be the law in this state. 1 Dunnell's Digest, § 1323, and cases cited; Presley Fruit Co. v. St. Louis, etc., R. Co., 130 Minn. 121, 153 N. W. 115.[86] In contending that these cases or any cases in this state apply the common-law rule that the carrier is an insurer of shipments of perishable freight, we think plaintiff is mistaken. Our reports are replete with cases announcing and applying the rule that proof of no negligence is a good defense in cases of injury to perishable freight, such as fruit and vegetables. Defend-

[86] In Presley Fruit Co. v. St. Louis, I. M. & S. Ry. Co., 130 Minn. 121, 153 N. W. 115 (1915), the court declared: "The general rule is that a common carrier is an insurer of the safe delivery at destination of goods committed to it for transportation, and it is liable for their loss in transit, whether the loss results from its fault or negligence or not. * * * This is true, whatever may be the nature of the goods, whether they be strawberries or cobble stones. The rule, however, is subject to some exceptions. This absolute liability is in all cases qualified, where loss or damage results from the nature and inherent tendencies of the thing carried. * * * In undertaking to carry strawberries the carrier assumes the obligation to deliver safely, having due respect to the tendency of strawberries to deteriorate and decay. The carrier is not liable for deterioration or decay of the property transported, resulting from natural causes, merely because the goods are being carried upon its cars. Where goods shipped suffer injury of a character arising out of their inherent nature, the liability of the carrier depends upon negligence, and the carrier is not liable if its own negligence did not occasion or contribute to the injury."

ant need not prove that the damage was caused by the natural tendency to decay. It is sufficient to prove that it was not caused by its negligence. The rule that proof of injury while in the carrier's possession makes a prima facie case of negligence, which may be rebutted, like any other prima facie case, by proof that the damage was not caused by negligence of the carrier, has been often distinctly stated by this court. 1 Dunnell's Digest, § 1333, and cases cited; Digest Supplement, § 1333, and cases cited. Some of the cases cited state in so many words that the carrier is not an insurer in the shipment of perishable freight. Brennisen v. Pennsylvania R. Co., 100 Minn. 102, 110 N. W. 362, 10 Ann. Cas. 169; B. Presley Co. v. Ill. Central R. R. Co., 117 Minn. 399, 136 N. W. 11. All of them proceed on the theory that the liability rests on proof of negligence, and that the prima facie case made by showing that the injury occurred while the goods were in the carrier's possession may be rebutted by proof that the carrier was not at fault. We hold that this rule, and not the rule that the carrier is liable as an insurer, applies to the facts in the instant case.[87]

2. Was the presumption rebutted? Does the evidence establish the want of negligence on the part of defendant? There is no doubt that defendant was in no way negligent in furnishing these cars, as it admittedly had nothing to do with that. They were furnished plaintiff at Mora by the Great Northern Company. That they were in fact unsuitable for shipping potatoes because of the salty bottoms is made plain by the evidence, but was defendant responsible for this condition? Plaintiff makes the claim that defendant is liable because it adopted the cars as its own and used them on its line to continue the shipments. This argument is based on the law that it is the duty of the carrier to furnish proper equipment, and the rule that when a carrier uses the cars of another connecting carrier it is responsible for their condition. If this rule creates a liability in this case, it is a liability not based on negligence, or on any breach of duty, unless it be a nominal one. Plaintiff expected the potatoes to proceed to their destination without unloading. It was impossible to discover the salty condition of the car bottoms. This is plain, both from the direct evidence, and from the fact that plaintiff's employés did not discover their condition either when the potatoes were loaded at Mora, or when they were inspected at St. Paul. We notice a claim that the cars were Burlington cars, but we find no evidence to support such a claim. It is clear, in our opinion, that if defendant is liable for the condition of these cars, it must be on the theory that there is an absolute liability, irrespective of

[87] Suppose that the goods in the principal case had been stolen from the possession of the carrier without fault on its part, or damaged in transit due to an accidental derailment. Does it follow from the decision of the court that the carrier would not be liable? If, in either case, the carrier would be liable, although free from negligence, does it not follow that a common carrier is an insurer under some circumstances, against loss or damage to perishable freight?

actual negligence or fault, arising from continuing the shipments on defendant's line in the cars in which they arrived at St. Paul.

The claim that this is the law is largely based upon the case of Shea v. Chicago, etc., R. Co., 66 Minn. 102, 68 N. W. 608. The facts in the Shea Case were that the defendant carrier knew that the car was unfit for the shipment of lemons when it received it from the connecting carrier. It was negligent in using such a car. While this is not made prominent in the opinion, and while some expressions therein seem to support a rule of absolute liability, it is nevertheless plain, taking the opinion as a whole, that the liability of defendant is predicated upon its actual negligence in the care of the lemons while in its custody. There is no doubt that it is generally correct to say that it is the duty of a carrier to provide safe and suitable vehicles for the transportation of goods intrusted to its care, and that he is not excused from this duty when the goods are received and carried by him in vehicles furnished by a connecting carrier. He adopts and makes such vehicles his own for the purpose of conveying the goods. Hutchinson on Carriers, §§ 498 to 501. The statement of the author in one part of the text that the carrier will be liable for any damage arising from the unfitness of the vehicles for the carriage of the goods should be read in connection with the statement that if the carrier fails to make reasonable inspection of the vehicles he will be deemed guilty of such negligence as will render him liable for any resulting loss. It seems to us that the liability of the carrier who continues a shipment received from a connecting carrier in the cars of the latter should rest on negligence, some fault on its part, as its failure to properly inspect the vehicles before continuing the shipment. It will doubtless be true except in rare instances that the unsuitable character of the car is discoverable on inspection, and this was the fact in the Shea Case and in all the cases we have found that concern the liability of carriers for failure to furnish suitable cars or accepting from other carriers shipments in cars that are defective.

In the case at bar the condition that caused the damage was not discoverable. We have been able to find no case like it among the many decisions. We think that the authorities generally recognize that the liability of the carrier for failure to furnish suitable cars, whether the cars be its own or the cars of a connecting carrier which come to it with their freight, is not an absolute liability, but only results in case of its failure to exercise due care, skill, or diligence. 5 Thompson on Negligence, § 6591; Moon v. Northern Pacific Ry. Co., 46 Minn. 106, 48 N. W. 679, 24 Am. St. Rep. 194. See note to Louisville, etc., R. Co. v. Church, 130 Am. St. Rep. at page 47, where the authorities are collected. The duty of the carrier is that of properly inspecting the cars of other roads that are received by it for transportation. If this duty is performed, or if the defect is one that a proper inspection will not disclose, there is no liability.

We have not considered it necessary to refer to the language of the

Carmack Amendment, but will say that it makes a carrier liable for the loss or damage caused by it or by the carrier which continues the transportation. It does not make the carrier liable for damage caused by a prior carrier. We have assumed, without so deciding, that the evidence is sufficient to show that the damage occurred after the cars were received by defendant.

Our conclusion in the case involving the two St. Louis cars is that there should be judgment for the defendant notwithstanding the verdict. * * *

A. F. THOMPSON MFG. CO. v. CHESAPEAKE & O. RY. CO.

(Supreme Court of Appeals of West Virginia, 1923. 93 W. Va. 3, 115 S. E. 877.)

MEREDITH, J.[88] The A. F. Thompson Manufacturing Company recovered a judgment of $3,519.12 for the damaging of a large part of a shipment of stoves delivered to the defendant company for carriage. Defendant seeks a reversal of that judgment.

Plaintiff is a manufacturer of sheet metal stoves in the city of Huntington. Defendant is a railway engaged in both interstate and intrastate commerce. On June 9, 1920, plaintiff delivered to defendant for shipment and packed in two cars furnished for the purpose 1,700 small gas heaters, receiving two bills of lading therefor. The stoves, about 800 in one car and 900 in the other, were consigned to the Richards & Conover Hardware Company, Kansas City, Mo. From 20 to 30 per cent. of them were packed in corrugated pasteboard cartons, sealed with gum tape; the remainder in small wooden crates. Under the terms of the sale, the stoves were purchased f. o. b. Kansas City.

On June 26 the cars reached Kansas City and were examined, though not opened, by the car inspector, who found them in first class condition. They were, according to the evidence, placed on the unloading siding at different times—one car being so placed on July 1; the other on the evening of the 3d or morning of the 4th. Employees of the consignee unloaded the cars on July 4th, which was Sunday, and while so engaged discovered the damage complained of. It appears that a majority of the stoves, when unloaded, especially those not packed in the cartons, were badly rusted or corroded. The nickeled corners and trimmings were in many instances very badly rusted, and there were large spots of rust on the polished sheet iron. So damaged was their condition that, although the purchaser was very much in need of the stoves, it was compelled to reject 778 of them as unsalable, and so notified the plaintiff, the seller, to whom they were later returned. * * *

The controversies of fact in this case are somewhat unusual, and upon them are based the conflicting theories of the parties. First of all, counsel for plaintiff urge that defendant being a common carrier,

[88] Parts of the opinion are omitted.

it is therefore an insurer absolutely, except as to acts of God and the public enemy, and that consequently, under no view of the facts, could the verdict have been otherwise than for the plaintiff. Counsel for the defendant, on the other hand, while not undertaking to excuse it of the responsibilities of a common carrier, insist with equal vigor that under the principles applicable to the facts here no liability attaches to the carrier in this case. They say, in short, that the facts show beyond doubt that the rusting of the stoves was brought about, not by an act or default on the part of the defendant or its agents, but by natural agencies, the result of a vice or defect inherent in the stoves themselves, and of which defendant had no knowledge or control.

Plaintiff denies the propriety of the defense offered. While admitting the application of defendant's reasoning to some classes of cases, counsel argue that the courts have never extended, and should never extend, the doctrine so as to include such inanimate objects as heating stoves. * * *

Whether we limit the doctrine in the strict manner contended for by plaintiff, or give it the more liberal application urged by defendant, we are not unmindful either of the strict accountability which sound policy exacts from common carriers of goods, or of the spirit of the exceptions which are engrafted on that principle. We agree with counsel for plaintiff that there seems to be no decision expressly extending the idea of inherent vice to such inanimate articles as iron stoves. We cannot agree, however, that the language of Judge Ritz in Talbott v. Payne, 90 W. Va. 280, 111 S. E. 328, precludes the propriety of such an extension. The reasoning of the court in excepting the carrier from absolute liability in the transportation of live animals in that case might with almost equal persuasiveness apply to the present circumstances. By no packing or securing of packages or careful handling, however painstaking, could the defendant have forestalled or checked the corrosion of these stoves, if caused by the presence of acetic acid in the asbestos, as it contends. At an expenditure of $150, plaintiff had all of the rusted stoves cleaned and greased with paraffin oil, and was but partially successful in remedying their condition.

Though the decisions cited on the subject are generally those applying the exception to live stock, fruits and vegetables, we have nowhere found an expression of the doctrine which would seem upon reason to limit the principle to those cases alone. * * *

A further persuasive authority in this connection is the case of Lister v. Railway Company, [1903] 1 K. B. 878, 72 L. J. K. B. 385, 88 L. T. 561, cited in Hutchinson, Carriers (3d Ed.) § 334. There the plaintiff employed defendant, a common carrier, to haul an engine on its own wheels to a nearby station. Due to a defect, not discernible in an ordinary examination, a shaft broke, defendant's horses became frightened, and the engine was upset and damaged. The trial court, being of opinion that the shaft would not have broken, except for the strain applied to it by defendant, held for the plaintiff. On appeal Lord Al-

verstone distinguished the case from those in which the defendant might have selected alternative modes of carriage, and in the course of his opinion used the following language: "The county court judge, in thinking that the rule as to the nonliability of a common carrier for damage caused by an inherent defect in the thing carried, was limited to cases in which the damage would equally have occurred if the thing had not been carried at all, in my opinion went too far." And in a note of concurrence, Channel, J., "thinks the proposition may be stated thus: The inherent unfitness for the carriage contemplated, although not known to either party, is inherent vice within the meaning of the exception that has been established by the decided cases."

This we think, was a clear judicial recognition of the applicability of the doctrine of inherent vice to articles other than animals and foodstuffs, and we are of opinion that the defendant here was entitled to make the defense attempted, remembering, as its counsel admit in their brief, and as the jury were instructed, that the burden of establishing such a defense rests upon the carrier. Baltimore & Ohio R. R. Co. v. Morehead, 5 W. Va. 293; Chicago, R. I. & P. R. Co. v. Logan, Snow & Co., 23 Okl. 707, 105 P. 343, 29 L. R. A. (N. S.) 663. * * *

So we reverse the judgment, set aside the verdict, and remand the case for a new trial.[89]

McGINNIS, J., absent.

NORTHWESTERN MARBLE & TILE CO. v. WILLIAMS.

(Supreme Court of Minnesota, 1915. 128 Minn. 514, 151 N. W. 419, L. R. A. 1915D, 1077.)

HALLAM, J.[90] Plaintiff, a dealer in marble in Minneapolis, shipped a number of marble slabs by rail to the state school for the feeble-minded at Faribault. Defendant is in the transfer business at Faribault. He was engaged to haul the marble from the railway station at Faribault to its destination. The marble was packed in crates, and on the way some of the crates fell from the wagon and several slabs were broken. Plaintiff sued for damages. The jury found for defendant. Plaintiff moved for judgment notwithstanding the verdict, but did not ask for a new trial, and the court denied the motion. This appeal involves only the question of the correctness of this ruling. * * *

2. We address ourselves, therefore, to this question of the sufficiency of the evidence to sustain the verdict. Defendant was admittedly a common carrier of goods. A common carrier of goods in general in-

[89] The case was retried before a jury, and resulted in a verdict and judgment for the plaintiff, which was affirmed in 95 W. Va. 670, 123 S. E. 421. The judgment was reversed, on other grounds, in Chesapeake & Ohio Railway Co. v. A. F. Thompson Manufacturing Co., 46 Sup. Ct. 318, 70 L. Ed. —— (1926).

[90] Part of the opinion is omitted.

sures the safe transportation of goods committed to him for that purpose, and he is responsible for all damage to the same while in transit, unless such damage is occasioned by certain excepted causes. These excepted causes are act of God, act of public enemy, the inherent quality or "proper vice" of the articles themselves, or some act or omission of the shipper or owner. Christenson v. American Express Co., 15 Minn. 270 (Gil. 208), 2 Am. Rep. 122; Goodman v. O. R. & N. Co., 22 Or. 14, 28 P. 894.

Defendant contends that this case comes within the last exception; that is, the contention is that the marble slabs were not properly packed or crated by the shipper, that when they were transferred to wagons they were loaded in the proper and practicable way and were braced in the usual and proper way by means of boards running from the top of the crates to the bottom of the wagon bed, but that they fell by reason of the fact that the crating was worm-eaten, dozy, and decayed, so that it would not properly hold the nails driven into it for that purpose.

The general rule is that, where the shipper packs articles for shipment, he cannot recover from the carrier for injuries due to improper packing. Hutchinson, Carriers, § 233; Shriver v. S. C. & St. P. R. Co., 24 Minn. 506, 31 Am. Rep. 353. Some authorities apply here the rules of contributory negligence, and hold that if the bad packing contributes in any measure to the loss or injury the carrier is not liable. 5 Thompson, Negligence, § 6465. See Reed & Walker v. P., W. & B. R. R. Co., 3 Houst. (Del.) 176, 212; Ross v. Troy & Boston R. Co., 49 Vt. 364, 24 Am. Rep. 144. It appears to us that the rules of contributory negligence have no application to such a case. Contributory negligence of plaintiff is a defense only in cases where the action is founded on negligence of defendant. Here the action is not founded on negligence of the carrier at all. The carrier's common-law liability is founded, not on negligence, but "on broad principles of public policy and convenience, and was introduced to prevent the necessity of going into circumstances impossible to be unraveled." Arthur v. St. Paul & Duluth R. Co., 38 Minn. 95, 100, 35 N. W. 721. It would be a distinct extension of the doctrine of contributory negligence to apply it to a case of this kind, and an extension which we believe to be unwarranted. On proof of the contract of carriage and of loss or damage, liability is prima facie established. To relieve himself from liability, the carrier must prove that the loss or damage arose solely from one or more of the excepted causes, and it avails him not to show that the shipper was negligent, if the loss or damage would not have resulted, except for the concurring fault of the carrier. The proof must bring the case "entirely and perfectly within the exception." This view is sustained by the weight of authority. McCarthy & Baldwin v. Louisville & Nashville R. Co., 102 Ala. 193, 14 So. 370, 48 Am. St. Rep. 29; Hutchinson, Carriers, § 333; 1 Moore on Carriers, 559; Elliott, Railroads, § 1492.

3. It is admitted that defendant discovered that the condition of the crating was defective at the time the marble was loaded on his wagon. It is claimed he thereby assumed all the responsibility of carrying it in its defective condition. There is some authority for the proposition that the full duty of the carrier is simply to carry goods in the condition offered, though the defect in loading or packing is apparent, and that if in such case injury results from such defective loading or packing the carrier is relieved. Ross v. Troy & Boston R. Co., 49 Vt. 364, 24 Am. Rep. 144. See Union Express Co. v. Graham, 26 Ohio St. 595. The better and the more general rule seems to be that, if goods presented for carriage are not properly packed, and that fact is apparent to the carrier or his servants upon ordinary observation, then the carrier may refuse to receive the goods in that condition; but, if he does see fit to receive them, he assumes to carry them as they are, and his full common-law liability as carrier attaches to the contract of carriage. McCarthy & Baldwin v. Louisville & Nashville R. Co., 102 Ala. 193, 14 So. 370, 48 Am. St. Rep. 29; E., J. & E. Ry. Co. v. Bates Machine Co., 98 Ill. App. 311; Elgin, etc., Ry. Co. v. Bates Machine Co., 200 Ill. 636, 66 N. E. 326, 93 Am. St. Rep. 218; The David & Caroline, 5 Blatchf. 266, Fed. Cas. No. 3,593; Klauber v. American Express Co., 21 Wis. 21, 91 Am. Dec. 452; Atlantic Coast Line R. Co. v. Rice, 169 Ala. 265, 52 So. 918, 29 L. R. A. (N. S.) 1214, Ann. Cas. 1912B, 389; Hannibal Railroad v. Swift, 12 Wall. 262, 20 L. Ed. 423; 1 Moore on Carriers, 559.

4. It cannot be said, however, that the carrier must, at his peril, know that the goods are not in fact safely packed. The shipper usually knows better than the carrier the manner in which the goods have been packed and the manner in which they should be packed, and even though the carrier may have knowledge of some defect in the packing, still if it is not apparent to the ordinary observation of the carrier or his servants that the goods cannot be safely carried in the condition in which they are presented, the carrier should not be held to take the chances of injury from improper packing. See Jaggard, Torts, 1064; McCarthy & Baldwin v. Louisville & Nashville R. Co., 102 Ala. 193, 14 So. 370, 48 Am. St. Rep. 29. It is right here that we think the evidence in this case presents a question of fact for the jury to determine whether it was manifest to the defendant that the marble could not be carried with safety in the manner in which it was crated.

The motion for judgment was therefore properly denied, and the judgment is affirmed.[91]

HOLT, J., took no part.

[91] Compare Ross v. Troy & Boston Railroad Co., 49 Vt. 362 (1877). See comment on principal case in 15 Col. Law Rev. 543. For a collection of cases dealing with the effect upon the carrier's liability of improper packing or loading by the shipper, see notes, 19 L. R. A. (N. S.) 952; 29 L. R. A. (N. S.) 1214; L. R. A. 1915C, 1220; L. R. A. 1915D, 1077.

F. D. FORESTER & CO. v. SOUTHERN RY. CO.

(Supreme Court of North Carolina, 1908. 147 N. C. 553, 61 S. E. 524.)

Civil action to recover damages growing out of a shipment of dried apples from Wilkesboro, N. C., to Richmond, Va.

BROWN, J.[92] * * * In this instance the defendant shipped the fruit in an ordinary box car and it was injured in consequence. The defendant had sent a proper car for its transportation, but through a mistake of an agent the ventilated fruit car was loaded with brick and sent off. The fact that plaintiff knew that his fruit was shipped in a box car will not relieve the defendant from liability, nothing else appearing. Railway v. Marshall, 74 Ark. 597, 86 S. W. 803; Railway v. Pratt, 22 Wall. (U. S.) 123, 22 L. Ed. 827. In the last case the Supreme Court of the United States said: "It is said that Pratt was aware of the defective condition of the car; that he voluntarily made use of it; and that the risk of loss by its use thus became his and ceased to be that of the company. The judgment charged the jury that it was the duty of the carrier to furnish a suitable vehicle of transportation; that, if he furnished unfit or unsafe vehicles, he is not exempt from responsibility by the fact that the shipper knew them to be unsafe and used them; and that nothing less than a direct agreement by the shipper to assume the risk would have that effect. * * * The authorities sustain the position taken by the judge at the trial."

We think his honor properly refused the defendant's prayers, and that he was right in charging the jury that the defendant was liable for such injuries to the fruit as it sustained by reason of shipment in an unsuitable car.

Affirmed.[93]

[92] Part of the opinion is omitted.

[93] For a collection of cases, see notes 18 L. R. A. (N. S.) 508; 19 L. R. A. (N. S.) 952. Concerning the liability of the carrier, where the defective car is selected or furnished by the shipper, see and compare Frohlich v. Pennsylvania Co., 138 Mich. 116, 101 N. W. 223, 110 Am. St. Rep. 310, 4 Ann. Cas. 1140 (1904), and Louisville & N. R. Co. v. Carr, 77 Fla. 469, 81 So. 779, 5 A. L. R. 102 (1919), and cases collected in note, 5 A. L. R. 102. As to the validity of a stipulation in the bill of lading that the shipper shall assume responsibility for the condition of the car, see Ginsberg & Sons v. Wabash R. Co., 219 Mich. 665, 189 N. W. 1018, 28 A. L. R. 518 (1922); Coustaline v. Louisiana Ry. & Nav. Co., 154 La. 667, 98 So. 81 (1923); and cases collected in note, 28 A. L. R. 526.

SECTION 4.—WHEN LIABILITY AS INSURER BEGINS AND ENDS

WALLING v. POTTER.

(Supreme Court of Errors of Connecticut, 1868. 35 Conn. 183.)

CARPENTER, J.[94] The plaintiff and defendant were residents of the same town. The defendant was an innkeeper, and the plaintiff took lodging and breakfast at his inn, paying therefor the usual charge for such entertainment. While at the defendant's inn the plaintiff lost a sum of money, and the court has found that he is entitled to recover the sum lost, provided the law is so that the relation of innkeeper and guest existed between the parties. Whether such relation existed or not is the question and the only question reserved.

An inn has been judicially defined as "a house where the traveler is furnished with everything which he has occasion for while on his way." Thompson v. Lacy, 3 Barn. & Ald., 283. A guest is one who patronizes an inn as such. But it is said that none but a traveler can be a guest at an inn in a legal sense. We do not suppose that the court intended, in the definition above quoted, to lay stress upon the word traveler. It is used in a broad sense to designate those who patronize inns. In Wintermute v. Clark, 7 N. Y. Super. Ct. 247, the court say, that in order to charge a party as an innkeeper, it is not necessary to prove that it was only for the reception of travelers that his house was kept open, it being sufficient to prove that all who came were received as guests without any previous agreement as to the time or terms of their stay. A public house of entertainment for all who choose to visit it, is the true definition of an inn. These definitions are really in harmony with each other. Webster defines a traveler as "one who travels in any way." Distance is not material. A townsman or neighbor may be a traveler, and therefore a guest at an inn, as well as he who comes from a distance, or from a foreign country. If he resides at the inn, his relation to the innkeeper is that of a boarder; but if he resides away from it, whether far or near, and comes to it for entertainment as a traveler and receives it as such, paying the customary rates, we know of no reason why he should not be subjected to all the duties of a guest, and entitled to all the rights and privileges of one.[95] In short, any one away from home, receiving ac-

[94] The statement of facts is omitted.

[95] For a discussion of the distinction between a boarder and a guest, see and compare Hancock v. Rand, 94 N. Y. 1, 46 Am. Rep. 112 (1883); Crapo v. Rockwell, 48 Misc. Rep. 1, 94 N. Y. S. 1122 (1905); Hackett v. Bell Operating Co., 181 App. Div. 535, 169 N. Y. S. 114 (1918).

commodations at an inn as a traveler, is a guest, and entitled to hold the innkeeper responsible as such.

The Superior Court must be advised to render judgment for the plaintiff.

In this opinion the other judges concurred.

AMEY v. WINCHESTER.

(Supreme Court of New Hampshire, 1895. 68 N. H. 447, 39 A. 487, 39 L. R. A. 760, 73 Am. St. Rep. 614.)

Case, against an innkeeper, by each plaintiff for the loss of his hat. Facts found by the court. Near the entrance to the dining-room of the defendant's hotel in Manchester, he has a rack on which his guests are invited to deposit their hats while eating their meals. On the evening of January 8, 1895, he provided in his dining-room a banquet for a club, under a contract by which the club agreed to pay a specified sum for each plate. About one hundred persons, mainly residents of Manchester, attended the banquet. The plaintiffs were not members of the club. They arrived at the hotel that evening, registered their names, and were assigned a room, which they occupied. They attended the banquet by invitation of the club, which paid for their plates. On entering the dining-room, they, in common with others, deposited their hats on the rack. About eleven o'clock they left the banquet, intending to return before it closed, and without taking their hats went to their room, where they remained more than an hour. On their return they found the banquet ended, the doors of the dining-room closed, and their hats missing. They lodged at the hotel that night, and the next morning demanded their hats of the defendant, who was unable to produce them and refused to pay for them. There was no actual negligence on the part of the defendant.

BLODGETT, J. To subject the defendant to liability as innkeeper, it must appear not only that the plaintiff's goods were lost at his inn, but that he was acting in the capacity of innkeeper when the goods were lost, and that the plaintiffs were his guests; or, in other words, that the plaintiffs were at the inn for purposes which the common law recognizes as the purposes for which inns are kept, namely, the accommodation and entertainment of travelers and wayfaring men, and not for those who may be there for some special purpose not connected with passage or travel. Calye's Case, 8 Co. 32, and note; Carter v. Hobbs, 12 Mich. 52, 83 Am. Dec. 762; Fitch v. Casler, 17 Hun (N. Y.) 126; Gastenhofer v. Clair, 10 Daly (N. Y.) 265, 266; 11 Am. & Eng. Enc. Law 20, 21; 62 Am. Dec. 590, note.

Upon the facts as reported, we think the rigorous rule that makes the landlord of an inn responsible for the goods of his guests under almost all circumstances, and without proof of negligence or fault on his part or of those in his employ, cannot be extended so as to protect

the plaintiffs, for as to the banquet where the loss occurred, and which they attended on the invitation and at the expense of the club, the plaintiffs are justly to be regarded as its guests, and not of the defendant, as innkeeper or otherwise, who simply provided the banquet as caterer under a contract with the club, without any lien or claim for compensation against its guests, and with no right or power to exclude anybody from participating in its festivities whom the club might properly invite.

Neither by contract nor by operation of law was the defendant acting in the character of innkeeper as to the club, and still less as to its guests, who would have had no right whatever to attend except upon its invitation. Both the club and its guests came not as ordinary travelers to an inn, but as to a banquet, for the purpose of participating in and enjoying its festivities. And likewise as to both, the fact that the defendant chanced to be keeping an inn and served the banquet there makes his liability no greater than that of any other person, not an innkeeper, who might have taken and executed the contract either at the inn or elsewhere. One may be an innkeeper without being a club caterer, or he may be a club caterer without being an innkeeper, or he may be both; but if he is, the two employments are so far separate and distinct in respect of duties and liabilities as not to make him responsible in the one capacity for liabilities incurred in the other. See Minor v. Staples, 71 Me. 316, 36 Am. Rep. 318.

Nor does the fact that the plaintiffs had registered and been assigned a room in the inn affect the legal status of either party. As to the banquet where the loss occurred, "which was not furnished to the guests of the house and was not one of the meals provided for them," the plaintiffs' registration and assignment put them in no different position in a legal sense than they would have occupied if they had registered and obtained a room elsewhere, or if the defendant had served the banquet at some place separate from and disconnected with his inn.

Not having lost their property at the defendant's inn in the character of guests, but in the execution of a purpose distinct from their accommodation as guests, the plaintiffs' actions are not maintainable. Authorities supra.

Other grounds of defense need not be considered.

Judgment for the defendant.[96]

CARPENTER, J., did not sit; the others concurred.

[96] Accord: Fitch v. Casler, 17 Hun (N. Y.) 126 (1879); Carter v. Hobbs, 12 Mich. 52, 83 Am. Dec. 762 (1863). Similarly, in Gastenhofer v. Clair, 10 Daly (N. Y.) 265 (1881), where the plaintiff was dining at the inn as the guest of a friend, who was a guest at the inn, the innkeeper was held not liable as an insurer for the loss of the plaintiff's coat.

BUNN v. JOHNSON.

(St. Louis Court of Appeals of Missouri, 1898. 77 Mo. App. 596.)

BIGGS, J.[97] The record presents a single question. If a person engages a room at a hotel for the night and pays for it, is he in legal contemplation a guest? In other words, is it immaterial that he did not at any time intend to occupy the room? The defendant is sought to be charged in this action as an innkeeper for the value of certain property which plaintiff claimed was deposited by him, as a guest of the hotel, with defendant's night clerk. The clerk absconded, taking the valuables with him. Plaintiff testified that he engaged a room at the hotel for the night, paid the night clerk therefor, and that at the time he intended to occupy it. He did not occupy it, but spent the night at another place. There was evidence tending to prove that he did not at any time intend to use the room, and that he engaged and paid for it merely for the purpose of securing a safe place of deposit for his money and jewelry. The court instructed, as a matter of law, that he was a guest if he engaged and paid for the room. The finding and judgment were for the plaintiff, and the defendant has appealed.

An inn or hotel is a place where the proprietor makes it his business to furnish food or lodging or both to travelers. To establish the relation of landlord and guest the traveler must visit the hotel for the purpose of availing himself of the entertainment offered, that is to obtain refreshments or lodging. Carter v. Hobbs, 12 Mich. 52, 83 Am. Dec. 762; Arcade Hotel Co. v. Wiatt, 44 Ohio St. 32, 4 N. E. 398, 58 Am. Rep. 785; Curtis v. Murphy, 63 Wis. 4, 22 N. W. 825, 53 Am. Rep. 242; Strauss v. County Hotel, 12 Q. B. D. 27; McDaniels v. Robinson, 26 Vt. loc. cit. 334, 62 Am. Dec. 574. Under the foregoing statement of the law the intention to become a guest is always present in such cases. Intention is a question of fact, and hence, all of the authorities say that whether the relation of landlord and guest exists, is always a question of fact for the jury. The evidence, however, may be of such a character in a given case as to leave no room for dispute as to plaintiff's intention. Thus, if he engaged a room at an hotel and occupied it in the usual way, there could be no question that he intended to become a guest, and it would be the duty of the court to instruct the jury that if they found those to be the facts, they should find that plaintiff was a guest. On the other hand, if a plaintiff should engage and pay for a room merely to secure a safe place for the deposit of his valuables, then clearly he would not be a guest, and it would be the duty of the court to instruct the jury to so find, provided they found the facts as stated. But if, from the evidence, it be doubtful whether the plaintiff engaged and paid for a room with the intention of availing himself of the hospitalities of the house, then it would be the duty of the court to instruct the jury that before they

[97] The statement of facts is omitted.

could return a verdict for plaintiff they must find that such was his intention. The latter case is the one we have here, and, as the declaration of law ignores entirely the question of intention it is clear that the judgment of the circuit court was predicated upon an erroneous conception of the law.

Judgment will be reversed and cause remanded. All concur.[98]

FLINT v. ILLINOIS HOTEL CO.

(Appellate Court of Illinois, 1909. 149 Ill. App. 404.)

Mr. Justice BAUME delivered the opinion of the court.[99]

This is a suit by appellee, a traveling salesman, against the Illinois Hotel Company, appellant, conducting a hotel at Bloomington, Illinois, to recover the value of a suit-case and its contents alleged to have been delivered to a servant of appellant to be kept for appellee as a guest of the hotel, which suit-case and its contents were thereafter lost. Upon the hearing of the case before the court without a jury there was a finding and judgment against appellant for $63.75.

The evidence tends to show and the court was warranted in finding, that appellee upon his arrival at Bloomington by train at about 5:30 p. m., on January 22, 1908, delivered his suit-case and sample case to one Hendryx, the agent of a local transfer company, with directions to deliver the same to appellant; that Hendryx carried said baggage to the hotel conducted by appellant and delivered the same to the head porter employed in said hotel, at the same time stating to the porter that the owner of the baggage would be there for dinner in a few minutes; that appellee arrived at the hotel about 6:15 p. m. when he registered, and upon his request to be assigned a room was informed by the clerk that they were short on rooms at that time and that he, appellee, had better wait until later in the evening before having his room assigned; that appellee then went to dinner and thereafter attended a revival service, returning to the hotel about 10 p. m., when a room was assigned to him; that he then called for his baggage and it was ascertained that his suit-case was missing, but that his sample-case was on the floor in the corridor of the hotel, between the hotel office and the check room; and that said suit-case was not thereafter recovered by appellee. * * *

The relation of innkeeper and guest may be, and was in this case, established by the reception of the baggage by the innkeeper. Where the baggage is delivered to the innkeeper as the baggage of an intended guest who, within a reasonable time thereafter, actually becomes a guest,

[98] Accord: Ingallsbee v. Wood, 33 N. Y. 577, 88 Am. Dec. 409 (1865). But compare Mason v. Thompson, 9 Pick. (Mass.) 280, 20 Am. Dec. 471 (1830).

[99] Parts of the opinion are omitted.

the responsibility of the innkeeper for the safe keeping of the baggage relates back to the time when the baggage was delivered. Eden v. Drey, 75 Ill. App. 102.

In the case at bar the delivery of the baggage by Hendryx, the agent of appellee, to the proper servant of appellant, was, in effect, a delivery of such baggage by appellee to appellant, and the duty was thereby imposed upon appellant to safely keep such baggage until called for by appellee within a reasonable time after its reception. * * *

The finding and judgment of the circuit court was right and will be affirmed.[1]

Affirmed.

KAPLAN v. TITUS.

(Supreme Court of New York, Appellate Division, 1910. 140 App. Div. 416, 125 N. Y. S. 397.)

McLAUGHLIN, J.[2] The defendant is the proprietor of the Hotel Woodward in the city of New York, and this action is brought to recover damages for the loss of a dress suit-case and its contents. It appears that the plaintiff and his family became guests at the hotel in January, 1909, and remained there until the 27th of February following. On that day he paid his bill and left the hotel about 4 o'clock in the afternoon. He left at the hotel some 19 pieces of baggage, one of which was the suit-case in question, to be called for by an expressman whom he had engaged. The plaintiff never received the suit-case, and brought this action in the Municipal Court to recover the damages sustained. The case was tried before the court without a jury, and resulted in a judgment in favor of the plaintiff for $60.00 and costs, which was affirmed by the Appellate Term, and the defendant, by permission, appeals to this court. * * *

The question is whether the defendant ceased to be liable as an innkeeper for the safety of the plaintiff's baggage the moment the

[1] But, where the plaintiff forwarded his baggage to the inn twelve days in advance of his arrival, it was held that the innkeeper was not an insurer during the interval. Hirsh v. Anderson Hotel Co., 58 Pa. Super. Ct. 387 (1914). Similarly, where the plaintiff sent his baggage to the inn without intending to become a guest, it was held that the innkeeper was not an insurer, although the plaintiff did in fact register nine hours later. Parker v. Dixon, 132 Minn. 367, 157 N. W. 583, L. R. A. 1916E, 534, Ann. Cas. 1918A, 540 (1916). Moreover, where the plaintiff delivered his baggage to the innkeeper's servant at the depot and went directly to the inn with the intention of registering, but due to a sudden change in his plans the plaintiff did not register, it was held that the innkeeper was not an insurer. Baker v. Bailey, 103 Ark. 12, 145 S. W. 532, 39 L. R. A. (N. S.) 1085 (1912). Likewise, where the plaintiff deposited money with the hotel clerk, but did not register because the inn was full, it was held that the innkeeper was not an insurer of the money. Mulhauser v. Dwyer (Sup.) 184 N. Y. S. 635 (1920). See comment, 21 Col. Law Rev. 286.

[2] Parts of the opinion are omitted.

latter left the hotel with the intention of not returning, or whether his liability continued thereafter during a reasonable time necessary for its removal. * * * In the present case the plaintiff had himself arranged, when he paid his bill, to have his baggage removed, and when he left the hotel was expecting the expressman to come and get it, and in fact he did come within less than an hour afterwards. It is not true that the relation of innkeeper and guest terminates as soon as the guest pays his bill and leaves the hotel with the intention of not returning, because he has thereafter a reasonable time in which to remove his baggage. Until such reasonable time has expired the innkeeper's liability, so far as the baggage is concerned, remains the same as it was prior to the departure of the guest. * * *

I am of the opinion the determination of the Appellate Term affirming the judgment of the Municipal Court is right and should be affirmed, with costs.

INGRAHAM, P. J., and LAUGHLIN, MILLER and DOWLING, JJ., concurred.

Determination affirmed, with costs.[3]

HOWELL et al. v. SEABOARD AIR LINE R. CO.

(Supreme Court of North Carolina, 1923. 186 N. C. 239, 119 S. E. 198.)

Action by J. S. Howell and another against the Seaboard Air Line Railroad Company. Judgment for plaintiff, and defendant appeals.

The plaintiffs delivered to the defendant at Louisburg, N. C., January 5, 1922, a package of harness packed, addressed, and in all respects ready for shipment. The bill of lading was immediately filled in, signed by the shipper and the agent of the carrier company. The agent of the carrier called the shipper over the telephone and asked if the harness was to be prepaid. He was told yes. The testimony of the witness for the plaintiff is that the defendant's agent said that he would call and get the money at plaintiff's office, and that this was their customary way of dealing. A witness for the defendant testified that the shipper replied that he would call at the office of the defendant and pay the freight. The inquiry was for the purpose of ascertaining whether the goods were to be shipped prepaid or collect.

On January 14 the warehouse of the defendant company at Louisburg was destroyed by fire, including this shipment. The issues sub-

[3] In De Lapp v. Van Closter, 136 Mo. App. 475, 118 S. W. 120 (1909), the plaintiff paid in advance for a room for 24 hours and deposited money with the hotel clerk. The plaintiff slept in the room, but departed without calling for the money until three weeks later, when it appeared that the money had been stolen. Held, even though the theft occurred before the expiration of the 24 hours, the innkeeper was not liable as an insurer if the money was stolen after the plaintiff left the inn.

mitted to the jury were: "Is the defendant indebted to the plaintiff? If so, how much"; to which they responded, "Yes, $320.88." The freight was never paid, and the evidence is that the bill of lading made out the day the shipment was brought to the station was put in a pigeon-hole in the desk, but was not delivered until after the fire.

At the conclusion of the evidence the defendant moved for a judgment of nonsuit which was overruled, and defendant excepted. Judgment upon the verdict in favor of the plaintiff. Appeal by defendant.

CLARK, C. J.[4] The motion for nonsuit rested upon the charge of the court, which, as it relates to the controversy in this case, was as follows:

"I instruct you, gentlemen of the jury, that the delivery of the bill of lading is not necessary to make the carrier liable for goods sent to it for shipment. The delivery of goods to a common carrier raises the presumption that it received them as a common carrier, and the burden is upon the company to show that it received them only as a warehouseman, and that the shipper either assented to that arrangement as, for instance, by request to hold the goods, or was notified by the company that it held them for further orders." * * *

The delivery of a bill of lading is not necessary to make a carrier liable for such goods as are sent to it for shipment. When goods are delivered to a carrier for shipment, the presumption is that they are received for shipment and not for storage, and the burden is upon the company to show that it received the goods as a warehouseman and not as a carrier. * * *

The defendant offered no evidence that it received the goods as warehouseman rather than as carrier. Having received the goods, the burden was on the defendant to show that it did not receive them as a common carrier. Joyner, agent of the defendant company, admitted on cross-examination that it was the custom of the defendant to carry a charge account for freight with the plaintiff. * * *

It is true that under the regulations of the Interstate Commerce Commission freight rates were required to be collected on a prepaid consignment before the shipment was forwarded, but the railroad agent accepted this shipment to be forwarded, and before the freight was actually paid over to him the goods burned. Though the fire occurred before the goods left the station, they were by virtue of this agreement in possession of the goods as a carrier and not as a warehouseman.

Under the regulations of the Interstate Commerce Commission, the goods should not be forwarded marked prepaid until the freight had been actually received by the company. None the less, by the actual receipt of the goods for shipment, they were in possession of the defendant as a common carrier.

Goods could be accepted for shipment either prepaid or collect. If the goods had been marked "prepaid" when shipped, when in fact

[4] Parts of the opinion are omitted.

they were not, this would have been in violation of the regulations of the Interstate Commerce Commission. They were not shipped so marked, nor was there notice that they were held for prepayment of freight.

Though the shipper stated when asked by defendant's agent that he wished them shipped prepaid, there is no evidence that they were held for lack of prepayment. They were in the hands of the defendant for shipment—that is, as a common carrier, and not as a warehouseman, and it is responsible for the loss by its failure to ship.

If it had demanded prepayment and this had not been made, then they would have been in the hands of the defendant simply as a warehouseman. On the contrary, it accepted the goods absolutely for shipment, and there is testimony that its agent stated that he would call for the freight charges according to its custom with the plaintiff, who testified that he thought the goods had been shipped, and that he stood ready to pay the defendant's agent whenever he should call, according to his promise.

The jury found that the delay in shipment was the neglect of the common carrier.

No error.[5]

[5] Accord: Knapp v. Minneapolis, St. P. & S. S. M. R. Co., 34 N. D. 466, 159 N. W. 81 (1916); Louisville & N. R. R. Co. v. Edwards' Adm'x, 183 Ky. 555, 209 S. W. 519 (1919); Morrison Grain Co. v. Missouri Pac. R. Co., 182 Mo. App. 339, 170 S. W. 404 (1914); Meloche v. Chicago, M. & St. P. Ry. Co., 116 Mich. 69, 74 N. W. 301 (1898). Similarly, in Hickox v. Naugatuck R. Co., 31 Conn. 281, 83 Am. Dec. 143 (1863), a carrier was held liable as an insurer of baggage which had been delivered to it four hours before the departure of the train and before a check had been issued therefor. See, also, Williams v. Southern Ry. Co., 155 N. C. 261, 71 S. E. 346 (1911). But the carrier is not an insurer of the baggage if the intended passenger does not in fact become a passenger. New Orleans & N. E. R. Co. v. Thigpen (Miss.) 105 So. 481 (1925). Compare Behrman v. Atlantic Coast Line R. R. Co., 118 S. C. 48, 109 S. E. 397, 22 A. L. R. 957 (1921), which held that a carrier, having posted notice that it would not be liable for goods left on the platform until issuance of a bill of lading, was not liable for the loss of goods placed on the platform by a shipper, but stolen prior to the issuance of a bill of lading, notwithstanding the shipper's custom of placing goods on the platform without obtaining a bill of lading until the close of the business day, at which time a bill of lading would be issued. See Beale, The Beginning of Liability of a Carrier of Goods, 15 Yale Law J. 207. For an exhaustive collection of cases on what constitutes delivery to a common carrier for transportation, see note, 22 A. L. R. 970. Concerning the liability of the carrier at common law, where a bill of lading is issued without receipt of the goods described therein, see and compare Mo. Pac. R. Co. v. McFadden, 154 U. S. 155, 14 S. Ct. 990, 38 L. Ed. 944 (1894), holding the carrier not liable, and Armour v. Michigan Central Railroad Co., 65 N. Y. 111, 22 Am. Rep. 603 (1875), holding the carrier liable. Under section 23 of the Uniform Bills of Lading Act, and section 22 of the Federal Bills of Lading Act (U. S. Comp. St. § 8604kk), the carrier is clearly liable. Johnson Lumber Co. v. Great Northern R. Co., 104 Wash. 358, 176 P. 343, 181 P. 932 (1918); Mid-City Trust & Savings Bank v. Chicago, M. & St. P. Ry. Co., 192 Ill. App. 225 (1915). See, on this point, Ferson, Fraudulent Bills of Lading, 21 Mich. Law Rev. 655; Thulin, Bill of Lading as Security, 16 Mich. Law Rev. 402, 411; Ross, Bills of Lading for Goods not Received, 15 Mich. Law Rev. 38.

ATCHISON, T. & S. F. RY. CO. et al. v. HOMEWOOD.

(Supreme Court of Oklahoma, 1912. 39 Okl. 179, 134 P. 856, 48 L. R. A. [N. S.] 990.)

ROSSER, C.[6] This was an action by Harry Homewood against the Atchison, Topeka & Santa Fé Railway Company and the Gulf, Colorado & Santa Fé Railway Company to recover damages for the loss of a certain car, called "Gertrude," together with its contents. The plaintiff, Harry Homewood, was engaged in the management of a certain minstrel show, and some time in November, 1907, he entered into contracts to present the show at Tecumseh and other places in the state of Oklahoma. On the 21st of November, 1907, he applied to the station agent of the Gulf, Colorado & Santa Fé Railway Company, at Gainesville, Tex., for transportation of the car, with its contents, and the troupe or company composing the minstrel show from Gainesville to various points in the state of Oklahoma, where he expected to give performances, among others the town of Tecumseh. It appears that there was an understanding between the plaintiff and the agent at Gainesville that this car should be moved over the entire route, stopping at the various places long enough to give the shows, according to plaintiff's contracts. The plaintiff made no general written contract as to the moving of the car, but bought tickets from point to point for the 20 people comprising his company, and the car was hauled without extra compensation. The car was brought into Tecumseh on the afternoon of November 27, 1907, and set out at a point, designated by the plaintiff, some distance from the station. It was plaintiff's intention to allow the car to remain at Tecumseh while the company showed or played there that day. He then intended to haul the necessary paraphernalia by another conveyance to Shawnee and give two performances the next day, allowing the car to remain at Tecumseh, and he intended then to take the car to Lindsay, which was the next place of performance. After the car was placed according to his orders, a freight train came into the station and was compelled to go upon the side track, upon which the car was standing, while another train passed. This train was compelled to move the car in order to get into the siding. The freight train did not replace the car at the point where it had first been placed, but left it at a point on the track along the side of the depot or station house, and while standing there, about 10 or 10:30 p. m. the car and contents, as well as the station, were destroyed by fire. * * *

The case was tried upon the theory that the company was the insurer of the car, and should be required to make good its value, whether lost through its negligence or not. The issue of negligence was not submitted to the jury. The defendants do not appear to question the theory that, when the company undertook to haul the car, it became

[6] Part of the opinion is omitted.

the insurer of the car while in transit, and the authorities support the doctrine that, where a railroad company without a special contract limiting its liability, undertakes to haul a car, its liability is the same as when it undertakes to transport ordinary freight. Pennsylvania R. Co. v. New Jersey R. & Transp. Co., 27 N. J. Law, 100; Peoria & Pekin U. R. Co. v. C., R. I. & P. R. Co., 109 Ill. 135, 50 Am. Rep. 605; Mallory v. Tioga R. Co., 39 Barb. (N. Y.) 488. The questions which seem to have been litigated were whether or not the plaintiff himself started the fire, and whether or not the car had been delivered to plaintiff in such a way as to relieve the company of its liability as a carrier or insurer. A considerable portion of the briefs of the parties, and almost the whole of the oral argument, was devoted to the question of delivery. The defendant relies on Snyder's Comp. Laws, § 451 and following, to show its duty with reference to delivering the property, and contends that its liability ceased upon the arrival of the car.

It is evident that the sections of Snyder's Comp. Laws referred to have no application in this case. These sections contemplate that the property is to be taken away. The plaintiff could not move the car, and it was not contemplated by either party that it would be moved. The parties intended for the car to stand on the siding until the plaintiff had filled his engagements at Tecumseh and Shawnee, and was ready to proceed to some other point. The question then is, Was the company to be liable as a carrier while the car stood at the station? The question of delivery is not decisive of this case. It seems clear that the car was delivered to plaintiff, as far as it was possible to make delivery, not to be taken away, but to be used by him at Tecumseh. He was in actual possession, and was using it at his home and as a hotel for his employés at the time the fire started.

There is a strong resemblance between this case and the case where goods are detained by the carrier before commencement of actual transportation at the request of the shipper, and for his accommodation. It is universally held that, where goods are detained at the request of the shipper, and for his accommodation, or in order that something further may be done to prepare the goods for transportation, the carrier's liability during such detention is only that of warehouseman. 6 Cyc. 453, citing numerous authorities. The carrier is not the insurer of the goods until it becomes its duty to forward them.

The rule is stated in the case of Barron v. Eldredge, 100 Mass. 455, 1 Am. Rep. 126, by Mr. Justice Colt, as follows: "The responsibility of a common carrier for goods intrusted to him commences when there has been a complete delivery for the purpose of immediate transportation. If, without putting them in transit, the carrier, for his own temporary convenience, places them in store, still the liability of a carrier attaches. The delivery must be for immediate transportation, and, of course, it cannot be complete if anything remains to be done by the shipper before the goods can be sent on their way. If by the usage and course of business, and especially if by express request, the

shipment is delayed for further orders as to their destination, or for the convenience of the owner, then, during the time of such delay, the liability is that of warehouseman. The more stringent liability of a common carrier only attaches when the duty of immediate transportation arises. It then shifts from that of warehouseman, although the goods remain unmoved in the storehouse. Whether the responsibility be in one capacity or the other is seldom a matter of express agreement between the parties. It arises out of the relation which the parties sustain, and the duties which the law imposes. These propositions are elementary, and need no extended citation of cases."

In the case of St. Louis, Alton & Terre Haute R. Co. v. Montgomery, 39 Ill. 336, the court said: "If, for example, the same person is common carrier and warehouseman, and he receives goods to be forwarded when he receives orders from the owner, his liability in the meantime is that of warehouseman, and not that of a common carrier."

In Basnight v. Atlantic & North Carolina R. Co., 111 N. C. 592, 16 S. E. 323, Mr. Justice McRea said: "Where goods are delivered to a common carrier to await further orders from the shipper before shipment, the former, while they are so in his custody, is only liable as warehouseman. O'Neill v. Ry. Co., 60 N. Y. 138; Wells v. Ry. Co., 6 Jones [51 N. C.] 47 [72 Am. Dec. 556]; Angell on Carriers, § 129. He is only responsible as carrier where goods are delivered to and accepted by him in the usual course of business for immediate transportation. 2 Am. & Eng. Ency. of Law, 198."

In the case of Burrows v. Chicago, B. & Q. R. Co., 85 Neb. 497, 123 N. W. 1028, 34 L. R. A. (N. S.) 220, the plaintiff was the proprietor of a tent show. He loaded part of his outfit into a car furnished him by the railroad company, and retained the balance for his use the following night, to be loaded the next morning. The goods loaded were destroyed by fire, and it was held that the company was not liable as carrier. The court said: "The rule seems to be well settled that, in order to render a transportation company liable as a common carrier for the loss of goods, delivery of the goods must be made to the carrier, or his agent, for transportation, for, if the goods are delivered to him to be stored by him for a certain time, or until the happening of a certain event, or until something further is done to prepare them for transportation, or until further orders are received from the owner, the carrier becomes a mere depository or bailee until the appointed time has expired, or the other contingency happened upon which the carriage is to commence, or until further orders have been given, as the case may be, for nothing could be more unjust than to permit the owner of the goods to impose upon a mere depository or warehouseman, whether he has yet become related to the goods as carrier or not, the extremely hazardous responsibility of the common carrier, so long as it might suit his interest or convenience to do so." [7]

[7] Concerning the liability of a carrier where part of a shipment has been delivered to it, see Turner Co. v. New York, N. H. & H. R. Co., 86 Conn.

In this case the car was being held at Tecumseh for the benefit and convenience of the plaintiff, and the company, while the car was so held as to the car, was not a common carrier at all. The law makes a carrier of goods responsible as a carrier, when it has the goods to carry, upon grounds of public policy. But when goods are held in storage by a common carrier, at the request of the shipper, there is no more reason why the carrier should be held as an insurer than that any other bailee should be so held. In this case, if the plaintiff, without having had his car hauled to Tecumseh by the defendant, had placed it there himself, and had said to the company, "I expect to get you to haul this car to Lindsay day after to-morrow, and in the meantime I want you to let it sit here so my employés can sleep in it," no one would contend the company would be liable. But in principle this case is exactly like it. To hold the carrier liable as an insurer the goods must be in its possession to carry, and, when the owner of the goods requests the carrier to hold them, the carrier ceases to be a carrier while they are so held, especially where the goods are, as in this case at least, partly in the possession of the owner.

It is contended that, because the company moved the car from the place where it was first set out upon the instruction of the plaintiff to a different place, the company had not delivered it, and that it was still in the possession of the company. It is urged by the plaintiff that at the point the car was placed it was impossible for him to take out property on account of the fact that he could not open the door of the cellar, because it was too close to the platform of the depot. The plaintiff himself testified that he did not intend to take anything out of the cellar until the next morning, and that the only reason he wanted the cellar open at all was so he could put his dog in the cellar. If everything had been taken out, the car would have remained, and the question as to whether or not it was delivered was not affected by its position at one place or another on the track. The evidence shows that it was necessary to move the car in order to allow trains to pass at the station, and the fact that it was not replaced upon the exact spot where it was first placed does not affect the question of delivery. It was delivered for his use at Tecumseh when it was set out, and the company, by changing its position, did not assume the relation of common carrier, although it may not have been so conveniently placed as when first set out. It was being held at the request of plaintiff, and therefore the company was not a carrier at the time, whether it was in possession of the car or not.

In view of the foregoing it is not necessary to decide the other questions involved in this case.

71, 84 A. 298, Ann. Cas. 1913D, 637 (1912), 22 Yale Law Journal, 490, and cases collected in Ann. Cas. 1913D, 641.

The case should be reversed and remanded for further proceedings not inconsistent with this opinion.

PER CURIAM. Adopted in whole.[8]

STANDARD COMBED THREAD CO. v. PENNSYLVANIA R. CO.

(Court of Errors and Appeals of New Jersey, 1915. 88 N. J. Law, 257, 95 A. 1002, L. R. A. 1916C, 606.)

PARKER, J. The question for decision is whether defendant, as a common carrier engaged in interstate commerce, is liable for the destruction by fire of certain goods of plaintiff intended to be consigned to parties in Ohio from Beverly, in this state, where plaintiff's factory is located. Defendant maintained what is called a "public siding" near plaintiff's factory, and was accustomed to place cars thereon for the convenience of plaintiff and other shippers in loading. The station of defendant company was one-half mile away, and the custom was for plaintiff to telephone for a car when needed, to defendant's freight agent at the station, and a car would be placed, and the shipper allowed 48 hours to load it. When defendant was notified the car was loaded, it would be moved by defendant to the freight station or its immediate vicinity, the doors would be sealed, and a bill of lading would be issued. Until such sealing the doors remained unfastened.

On the occasion in question, the plaintiff ordered a car on June 12th. When it was placed does not appear, but the stipulation of facts shows that it was loaded on the 13th and the loading finished at 6 p. m., at which time the freight office was closed; and no notice that the car was ready was given to defendant. The car remained in place with doors unfastened that night, and took fire, or was set on fire during the night, and the contents destroyed. Defendant claimed that there had been no delivery to it, and, if there had been, that it was protected by a clause in its "uniform bill of lading" prescribed by the so-called Carmack amendment, which clause reads as follows:

"Property destined to or taken from a station, wharf or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains."

The trial court held that there had been a delivery, and, conceding that under the federal legislation relating to interstate commerce the rights of the parties after delivery were regulated by the terms of

[8] For a further collection of cases, see 48 L. R. A. (N. S.) 990. Concerning the shifting status of a carrier with relation to goods in its possession, see Thompson, The Relation of Common Carrier of Goods and Shipper and Its Incidents of Liability, 38 Harv. Law Rev. 28.

the uniform bill of lading, though none had in fact issued, held as a matter of construction of the clause in question that the words "private or other siding" excluded a "public siding" such as that in question, and held defendant liable.

Our examination of the case leads us to the conclusion that there was error in both rulings.

First, we think there was no complete delivery. The place was not a station. No agent of the defendant was in attendance or exercising any supervision. No notice that the car was ready had been given to the defendant, and, until the receipt of such notice or the expiration of the 48 hours allowed for loading, defendant's agents were entitled to assume that the loading was not complete. The general common-law rule is that there must be a delivery and acceptance, and, while acceptance may be inferred from the receipt of notice, there must be notice. 6 Cyc. 412, 413. Special circumstances, such as the existence of a custom relieving the shipper from the requirement of notice, or actual knowledge by the carrier, may modify the rule, but there was no such custom in this case; on the contrary, the custom was for the shipper to give notice to the carrier.

The case of Illinois Central R. Co. v. Smyser, 38 Ill. 354, 87 Am. Dec. 301, is relied on by plaintiff; but in that case, though the other circumstances were similar, it appeared that the agent of defendant was notified the cars were ready, and received manifests of their contents at the usual time. On the other hand, in Southwestern R. Co. v. Webb, 48 Ala. 585, it was held that there was no delivery of cotton left at the railroad warehouse without notice to the agent, though two consignments had been received and sent forward just previously. In Houston & Texas Central R. Co. v. Hodde, 42 Tex. 467, the carrier placed a car on a siding for the shipper, and the contents took fire half an hour after being loaded thereon. There was no notice to the agent that the car was ready. It was his custom to visit this and other sidings in the evening, and check up the contents. He had not had time to do so. It was held that, under the circumstances, delivery and acceptance was a jury question. The case of Tate v. Yazoo, etc., R. Co., 78 Miss. 842, 29 So. 392, is very similar to that at bar. The custom was to notify the conductor of the daily freight train that a car was needed, and he would then have one on the siding. The car would then be loaded, and the next freight train would be flagged to pick it up, and the conductor of that train would deliver a bill of lading. The car in question was left on the siding according to custom, loaded after the train had gone, and was burned before the next train came on the following day. The court held that there could not be delivery without acceptance, and there could not be acceptance until the carrier had notice that the car was ready.

Whether, in a case of loading by the shipper on a siding, the carrier is entitled to a reasonable time after notice to come and take charge of the property, is a question not presented for decision, be-

cause no notice was given.[9] It is true that it could not be given at the nearest station or office of the company, because that was closed; but, of course, defendant's agent was under no obligation to keep the office open indefinitely. Our conclusion on this branch of the case is that the stipulated facts were insufficient in law to warrant a finding of delivery to the carrier.[10]

But assuming a delivery, still, under the terms of defendant's uniform bill of lading, the goods remained at the risk of the shipper. The "Carmack amendment," which is part of section 20 of the Interstate Commerce Act, as amended by the Hepburn Act of June 29, 1906 (34 Stat. at L. 584, c. 3591, quoted in Adams Ex. Co. v. Croninger, 226 U. S. 491, 33 S. Ct. 148, 57 L. Ed. 314, 44 L. R. A. [N. S.] 257), requires the issue by carriers of a bill of lading. Under the act, and the regulations made by the Interstate Commerce Commission pursuant thereto, defendant was required to submit and publish with its tariffs a uniform bill of lading; and, in the absence of a disclaimer by the shipper and the acceptance of a ten per cent. higher rate, the terms of the uniform bill of lading are declared applicable. Such a bill of lading was submitted, approved, and published. It contained the clause quoted above. In International Watch Co. v. D., L. & N. R. R. Co., 80 N. J. Law, 553, 78 A. 49, affirmed 82 N. J. Law, 528, 82 A. 730, on the opinion delivered in the Supreme Court, it was held (page 556 of 80 N. J. Law, page 50 of 78 A.) that:

"Where no bill of lading is given, the shipper himself stands in the same position as if he was the lawful holder of such bill of lading, and the liability of the company to such shipper is the same liability as is imposed in favor of the lawful holder of a receipt or bill of lading."

The clause in question, then, was binding on both parties, and it remains to ascertain whether the siding in question was a "private or other siding." It was not a private siding. The trial court held the view that a public siding was not in the intendment of the clause, an "other" siding. We do not share this view. If sidings are to be classified into private and other sidings, the other sidings would necessarily be other than private, and the logical alternative to "private" is "public."

On the facts stipulated, the defendant was entitled to judgment.

The judgment for plaintiff will, accordingly, be reversed, and a new trial ordered.

[9] On this point, see Chickasaw Cooperage Co. v. Yazoo & M. Valley R. Co., 141 Ark. 71, 215 S. W. 897 (1919).

[10] As to what constitutes delivery to the carrier for shipment where goods are loaded in a car on a siding, see Kansas City, Mex. & Orient Ry. Co. v. Cox, 25 Okl. 774, 108 P. 380, 32 L. R. A. (N. S.) 313 (1910), where car was loaded, but no notice had been given; Central of Ga. Ry. Co. v. Sigma Lumber Co., 170 Ala. 627, 54 So. 205, Ann. Cas. 1912D, 965 (1910), where notice that car was loaded, but no shipping instructions had been given; American Lead Pencil Co. v. Nashville, C. & St. L. R. Co., 124 Tenn. 57, 134 S. W. 613, 32 L. R. A. (N. S.) 323 (1911), where notice that car was ready had been given, but no bill of lading issued; Morrison

BERS et al. v. ERIE R. CO.

(Court of Appeals of New York, 1919. 225 N. Y. 543, 122 N. E. 456.)

Action by Joseph L. Bers and Aaron Bers, doing business under the firm name and style of E. Bers & Company, against the Erie Railroad Company. From a judgment of the Appellate Division (176 App. Div. 241, 163 N. Y. S. 114), affirming a judgment of the Trial Term dismissing the complaint, plaintiffs appeal.

POUND, J. This action is to recover damages for the loss of merchandise delivered to defendant for transportation from Passaic, N. J., to New York City. It involves the proper construction of the latter portion of section 5, paragraph 3, of Uniform Bill of Lading which reads as follows:

"Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels, or until loaded into cars or vessels, and when received from or delivered on *private or other sidings,* wharves, or landing shall be at owner's risk until the cars are attached to and after they are detached from trains."

The purpose of this limitation of liability is to fix definitely a time when owner's risk terminates and carrier's risk begins.

If the property was received by the defendant on a "private or *other*" siding, it was at plaintiff's risk, as the car from which it was taken had not been attached to a train. The merchandise had been loaded by consignors upon a car which was placed on a track in front of their warehouse. This track had been constructed by defendant on its own land, east of its freighthouse, for the receipt and delivery of freight at a number of private warehouses and was under its exclusive control. It extended from the freighthouse about a mile parallel with the main track. It was connected with the main track with two sets of switches. There is also a connecting piece of side track on which cars are placed for loading or unloading at defendant's freighthouse, but the track in question was used regularly by the warehouses in front of which it ran. It was a side track, a short track connected with the main track, a siding. Appellant contends that it is not a "private or other" siding. The majority of the court below held that the phrase in the bill of lading included within its terms *all* sidings, whether public or private. That meaning would be more clearly expressed by the use of the words "all sidings" and a good rule of construction suggests that the words "or other" following the word "private" include not *all* sidings, but only sidings *like* private sidings.

"When a particular class is spoken of, and general words follow, the

Grain Co. v. Mo. Pac. Ry. Co., 182 Mo. App. 339, 170 S. W. 404 (1914), where shipping instructions had been given, but no bill of lading issued. For a further collection of cases, see 32 L. R. A. (N. S.) 313, L. R. A. 1916C, 608, and 22 A. L. R. 970.

class first mentioned is to be taken as the most comprehensive" (Matter of Hermance, 71 N. Y. 481, 487), and the general words are restricted to those of the same kind (ejusdem generis). The minority held this particular siding was not a siding within the contemplation of the bill of lading; that it was merely an extension of defendant's freight depot, at which it received the property, but that conclusion seems to be based on proximity exclusively.

It was not a private siding. Private sidings include mainly those which are owned or maintained by shippers for the purpose of connecting their factories and warehouses with the tracks. They thus provide themselves with conveniences which the railroad fails to furnish. It was not a public siding, open to the use of the shipping public in general, for the loading and unloading of cars, like the freight station and yards. It was not a part of the railroad terminal or freight station. It was separated therefrom as effectively as if the warehouses had been five miles from the freight depot. It was an industrial switch, a terminal facility for the use and convenience of the shippers whose warehouses were adjacent thereto. It was like a private siding in all respects except that the carrier owned it. These shippers were fortunate enough to have the advantages of a private siding without the burden of private ownership. If any force is to be given to the words "or other," as qualifying rather than amplifying the word "private," they must be extended to include such a siding as this. Thus full meaning is given to the words used and the apparent purpose of the parties is accomplished.

Cases dealing with the duty of carrier to shipper with regard to cars on such tracks do not aid us in finding a proper meaning of contractual words intended to limit liability, nor is it necessary to define the term "delivery on a private or other siding" which may present other questions. Jolly v. A., T. & S. F. Ry. Co., 21 Cal. App. 368, 131 P. 1057; N. Y. Central & H. R. R. R. Co. v. General Electric Co., 219 N. Y. 227, 114 N. E. 115.

I, therefore, recommend that the judgment appealed from be affirmed, with costs.

HISCOCK, C. J., and COLLIN, CUDDEBACK, CARDOZO, CRANE, and ANDREWS, JJ., concur.

Judgment affirmed.

YAZOO & M. V. R. CO. et al. v. NICHOLS & CO.

(Supreme Court of the United States, 1921. 256 U. S. 540, 41 S. Ct. 549, 65 L. Ed. 1081.)

Mr. Justice BRANDEIS delivered the opinion of the Court.

In November, 1917, the Yazoo & Mississippi Railroad Company issued to Nichols & Co. a bill of lading for 31 bales of cotton which had been loaded into a box car at Alligator, Miss., for shipment to Memphis,

Tenn. Before the loaded car had been attached to any train or engine it was destroyed by fire. The shipper sued in a state court of Mississippi to recover the value of the cotton. The carrier contended that by the terms of the bill of lading it was relieved from liability. The provision relied upon was the second clause of the last paragraph of section 5 of the Uniform Bill of Lading, approved by the Interstate Commerce Commission June 27, 1908, and duly filed and published as part of the railroad's tariff. The paragraph referred to is this:

"Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent, shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels and when received or delivered on private or other sidings, wharves or landings shall be at owners' risk until the cars are attached to and after they are detached from trains."

The shippers insisted that the provision did not apply, because at Alligator there was a regularly appointed agent, and that the second clause of the paragraph, like the first, was applicable only to stations where there was none. The shippers also contended, on the following facts which were undisputed, that the place where the car was received was, in effect, a part of the carrier's terminal, and not a "private or other" siding within the meaning of the above provision.

The cotton had been loaded from the platform of a gin located at the blind end of a spur which leads from the main line at a point near the depot. The spur, which is 1,000 feet long, had been built by the railroad many years before at its own expense. About half of it is on the railroad right of way, and runs parallel to the main line; the rest is on private land. Under the contract for building the spur the landowner furnished free the right of way over his own land; but the railroad was to have full control over the spur, and reserved the right to abandon it at any time and remove the track material. The spur was used generally by the public for loading and unloading carload freight. The only track scale at Alligator was on it—as was also another gin.

Each party requested a directed verdict. A verdict was directed for the shippers. The judgment entered thereon was affirmed by the Supreme Court of Mississippi on the ground that the clause in question applies only to stations at which there is no regularly appointed agent. 120 Miss. 690, 83 So. 5. In the appellate courts of the states in which the question had arisen the decisions were conflicting.[11] For this

[11] The clause was held not applicable in McClure v. Norfolk & Western Ry. Co., 83 W. Va. 473, 98 S. E. 514 (1919); Jolly v. Atchison, etc., R. R. Co., 21 Cal. App. 368, 131 P. 1057 (1913). It was applied under different facts in Chickasaw Cooperage Co. v. Yazoo & Mississippi Valley R. R. Co., 141 Ark. 71, 215 S. W. 897 (1919); Standard Combed Thread Co. v. Pennsylvania R. R. Co., 88 N. J. Law, 257, 95 A. 1002, L. R. A. 1916C, 606 (1915); Bers v. Erie R. R. Co., 225 N. Y. 543, 122 N. E. 456 (1919); Id., 176 App. Div. 241, 163 N. Y. S. 114 (1917); Siebert v. Erie R. R. Co. (Sup.) 163 N. Y. S. 111 (1915). See, also, Bianchi & Sons v. Montpelier & Wells River R. R.

reason a writ of certiorari was granted. 251 U. S. 550, 40 S. Ct. 219, 64 L. Ed. 409. The only question requiring decision here is whether the court below gave the correct construction to the clause. In our opinion it did.

Whether goods destroyed, lost or damaged while at a railroad station were then in the possession of the carrier as such, so as to subject it to liability in the absence of negligence, had, before the adoption of the Uniform Bill of Lading, been the subject of much litigation. At stations where there is a regularly appointed agent the field for controversy could be narrowed by letting the execution of a bill of lading or receipt evidence delivery to and acceptance by the carrier; and by letting delivery of goods to the consignee be evidenced by surrender of the bill or execution of a consignee's receipt. But at nonagency stations this course is often not feasible. There the field for controversy as to the facts was particularly inviting and the reasons persuasive for limiting the carrier's liability. Local freight trains are often late. Shippers or consignees cannot be expected to attend on their arrival. Less than carload freight awaiting shipment must ordinarily be left on the station platform to be picked up by the passing train and lots arriving must be dropped on the platform to be called for by the consignee. At such stations the situation in respect to carload freight is not materially different. And this is true whether the car be loaded for shipment on the public siding or on a neighboring private siding, and whether the arriving loaded car be shunted onto a public siding or a private siding. There carload, as well as less than carload, freight, whether outgoing or incoming, must ordinarily be left unguarded for an appreciable time.

It is not unreasonable that shippers at such stations should bear the risks naturally attendant upon the use. The reason why an agent is not appointed is that the traffic to and from the station would not justify the expense. The station is established for the convenience of shippers customarily using it. And the paragraph here in question was apparently designed to shift the risk from the carrier to shipper or consignee of both classes of freight. It does so in the case of less than carload freight by having the carrier's liability begin when the goods are put on board cars and end when they are taken off. It does so in the case of carload freight by limiting liability to the time when the car is attached to or detached from the train. But, at a station where there is a regularly appointed agent it would be obviously unreasonable to place upon the shipper, after a bill of lading has issued, the risks attendant upon the loaded car remaining on the public siding because it has not yet been convenient for the carrier to start it on its journey. It would likewise be unreasonable to place upon the consignee at such a station the risk attendant upon the arriving car's remaining on the siding before there has been notice to the con-

Co., 92 Vt. 319, 104 A. 144 (1918); Bainbridge Grocery Co. v. Atlantic Coast Line Ry. Co., 8 Ga. App. 677, 70 S. E. 154 (1911).—[Footnote by the Court.]

signee of arrival and an opportunity to accept delivery. The situation there would be practically the same whether the loaded cars were left standing on a public siding or on a siding to a private industry on the railroad's right of way, as in Swift & Co. v. Hocking Valley Railway Co., 243 U. S. 281, 37 S. Ct. 287, 61 L. Ed. 722, L. R. A. 1917E, 1196, Ann. Cas. 1918A, 955, or on a siding, partly on the railroad's right of way and partly on private lands as in Chicago & North Western Railway v. Ochs, 249 U. S. 416, 39 S. Ct. 343, 63 L. Ed. 679, and Lake Erie & Western Railroad Co. v. Public Utilities Commission, 249 U. S. 422, 39 S. Ct. 345, 63 L. Ed. 684, when the siding is, either by state law or by agreement and in fact, a part of the carrier's terminal system.

If we approach the construction of the second clause of the last paragraph of section 5 of the Uniform Bill of Lading in the light of this practical situation all doubt as to its meaning must vanish. It could not have been intended that at stations where there are regularly appointed agents outgoing loaded cars for which bills of lading have issued and which are left standing on a siding solely to await the carrier's convenience are to be at the risk of the shipper. And this is true whether the siding be a strictly public one, or a semipublic one as in the Ochs and Lake Erie and Western Cases, supra, and the case at bar; or whether it be a siding privately used but owned by the railroad as in the Swift Case, supra; and in such cases the fact that the spur extends over land not part of the carrier's right of way is immaterial. The construction contended for by the railroad, even if not applied to team tracks in the freight yards of a great city, would place all loaded cars arriving elsewhere at the owner's risk from the moment they were detached from a train, although the consignee had not even been notified of their arrival.

It is clear that the immunity conferred by the last paragraph of section 5 does not apply to loaded cars on the spur here involved. Whether the same rule should apply to cars on strictly private industry tracks effectively separated from the terminal and exclusively under private control, like the industry tracks involved in Bers v. Erie R. R. Co., 225 N. Y. 543, 122 N. E. 456, we have no occasion to determine.

Affirmed.

WITBECK v. HOLLAND.

(Court of Appeals of New York, 1871. 45 N. Y. 13, 6 Am. Rep. 23.)

[This was an action against the American Express Company to recover for the loss of certain money delivered to it for transportation and consigned to Martin Witbeck at Schenectady, N. Y. The American Express Company delivered the package to its local agent at Schenec-

tady, December 6, 1864. Martin Witbeck, the consignee of said package, resided with his wife at Schenectady, at the time of the arrival of the package at Schenectady and until after January 14, following.

[The agent of the American Express Company did not know Martin Witbeck, and, when the package arrived, looked at the directory and did not find his name in it. The next day the agent addressed a notice to "Martin Whitbeck, Schenectady," and deposited it in the post office. Between one and three days thereafter, the agent inquired of two men, conductors upon the New York Central Railroad, running from Schenectady to Troy, and also inquired of John Bradt, the city treasurer of Schenectady, whether they knew "Martin Whitbeck," and they replied they did not.

[The agent made no further effort to find the consignee, and the package was deposited in the company's iron safe in its office until January 17, 1865, when the office was burglariously opened in the night, the safe blown open, and the package stolen.

[The notice put in the post office was not received by Martin Witbeck, though inquiries were made several times at the post office while it was there, by his wife and father, for letters for themselves and for him.

[The referee, before whom the action was tried, decided, among other things, that the American Express Company was bound to deliver the package to Martin Witbeck, personally, or at his residence or place of business; that the American Express Company did not make due effort to find Martin Witbeck, or his residence or place of business; that the plaintiff was entitled to judgment for $320, with interest from December 7, 1864.

[From the judgment entered upon the report the defendant appealed to the General Term, where it was affirmed, and from such judgment of affirmance this appeal was taken.][12]

GROVER, J.[13] * * * The first inquiry is, whether it was the duty of the carrier so to deliver the package in the absence of any restriction. Carriers by land are bound to deliver or tender the goods to the consignee at his residence or place of business, and until this is done they are not relieved from responsibility as carriers. 2 Kent's Com. 605; Angell on Carriers, § 295; Gibson v. Culver, 17 Wend. (N. Y.) 305, 31 Am. Dec. 297; Fisk v. Newton, 1 Denio (N. Y.) 45, 43 Am. Dec. 649. But when goods are safely conveyed to the place of destination, and the consignee cannot, after reasonable effort, be found, the carrier may discharge himself from further responsibility by depositing the property in a suitable place for the owner. Fisk v. Newton, supra. Carriers by vessels, boats and railways are exempt from the duty of personal delivery. Redfield on Railways, § 127; Thomas v. Boston R. R. Co., 10 Metc. (Mass.) 472, 43 Am. Dec. 444. Such carriers discharge themselves from responsibility, as such, by

[12] The statement of facts has been partly rewritten and abbreviated.
[13] Parts of the opinion are omitted.

transporting the goods to their nearest business station to the residence or place of business of the consignee, and notifying the consignee of their readiness to deliver the goods at such station, after the lapse of a reasonable time for him to receive them. But this exemption does not extend to express companies, although availing themselves of carriage by rail. Redfield on Railways, § 127. These were established for the purpose of extending to the public the advantages of personal delivery enjoyed in all cases of land carriers prior to the introduction of transportation by rail. * * *

The only remaining question arises upon the exception taken to the finding by the referee, as a fact, that the defendant did not make due effort, nor use due diligence to find said Martin Witbeck, the consignee of said package. It is insisted by the counsel for the appellant, that the question, what is reasonable diligence, is one of law. That may be so, when there is no conflict in the evidence, or controversy as to the facts to be inferred therefrom. But that is not this case, nor will most cases of this class be of that description. In most, if not all, the questions will be mixed, both of fact and law. In the present case the finding of the referee was clearly correct. The diligence, which the law required of the defendant, was such as a prudent man would have used in an important business affair of his own. The evidence shows that the defendant was so inattentive as to mistake the surname of the consignee. Although the package was addressed to Witbeck, all its inquiries were made for Whitbeck. This may have prevented their finding him. It further appeared that their inquiries were confined to a few persons in the vicinity of its place of business, and that by these it obtained information of other persons of a like surname, one of whom was the father of the consignee. Surely inquiry should have been made of these persons, and had it been so made delivery would have been made and the loss would never have occurred. * * *

The judgment appealed from must be affirmed.

All the judges concurring, judgment affirmed.[14]

[14] While the decision in the principal case that, in the absence of any restriction, an express company remains an insurer until delivery of the goods to the consignee at his residence or place of business, or until reasonable effort has been made to make such delivery, is unquestioned law, nevertheless many cases have held that where it is customary for the express company to make delivery at its office, after notice, the company's liability as insurer terminates when a reasonable time, after notice, has elapsed. Hutchinson v. United States Express Co., 63 W. Va. 128, 59 S. E. 949, 14 L. R. A. (N. S.) 393 (1907), and cases cited in note, 14 L. R. A. (N. S.) 393.

POYTHRESS v. DURHAM & S. RY. CO.

(Supreme Court of North Carolina, 1908. 148 N. C. 391, 62 S. E. 515.)

BROWN, J.[15] The facts alleged in the first cause of action, which, for the purposes of the hearing only, are admitted by the demurrer to be true, appear to be substantially as follows: On the 6th of June, 1907, the plaintiff delivered to the defendant, in good condition, at its station in Dunn, two boxes containing a moving picture outfit, consigned to the plaintiff at Duke, N. C., a station on defendant's road, which boxes and contents the defendant agreed to safely transport and deliver to plaintiff at destination; that they arrived at Duke on the same day, late in the evening, too late for plaintiff to remove the same on that day; that soon after the arrival of the boxes at Duke, N. C., on the same evening, June 6, 1907, after deposit of the same in defendant's warehouse, and before plaintiff had been notified of their arrival, or had time to remove the same, the boxes were destroyed by fire.

The question raised by the demurrer is one which has been much debated by jurists, and about which they are not agreed, as to when the liability of a common carrier of freight ends and its liability as a warehouseman begins. Some courts hold that, when the transit is ended and the goods deposited in the warehouse of the carrier, the liability as such terminates, and the more modified liability of warehouseman begins. The leading case in this country entertaining that view is from the Massachusetts court (Norway Plains Co. v. B. & M. R. R., 1 Gray, 263, 61 Am. Dec. 423), where the subject is considered at length by Chief Justice Shaw. A comprehensive note, citing many cases, is to be found to the case of Schmidt v. Blood (N. Y.) 24 Am. Dec. 145, citing authorities taking the same view.[16] Another class of cases hold that placing the goods in the warehouse alone does not discharge the company from its liability as a common carrier, until the consignee has had reasonable time after their arrival to inspect and take them away, in the ordinary course of business. The

[15] Part of the opinion is omitted.

[16] Cases applying this rule are Almand v. Georgia Railroad & Banking Co., 95 Ga. 775, 22 S. E. 674 (1895); Illinois Cent. R. R. Co. v. Carter, 165 Ill. 570, 46 N. E. 374, 36 L. R. A. 527 (1897); Gashweiler v. Wabash, St. Louis & Pac. Ry. Co., 83 Mo. 112, 53 Am. Rep. 558 (1884); Francis v. Dubuque & Sioux City R. R. Co., 25 Iowa, 60, 95 Am. Dec. 769 (1868). In some states the rule that notice is not necessary applies only when the goods arrive on time, Herf & Frerichs Chemical Co. v. Lackawanna Line, 70 Mo. App. 278 (1897), and there is no custom on the part of the carrier to give notice, Georgia & Alabama Ry. v. Pound, 111 Ga. 6, 36 S. E. 312 (1900). Furthermore, with regard to the requirement of notice, a distinction has been drawn between carriers by water and carriers by rail. See Illinois Cent. R. R. Co. v. Carter, supra. Again, it has been held that, although a carrier of freight ceases to be an insurer immediately upon the arrival of the goods and their deposit in a warehouse or depot, the carrier's insurer's liability as to baggage continues for a reasonable time after arrival. See Hicks v. Wabash Railway Co., 131 Iowa, 295, 108 N. W. 534, 8 L. R. A. (N. S.) 235 (1906).

leading case holding this view was decided in a very elaborate opinion, upon almost the same state of facts as the Norway Plains Case, by the Supreme Court of New Hampshire.[17] Moses v. B. & M. Ry. Co., 32 N. H. 523, 64 Am. Dec. 381. Wood v. Crocker, 18 Wis. 345, 86 Am. Dec. 773, Ayres v. Morris & Essex R. R., 29 N. J. Law, 393, 80 Am. Dec. 215, and Blumenthal v. Brainerd, 38 Vt. 413, 91 Am. Dec. 350, support the New Hampshire rule.

And still there is another class of cases which hold that the liability of the company as carrier continues until the consignee has been notified of the arrival of the goods and has had a reasonable time in the ordinary course of business within which to remove them. This view is maintained by Judge Cooley in a most elaborate and able opinion in McMillan v. Railroad, 16 Mich. 100, 93 Am. Dec. 208, concurred in by his eminent associate, Judge Christiancy. In that case the Michigan court was equally divided; the Chief Justice and Mr. Justice Campbell holding that notice was not necessary, and that the company was liable only as a warehouseman when the goods had been deposited in its warehouse. In 1905 the Supreme Court of Michigan unanimously adopted the views of Cooley and Christiancy in the case of Walters v. Detroit Ry., 139 Mich. 303, 102 N. W. 745. This view is also supported by McDonald v. W. R. R. Corp., 34 N. Y. 497, where the Court of Appeals of New York says: "In those cases, according to the weight of authority in this state, notice to the owner or consignee of the arrival of goods, and a reasonable time and opportunity after notice to remove them, would come in lieu of personal delivery, so far as to change the strict liability of the carrier to that of a warehouseman." See, also, 2 Parsons on Cont. (5th Ed.) 189; Ang. on Carriers, § 313; Chitley on Carriers, 90; Pinney v. Railroad, 19 Minn. 251 (Gil. 211); Railroad v. Fuqua & Horton, 84 Miss. 490, 36 So. 449; Railroad v. Hatch, 52 Ohio St. 408, 39 N. E. 1042. In the states of Alabama, California, Tennessee, and Texas the law is made to practically conform to this latter view by statute, as shown by adjudication of the courts. Collins v. Railroad, 104 Ala. 390, 16 So. 140; Wilson v. Railroad, 94 Cal. 166, 29 P. 861, 17 L. R. A. 685; Railroad

[17] Although no notice was given in the case of Moses v. Boston & M. Ry. Co., 32 N. H. 523, 64 Am. Dec. 381 (1856), the Supreme Court of New Hampshire in the subsequent case of Welch v. Concord Railroad, 68 N. H. 206, 44 A. 304 (1895), announced the rule as follows: "The defendants are not liable as common carriers. Their duties as such terminated when the goods reached their destination, after notice to the plaintiffs that they were ready to be delivered, and a reasonable opportunity for examination and removal by them. Moses v. Railroad, 32 N. H. 523 [64 Am. Dec. 381 (1856)]." However, many courts have adopted the view that although the carrier remains an insurer of freight for a reasonable time after arrival, notice is not necessary although it may be important in determining whether a reasonable time has elapsed. Berry v. West Va. & P. R. Co., 44 W. Va. 538, 30 S. E. 143, 67 Am. St. Rep. 781 (1898). But if the contract of shipment requires notice, the carrier remains an insurer for a reasonable time after notice is given. Leavenworth, L. & G. R. Co. v. Maris, 16 Kan. 333 (1876).

v. Naive, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443; Railroad v. Haynes, 72 Tex. 175, 10 S. W. 398.

Not only does the great weight of authority in this country sustain the view of Judge Cooley, but such is the English and Canadian law. Mitchell v. Railway Co., 10 L. R. Q. B. 256; Chapman v. Great Western R. Co., 5 Q. B. D. 278; Richardson v. Canadian Pac. Ry. Co., 10 Ont. Rep. 369. Mr. Hutchinson, referring to the English law on this subject, says: "No trace is there to be found of the distinction which has been made in this country in favor of railway companies as common carriers, which converts them into mere warehousemen, without notice to the consignee. Notice, it is there held, is necessary to effect this change of character and liability; and after such notice, if the consignee fails to call for the goods, the carrier becomes, as to them, a warehouseman merely. And it is to be gathered from the cases that it is the universal course of business there, with this class of carriers, either to deliver personally, or to send to the consignees what are there denominated 'advice notes,' informing them of the arrival of the goods, and that until this is done the company remains subject to the liability of a common carrier." 2 Hutchinson on Carriers, p. 792. See, also, 4 Elliott, p. 146, where the cases are collected, showing that most of the courts of this country follow the English precedents.

The rule subjecting common carriers to this strict responsibility as insurers is founded on broad principles of public policy and convenience, and, as said by Chancellor Kent, "it was introduced to prevent the necessity of going into circumstances impossible to be unraveled." 2 Kent, Com. 602. "It is a politic establishment," says Lord Chief Justice Holt in his celebrated judgment in Coggs v. Bernard, 2 Lord Raymond, 918, "contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust to these sort of persons, that they may be safe in their ways of dealings; for else the carrier might have opportunity of undoing all persons who had any dealings with him, by combining with thieves, etc., and yet doing it in such a clandestine way as would not be possible to be discovered." Of course, the danger from loss by collusion is not near so great in these days as in the semibarbarous times; but upon this point it is well said by the Supreme Court of New Hampshire, in Moses v. Boston & Maine R. R., 24 N. H. 71, 55 Am. Dec. 222, and again in 32 N. H. 523, 64 Am. Dec. 381: "The immense increase of the business, the great value of the commodities now necessarily intrusted to the charge of the common carriers, and the vast distances to which they are to be transported, have multiplied the difficulties of the owner who seeks to recover for the loss of his goods, and have greatly added to the opportunities and temptations of the carrier who might be disposed to neglect or violate his trust." The reasons upon which the rule is founded continue to apply in full force to railway companies as common carriers, and any relaxation of it must be attended only with mischief.

These reasons, founded on a sound public policy, require not only that the carrier shall be held as an insurer during transit, but until he has notified the consignee of the arrival of the goods at the point of destination, and until he shall have a reasonable time to effect their removal. The notice need not be served personally on the consignee. It is sufficient if deposited in the post office, addressed to him, as is provided in the regulations of the Corporation Commission, which provide: "Notice shall be given by delivering same in writing in person, or by leaving same at consignee's place of business or by depositing it in the post office." Rule 1. After service, or deposit of the notice, the consignee is allowed a reasonable time within which to take his goods away. If he fails to do so, the liability of the company as a common carrier terminates, and its less stringent liability as a warehouseman begins.

What length of time will be considered reasonable for the removal of the goods is a question not now presented. It may, however, be said that no fixed or definite rule can be laid down; but it must depend, in great measure, upon the circumstances of each case.[18] When the facts are undisputed, it becomes a question to be determined by the court, as one of law; but where they are disputed and unsettled the question must be submitted to a jury. Roth v. Railroad, 34 N. Y. 548, 90 Am. Dec. 736; Lemke v. Railroad, 39 Wis. 449. Hutchinson on Carriers, p. 796, and cases cited in note. We do not think that this question was presented, or has heretofore been determined by this court, in the case of Alexander v. Railroad, 144 N. C. 98, 56 S. E. 697, or by any other case that has been called to our attention, or that we have been able to find. * * *

The ruling of the superior court is affirmed.[19]

[18] As to what is a reasonable time, see and compare Fisher v. Northern Pac. R. Co., 49 Wash. 258, 94 P. 1073, 126 Am. St. Rep. 867 (1908); North Yakima Brewing & Malting Co. v. Northern Pac. R. Co., 49 Wash. 375, 95 P. 486, 16 L. R. A. (N. S.) 935 (1908); United Fruit Co. v. New York & B. Transp. Co., 104 Md. 567, 65 A. 415, 10 Ann. Cas. 437 (1906); and notes in 8 L. R. A. (N. S.) 240; 16 L. R. A. (N. S.) 935; 25 L. R. A. (N. S.) 938.

[19] The rule announced in the principal case has been adopted in most of the states. See note, 7 Mich. Law Rev. 330. For a collection of cases, see note in 18 L. R. A. (N. S.) 427. But the requirement of notice may be dispensed with by agreement. Rosenstein v. Vogemann, 184 N. Y. 325, 77 N. E. 625, 6 Ann. Cas. 13 (1906). Furthermore, if because of the absence of the consignee, or lack of address, or other circumstances, it is impossible to give notice, the liability as insurer will terminate after a reasonable time, although no notice is given. Pelton v. Rensselaer & Saratoga R. R. Co., 54 N. Y. 214, 13 Am. Rep. 568 (1873), and cases cited in note, 26 L. R. A. (N. S.) 572. But the carrier must exercise due diligence to find the consignee. Zinn et al. v. New Jersey Steamboat Co., 49 N. Y. 442, 10 Am. Rep. 402 (1872).

MISSOURI PAC. RY. CO. v. CHICAGO & A. RY. CO.

(Circuit Court of the United States, E. D. Missouri, 1885. 25 F. 317.)

Suit for the value of a number of cars delivered in good order, loaded with grain, by plaintiff to defendant, for transportation over the latter's road. The answer states as a defense that the cars were destroyed by fire without the defendant's fault after they were delivered to the consignee.

TREAT, J.[20] It appears that the course of through traffic among railroads requires each to receive cars owned by other than the transporting road, and forward the same; and accepting the general principle stated in Peoria & P. U. Ry. Co. v. Chicago, R. I. & P. Ry. Co., 109 Ill. 135, 50 Am. Rep. 605, that each road, as to said cars by it so received and forwarded to the next road, is under the obligations of a common carrier, the case before the court shows that there were 10 cars to be delivered to the Advance elevator, and received by the defendant for that purpose. Six of these were actually delivered, and were in possession of said elevator. Four of said ten, still in actual possession of the defendant, had been tendered to said elevator, and remained in the custody of the defendant from the inability of the elevator to receive the same when so tendered. All of these cars were destroyed by fire without any fault of the defendant.

As to the six cars actually delivered and so destroyed there evidently can be no recovery. The duties of the defendant as to the other four of said cars were simply those of a warehouseman. When a common carrier transports merchandise and delivers the same to the consignee, its obligations with respect thereto are at an end. If, however, the same are tendered to him, and through no fault of the carrier he does not or will not receive the same, the carrier can cause the same to be stored at the risk of the consignee, or retain the possession of the same simply as a warehouseman. Were this not so, the through traffic from one part to the other of this vast country would compel not only the breaking up but stoppage of trains, if at the intermediate points of delivery the consignee failed or refused to receive consignments. * * *

In this case, as already stated, there can be no recovery as to the 10 cars shipped to the Advance elevator.[21] * * *

[20] Parts of the opinion are omitted.

[21] If the consignee fails or refuses to accept delivery, it is the duty of the carrier to notify the consignor, if practicable, Alabama Great So. R. Co. v. McKenzie, 139 Ga. 410, 77 S. E. 647, 45 L. R. A. (N. S.) 18 (1913); unless authorized by statute to do otherwise. See Leech v. New York, N. H. & H. R. Co., 40 Misc. Rep. 654, 83 N. Y. S. 166 (1903). But notice to the consignor is not necessary to terminate the carrier's liability as insurer. Keystone Pub. Co. v. Penn. R. Co., 78 Pa. Super. Ct. 486 (1922). Concerning the privilege of the carrier to dispose of goods refused by the consignee, see note in 45 L. R. A. (N. S.) 18.

CHICAGO, M. & ST. P. RY. CO. v. KELM.

(Supreme Court of Minnesota, 1913. 121 Minn. 343, 141 N. W. 295, 44 L. R. A. [N. S.] 995.)

TAYLOR, C.[22] Plaintiff brought suit to recover its freight charges for transporting two car loads of hay for defendant in the year 1911. Defendant admitted plaintiff's cause of action, and interposed a counterclaim for damages to a car load of hay shipped by him in the year 1910. The trial court found that defendant was not entitled to recover upon his counterclaim, and rendered judgment in favor of plaintiff for its freight charges. Defendant appealed from the judgment, and contends that the trial court erred in not allowing the counterclaim.

The facts stated briefly are as follows: Plaintiff has a line of railway extending from Kansas City, Mo., to Stillwater, Minn., at which place it has a station, and industrial and other tracks. Defendant has a warehouse at Stillwater, located at some distance from plaintiff's tracks, but adjacent to an industrial track of the Northern Pacific Railway. Defendant shipped four car loads of hay from Kansas City to Stillwater over plaintiff's railway, and on the morning of July 5, 1910, plaintiff's local station agent at Stillwater notified him that the hay had arrived and asked him where he wanted the cars "spotted" for unloading. Defendant replied that he wanted them placed upon the track adjacent to his warehouse, and directed the agent to deliver them to the Northern Pacific Railway for the purpose of having that company place them at the point designated. Before noon on the 5th plaintiff delivered them to the Northern Pacific Company as directed, and on the same day they were transported by that company to the place designated by defendant, and there "spotted" ready for him to unload them. Defendant began unloading on the following day, the 6th, and unloaded three cars safely, but between 4 and 5 o'clock in the afternoon of the 6th the fourth car caught fire, and the hay therein was damaged by fire and water. It is not claimed that the fire or the damage resulted from any fault or negligence of plaintiff. * * *

Where a carrier transports bulky freight, in carload lots, to its destination, and, to enable the consignee to unload it conveniently, places the cars upon a track designated by the consignee for that purpose, or, if he has made no such designation, upon a track proper for that purpose, and he has notice thereof, it is held by several courts that the carrier has performed the last act required by its duty to the consignee, that the delivery is complete, and that the carrier's liability as carrier has terminated. P., C. & St. L. Ry. v. Nash, 43 Ind. 423; Pindell v. St. L. & H. Ry., 41 Mo. App. 84; Cohen v. M., K. & T. Ry., 126 Mo. App. 244, 102 S. W. 1029; C., R. I. & P. Ry. v. Kendall, 72 Ill. App. 105; Gregg v. I. C. Ry., 147 Ill. 550, 35 N. E. 343, 37

[22] Part of the opinion is omitted.

the car has been spotted it is a delivery.
In less than carload lots and is unloaded by R.R.
notice must be given and a reasonable time must
be given to move the goods and during that time

Am. St. Rep. 238; Paddock v. Toledo & O. C. Ry., 11 O. C. D. 789. See, also, Independence Mills v. B., C. R. & N. Ry., 72 Iowa, 535, 34 N. W. 320, 2 Am. St. Rep. 258, and S. & N. A. Ry. v. Wood, 66 Ala. 167, 41 Am. Rep. 749.

It is held by other courts that the liability of the carrier continues for such length of time after the cars are placed ready for unloading as is necessary to afford the consignee, proceeding with diligence, a reasonable opportunity to remove his goods.[23] Whether the carrier's liability as to bulky freight, shipped in car load lots, and to be unloaded by the consignee, terminated when the carrier, with the knowledge of the consignee, "spotted" the cars at the point designated by the consignee as the place where he desired to unload them, did not arise and was not considered in Derosia v. Winona & St. P. Ry., 18 Minn. 133 (Gil. 119), Pinney v. First Div. St. P. & P. Ry., 19 Minn. 251 (Gil. 211), or Kirk v. Chicago, St. P., M. & O. Ry., 59 Minn. 161, 60 N. W. 1084, 50 Am. St. Rep. 397, although the latter case suggested a distinction between bulky freight, usually unloaded by the consignee, and package freight, usually unloaded by the carrier and placed in its warehouse for future delivery.

In referring to the stringent rule of liability imposed upon carriers, it is said in Arthur v. St. P. & D. Ry., 38 Minn. 95, 35 N. W. 718: "The reason of the rule, in the language of Best, C. J., in Riley v. Horne, 5 Bing. 217, is that, 'when goods are delivered to a carrier, they are usually no longer under the eye of the owner. He seldom follows or sends any servant with them to their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves.'" And it is further said in the same case that this liability terminates, "whenever the care and custody of the property has passed from the carrier to the owner, or some bailee of his own choosing, or whenever the owner has, after its arrival at its destination, had a reasonable opportunity of taking the property into his own charge. The crucial test is whether, having proper regard to the principles upon which the carrier's liability rests, the property has so far passed out of the care and custody of the carrier or his servants, into that of the owner, that there is no longer any occasion, within the reason of the rule, for further holding the carrier to this strict liability. So long as the reasons continue, the liability should also continue; when they cease, it should cease."

[23] For cases supporting this view, see Missouri Pac. Ry. Co. v. Wichita Wholesale Grocery Co., 55 Kan. 525, 40 P. 899 (1895); Eagle v. White, 6 Whart. (Pa.) 505, 37 Am. Dec. 434 (1841). The same rule was applied to a water carrier in Scheu v. Benedict, 116 N. Y. 510, 22 N. E. 1073, 15 Am. St. Rep. 426 (1889). For a further collection of cases, see notes, 97 Am. St. Rep. 89 and 40 L. R. A. (N. S.) 773.

In Naas v. Chicago, Rock Island & Pacific Ry., 96 Minn. 84, 104 N. W. 717, the trial court charged the jury, in effect, that, from the time the consignee had notice that the car was placed upon a proper unloading track ready for him to unload, the company was relieved from liability. A verdict was returned for the company, and on motion of the plaintiff a new trial was granted by the trial court. On appeal this court reversed the order granting a new trial, and directed judgment for the company. This decision necessarily held that the above instruction was correct, and that the liability of the carrier terminated when the car was placed upon a proper unloading track and the consignee had knowledge of that fact.

As defendant's four car loads of hay had been placed at the point designated by him, for his convenience in unloading them, and the possession of the hay had been turned over to and taken by him for the purpose of removing it, and he had actually begun such removal, so that the final act required of the plaintiff in the performance of its duty had been completed before the fire, plaintiff's absolute liability as carrier had terminated, and it was liable for the subsequent damage to the property only in case such damage resulted from its negligence. In this case it is not claimed that the damage to the hay resulted from any negligence on the part of plaintiff. * * *

The judgment appealed from is affirmed.[24]

MICHIGAN CENT. R. CO. v. MARK OWEN & CO.

(Supreme Court of the United States, 1921. 256 U. S. 427, 41 S. Ct. 554, 65 L. Ed. 1032.)

Mr. Justice McKENNA[25] delivered the opinion of the Court.

Action in the municipal court of Chicago for damages for loss on several shipments of grapes, four car lots, shipped in sound and merchantable condition.

On receipt of the shipments bills of lading were issued. The total loss is alleged to have been 126 baskets of grapes of the value of $23.30. The municipal court found against plaintiff (respondent here, and it will be so referred to). The judgment was reversed by the Appellate Court, First District, of the state, and judgment awarded respondent which was affirmed by the Supreme Court of the state, to which an appeal was granted because the court of appeals considered that the case involved questions of importance "on account of principal and collateral interests" which should be passed upon by the Supreme Court.

Our review is concerned with questions of law; the facts are undisputed. It is stipulated that the cars were transported by the railroad

[24] Concerning the liability of a carrier after cars have been placed on a delivery track and the consignee notified, see cases collected in notes, 97 Am. St. Rep. 89 and 40 L. R. A. (N. S.) 773.

[25] The dissenting opinion of McReynolds, J., is omitted.

company from their respective points of origin to Chicago, arriving there at different days and times of the days. Upon the arrival of each car it was placed on a public delivery track of the railroad company and notice thereof given. Respondent accepted each car, breaking the seals thereof; and it is stipulated that at the time respondent started to unload, each of the cars contained the number of baskets and pounds of grapes received for transportation. The loss, whatever there was, occurred after the acceptance of the cars and their unloading had commenced, and whether the railroad company is liable therefor, and in what capacity liable—whether as carrier, or warehouseman, or at all —is the question in the case.

The answer depends upon the construction to be given to the first paragraph of section 5 of the bill of lading. It is as follows:

"Property not removed by the party entitled to receive it, within 48 hours exclusive of legal holidays, after notice of its arrival has been duly sent or given, may be kept in car, depot, or place of delivery of the carrier subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner, and there held at owner's risk and without liability on the part of the carrier and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage."

Regarding the words of the section merely, they are clear enough, and present no "double sense." But controversies have arisen and judicial judgments have divided upon them. The point of the controversies has been, and is, as to the relation of the carrier to a shipment within 48 hours after notice of its arrival has been duly sent or given, and the contentions upon the point are in sharp antagonism. That of respondent is that the railroad company during the 48 hours is responsible as a carrier, this relation not terminating until the expiration of that time. The contention of the railroad company is contra, and that it, the company, is neither liable as a carrier or warehouseman. Not as carrier because the shipment had been delivered and accepted—not as warehouseman because no negligence has been proved against it. The Supreme Court decided against the contentions of the railroad company and held it liable for loss on all of the shipments. As to three of them we may say immediately, in disposition of them, respondent withdraws any claim on account of them, and confines the issue to one car which was undoubtedly unloaded within 48 hours of the notice of its arrival. There is question of the other cars.

The importance of the issue, however, still remains, although it is concerned with only 31 baskets of grapes, of the value of $8.68, and the difficulty of its determination is indicated by the fact of the diversity of judicial reasoning upon a like issue in other cases. And counsel have been at pains to set the cases in opposition with approving or disapproving comment of their own.

Read v. Bean 149 NC. 423.

The differences of the cases cannot be reconciled and a review of them for the purpose of selection would manifestly extend this opinion to a great length. Their outside principle is simple enough; the bill of lading is a contract between the transportation company and him who is interested in the shipment, and legal when within the policy and edicts of the law regulating that relation.[26]

By recurring to section 5 of the bill of lading, it will be seen that it supposes a contingency and provides for its occurrence. It supposes that property may not be removed when it has reached destination, and is available for delivery, and two periods of time are provided for. One of 48 hours after notice of the arrival of the property has been sent or given. During this time there is no declaration of the relation of the railroad company to the property. The other period commences at the expiration of the first or 48-hour period, during which the provision is that the property is subject "to carrier's responsibility as warehouseman only." The comparison has its significance and must be accounted for. Realizing this, the railroad company makes a distinction. Its contention is that where delivery has been made of the property as, it insists was true, in the case at bar, the responsibility of the railroad company as carrier immediately ceases. If, however, it is neither delivered nor removed within 48 hours after notice of its arrival, the responsibility of the railroad company thereafter is that of "warehouseman only."

To the distinction and the contention based upon it, the Supreme Court of the state answered that the bill of lading provides for property "not removed"—not to property "delivered" or "not delivered," and it must be taken at its word.

The answer puts too much emphasis upon the distinction between property removed and property delivered. The property here was not delivered; access was only given to it that it might be removed, and 48 hours were given for the purpose. Pending that time it was within the custody of the railroad company, the company having the same relation to it that the company acquired by its receipt and had during its transportation.

The bill of lading is definite, as we have pointed out, in its provisions and of the time at which responsibility of the company shall be that of warehouseman, and by necessary implication, therefore, until that responsibility attaches, that of carrier exists.

[26] Texas & Pacific Ry. Co. v. Reiss, 183 U. S. 621, 22 S. Ct. 253, 46 L. Ed. 358 (1902); Kansas City Southern Ry. Co. v. Carl, 227 U. S. 639, 33 S. Ct. 391, 57 L. Ed. 683 (1913); G., F. & A. Ry. Co. v. Blish Milling Co., 241 U. S. 190, 36 S. Ct. 541, 60 L. Ed. 948 (1916); St. L., I. M. & S. R. Co. v. Starbird, 243 U. S. 592, 37 S. Ct. 462, 61 L. Ed. 917 (1917); M., K. & T. Ry. Co. v. Ward, 244 U. S. 383, 37 S. Ct. 617, 61 L. Ed. 1213 (1917); Southern Ry. Co. v. Prescott, 240 U. S. 632, 36 S. Ct. 469, 60 L. Ed. 836 (1916); Erie Railroad Co. v. Shuart & Sons, 250 U. S. 465, 39 S. Ct. 519, 63 L. Ed. 1088 (1919).—[Footnote by the Court.]

All the elements of the case considered and assigned their persuasive force, we think the judgment of the Supreme Court should be and it is Affirmed.[27]

ROTUNDO v. ERIE R. CO.

(Supreme Court of New York, Appellate Term, First Department, 1923. 120 Misc. Rep. 461, 198 N. Y. S. 688.)

LEHMAN, J. The plaintiff is the consignee of goods shipped on the defendant railway. The car containing the plaintiff's goods arrived in New York at noon on Thursday, October 20, 1921. Notice of such arrival was mailed to the plaintiff at 5 p. m. Friday, October 21st, and was received by the plaintiff on Saturday afternoon. On Monday morning the plaintiff started to unload the car, and he claims that he did not unload the entire contents of the car that day. In the afternoon of the same day the plaintiff placed his own lock on the car and arranged with an employee of the defendant that he should have opportunity to complete the unloading the next day, upon payment of storage charges. There is evidence that, when plaintiff returned the next morning, he found that some of his goods had been stolen from the car, and the plaintiff has recovered a judgment for the value of the goods alleged to be missing.

The bill of lading contains a clause that "property not removed by the party entitled to receive it within 48 hours, exclusive of legal holidays, after notice of its arrival has been duly sent or given, may be kept in car, * * * subject to reasonable charge for storage and to carrier's responsibility as warehouseman only."

If the goods at the time they were stolen were in the possession of the defendant, subject to the defendant's responsibility as carrier, then the defendant is liable for their loss; but, if they were held by defendant subject only to responsibility as warehouseman, the evidence is insufficient to show any negligence on the defendant's part which would make it liable for their loss. Concededly more than 48 hours had passed since the notice of arrival was properly mailed to the plaintiff; but the plaintiff claims that the 48 hours after which the goods under the terms of the bill of lading were to be held subject to the

[27] Under the provisions of section 5 of the Uniform Bill of Lading, property destined to a station at which there is no regularly appointed agent is at the risk of the owner after unloaded from cars, or when delivered on private or other sidings, after the cars are detached from the train. This section has been interpreted to relieve the railroad from liability both as carrier and warehouseman where a car is left at a nonagency station, although no notice was given the consignee. Alabama Fuel & Iron Co. v. Williams, 207 Ala. 99, 91 So. 879 (1921). But in Annese v. Baltimore & O. R. Co., 87 W. Va. 588, 105 S. E. 807, 22 A. L. R. 869 (1921), it was held that, notwithstanding the provisions of section 5, the carrier was responsible for damage to goods caused by the negligence of the carrier in unloading at a nonagency station. For a further collection of cases, see note in 22 A. L. R. 878.

"carrier's responsibility as warehouseman only" began to run only from the time when the notice was received. This construction of the bill of lading seems to me erroneous and contrary to its unambiguous terms. The notice was "sent" on Friday afternoon, when it was mailed, and, if it was intended that it should take effect only from the time when it was received, the words "or given" in the bill of lading would be meaningless. At that time the goods were waiting delivery, and the consignee could have obtained them on proper application, and the railroad company is not responsible for the fact that the plaintiff for some reason received the notice only in the afternoon of the following day, too late to enable him to go to the bank to draw the money to pay the defendant's charges.

The cases cited by the plaintiff are not authority for any other construction, for in the case of Hunt v. New York Cent. R. Co. (Sup.) 173 N. Y. S. 465, the notice which was mailed was not addressed properly, and therefore was not "duly" sent, and under the terms of the bill of lading the responsibility of the railway company as carrier continued until 48 hours after the time when notice was "given" in other form; and in the case of McKinney v. Jewett, 90 N. Y. 267, it appeared affirmatively that the goods were not waiting delivery, but, on the contrary, that delivery was refused.

The plaintiff's claim that in any event the evidence shows that the defendant was negligent in failing to mail a notice before 5 o'clock on Friday evening, though the goods arrived in New York on Thursday at 12:55 p. m., needs no serious consideration, for, even if negligence could be inferred from such delay, and even if we assume that this question was properly raised at the trial, it is evident that such negligence would not be a proximate cause of a loss by theft the following week.

It follows that the judgment must be reversed, and a new trial ordered, with $30 costs to appellant to abide the event. All concur.[28]

BARNETT v. MINNEAPOLIS & ST. L. R. CO.

(Supreme Court of Minnesota, 1913. 123 Minn. 153, 143 N. W. 263, 48 L. R. A. [N. S.] 262.)

HALLAM, J. Plaintiff claims to have suffered injury from being obliged to sit in a cold station at Mason City, Iowa, for many hours during a night in February while waiting for a train.

1. We entertain no doubt that a railroad company carrying passengers

[28] In Keystone Pub. Co. v. Pennsylvania R. Co., 78 Pa. Super. Ct. 486 (1922), it was held that, in order to relieve the carrier of its insurer's liability, it was not necessary to notify the shipper, where notice had been sent to the consignee, although the consignee could not be located. As to the carrier's duty to notify the consignor when delivery to the consignee cannot be made, see Alabama Great So. R. Co. v. McKenzie, 139 Ga. 410, 77 S. E. 647 (1913), and note in 45 L. R. A. (N. S.) 18.

In respect to Passengers — R.R. must keep the station comfortable.

is obliged to reasonably heat its stations in winter time for the accommodation of passengers. It is clear that this station was not so heated. But defendant is not obliged to provide a heated room for the accommodation of persons not passengers. The first question, then is, was plaintiff a passenger during the time he was in the depot? [29]

2. On the day before, plaintiff was at Union, Iowa. He was desirous of going to Kilkenny, Minnesota. Defendant's line of road runs between these points. He asked the station agent at Union to sell him a ticket to Kilkenny, expecting to take a designated through train. The agent told him that the through train mentioned did not stop at Union; that it did stop at Mason City. He told plaintiff he would sell him a ticket to Mason City; that he could take a local train to Mason City and there buy a ticket and take the through train for Kilkenny. Plaintiff accordingly purchased a ticket to Mason City. On arriving there, about 10 p. m., he asked the agent for a ticket to Kilkenny for a train due to leave at 3:55 a. m. The agent told him to come and buy it later, stating that the station would be open all night. Plaintiff left the depot, and at about 11:30 came back. He then remained in the station until the train came. There was no fire in the station. He bought his ticket about 3 a. m.

Plaintiff was not a through passenger from Union to Kilkenny. The agent at Union did not sell him a through ticket, and for a justifiable reason. Plaintiff's intention to take another train from Mason City to Kilkenny did not, under the circumstances, make him a through

[29] While a carrier of passengers is not an insurer of the passenger's safety, Louisville & N. R. Co. v. Compiretto, 137 Miss. 766, 102 So. 837 (1925), there are certain duties imposed upon the carrier in favor of passengers as distinguished from mere licensees and invitees; e. g., the duty to protect the passenger against assaults, Yellow Cab Co. of Atlanta v. Carmichael, 33 Ga. App. 364, 126 S. E. 269 (1925); Culbreth v. Pullman Co. (D. C.) 293 F. 402 (1923); or insults, Louisville & N. R. Co. v. Robinson, 213 Ala. 522, 105 So. 874 (1925), and, according to many cases, the duty to exercise a high degree of care for the passenger's safety, Seaboard Air Line Ry. Co. v. Mobley, 194 Ala. 211, 69 So. 614 (1915); Brown v. L. & N. R. R. (Ky.) 53 S. W. 1041 (1899); Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898 (1876). But compare Kelly v. International Ry. Co., 214 App. Div. 652, 212 N. Y. S. 309 (1925). Furthermore, in an action by a passenger against a carrier to recover for injuries alleged to have been caused by the carrier's negligence, the rule of res ipsa loquitur is frequently available to the passenger in proving negligence under circumstances when it would not be available to an invitee or licensee. Plumb v. Richmond Light & R. Co., 233 N. Y. 285, 135 N. E. 504, 25 A. L. R. 685 (1922); Coblentz v. Jaloff, 115 Or. 656, 239 P. 825 (1925); Dieckmann v. C. & N. W. Ry. Co., 145 Iowa, 250, 121 N. W. 676, 31 L. R. A. (N. S.) 338, 139 Am. St. Rep. 420 (1909). See 22 Colum. Law Rev. 764. While in many cases the courts state as the reason for permitting a recovery that the plaintiff was a passenger, see Metcalf v. Yazoo & Mississippi Valley R. R. Co., 97 Miss. 455, 52 So. 355, 28 L. R. A. (N. S.) 311 (1910), when, in fact, the plaintiff could have recovered were he only an invitee, Sink v. Grand Trunk Western Ry. Co., 227 Mich. 21, 198 N. W. 238 (1924); Webb et al. v. West Jersey & S. S. R. Co. (N. J. Sup.) 126 A. 659 (1924), nevertheless there are situations where proof that the plaintiff was a passenger is essential to his right to recover, and therefore it is necessary to distinguish passengers from mere invitees and licensees.

passenger. The authorities bearing upon the rights of through passengers are accordingly not applicable.

3. We are of the opinion that he was not a passenger after his arrival at Mason City and before he bought his ticket there for Kilkenny. We do not mean that possession of a ticket is decisive of the relation of carrier and passenger. It is not. A man may have a railroad ticket and be upon railroad premises without being a passenger, Illinois C. R. Co. v. O'Keefe, 168 Ill. 115, 48 N. E. 294, 39 L. R. A. 148, 61 Am. St. Rep. 68; Johnson v. Boston & M. Railroad, 125 Mass. 75; Webster v. Fitchburg R. Co., 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521; Donovan v. Hartford St. Ry. Co., 65 Conn. 201, 32 A. 350, 29 L. R. A. 297; and he may be a passenger without a ticket, Illinois C. R. Co. v. Laloge, 113 Ky. 896, 69 S. W. 795, 24 Ky. Law Rep. 693, 62 L. R. A. 405; St. Louis, I. M. & S. Ry. Co. v. Laurence, 106 Ark. 544, 153 S. W. 799. He becomes a passenger when he puts himself into the care of the carrier to be transported, and is received and accepted as a passenger by the carrier. There is seldom any formal act of putting himself into the care of the carrier or of acceptance by the carrier. The existence of the relation of carrier and passenger is commonly to be implied from circumstances. A carrier holds itself out as ready to receive as passengers all persons who present themselves in a proper condition and in a proper manner and proper time and place to be carried. Webster v. Fitchburg R. Co., 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521; Illinois C. R. Co. v. O'Keefe, 168 Ill. 115, 48 N. E. 294, 39 L. R. A. 148, 61 Am. St. Rep. 68. Where a person with the bona fide intention of taking passage upon a train goes to the station within a reasonable time prior to the hour of departure of the train, and there, either by the purchase of a ticket, or in some other manner, indicates to the carrier his intention to take passage, from that time on, while waiting for the train, he is entitled to all the rights and privileges of a passenger. In such case the law implies his acceptance as a passenger. 2 Hutchinson, Carriers, § 1006; St. Louis, I. M. & S. Ry. Co. v. Laurence, 106 Ark. 544, 153 S. W. 799, 801; 4 Elliott, Railroads, § 1579; Fremont, E. & M. V. R. Co. v. Hagblad, 72 Neb. 773, 101 N. W. 1033, 106 N. W. 1041, 4 L. R. A. (N. S.) 254, 9 Ann. Cas. 1096; Chicago T. T. R. Co. v. Young, 118 Ill. App. 226; Radley v. Columbia Ry. Co., 44 Or. 332, 75 P. 212, 1 Ann. Cas. 447; Illinois C. R. Co. v. Laloge, 113 Ky. 896, 69 S. W. 795, 24 Ky. Law Rep. 696, 62 L. R. A. 405. But he is entitled to the privileges of a passenger only for a reasonable time before train time. Louisville, N. A. & C. Ry. Co. v. Treadway, 143 Ind. 689, 697, 40 N. E. 807, 41 N. E. 794; Alabama G. S. R. Co. v. Arnold, 84 Ala. 159, 168, 4 So. 359, 5 Am. St. Rep. 354.

No reasonable occasion or demand of travel could require or justify plaintiff's coming to this station at the time he did, Brown v. Georgia, C. & N. Ry. Co., 119 Ga. 88, 46 S. E. 71; Illinois C. R. Co. v. Laloge, 113 Ky. 896, 69 S. W. 795, 24 Ky. Law Rep. 693, 62 L. R. A.

405; Phillips v. Southern Ry. Co., 124 N. C. 123, 32 S. E. 388, 45 L. R. A. 163; Archer v. Union Pac. R. Co., 110 Mo. App. 349, 85 S. W. 934; see, also, Heinlein v. Boston & P. R. Co., 147 Mass. 136, 16 N. E. 698, 9 Am. St. Rep. 676; or in fact any time earlier than the time he purchased the ticket, which was about an hour before train time. A person is not a passenger all night because he intends to take a train the next morning, even though he asks to buy a ticket the night before, and even though he came the evening before from another station on the same road for the purpose of taking passage on that train.

4. The sale of a ticket to a passenger at a station, though not conclusive of the relation of carrier and passenger, will often fix the time when that relation begins. Johns v. Charlotte, C. & A. R. Co., 39 S. C. 162, 17 S. E. 698, 20 L. R. A. 520, 39 Am. St. Rep. 709. We think that under the circumstances disclosed in this case plaintiff became a passenger at the time of such sale, but not earlier.

5. It follows from what we have said that defendant did not owe plaintiff the highly exacting obligation of carrier to passenger prior to the time he purchased his ticket for Kilkenny. Defendant doubtless did owe him some duty as a licensee, Archer v. Union Pac. R. Co., 110 Mo. App. 349, 85 S. W. 934; but we cannot hold that this involved any duty to furnish him a warm room in which to spend the night. We are of the opinion that there can be no recovery predicated on injuries received prior to the time plaintiff purchased his ticket to Kilkenny.

6. The question whether plaintiff suffered any damage after he became a passenger, and before the train came, should have been submitted to the jury. The train was three hours late. A person who comes to a railroad station a reasonable time before train time and purchases a ticket is not entitled at all hazards to remain in the depot until the train arrives, if by doing so he is manifestly endangering his health and there is any other place he may reasonably go and avoid damage. But a passenger waiting for a delayed train may not always safely leave the station after the train is due. Ohio & M. Ry. Co. v. Allender, 59 Ill. App. 620; International & G. N. R. Co. v. Johnson, 43 Tex. Civ. App. 147, 95 S. W. 595. The question here is: What course does ordinary prudence require? It does not conclusively appear that common prudence dictated that plaintiff leave the station at any time after he in fact bought his ticket. This question should have been submitted to the jury.

If entitled to damages at all, he would be entitled to recover at least for the discomfort of being obliged to remain in a cold station for the period mentioned. We cannot say that this damage would be merely nominal.

A more important question, however, is the question whether plaintiff can in any event recover for the alleged illness that followed. In view of the fact that a new trial must be had, we deem it proper to make some reference to this question.

If plaintiff had come to the station at the time he bought his ticket, this question would give us no trouble. It would then be a question for the jury whether the subsequent exposure caused the illness that followed. The difficulty arises from the fact that the illness followed a period of exposure for the first part of which defendant was not responsible, and for the latter part of which a jury might find that defendant was responsible. We are of the opinion that the testimony in the record before us is insufficient to sustain a finding that the subsequent illness of plaintiff, or any part of it, was due to the exposure plaintiff suffered after the purchase of his ticket. But the case was not tried in the trial court, nor argued in this court, on the theory that any such showing was necessary, and we are unable to say that such a result is incapable of proof on another trial of the case.

Order reversed and new trial granted.[30]

DAVIS v. SOUTH SIDE EL. R. CO.

(Supreme Court of Illinois, 1920. 292 Ill. 378, 127 N. E. 66, 10 A. L. R. 254.)

Mr. Justice CARTER delivered the opinion of the court.

Appellee filed a statement of claim of the first class in the municipal court of Chicago against appellant for damages alleged to have been sustained through an accident from falling on the stairway lead-

[30] Cases containing a good discussion of when the relation of carrier and passenger begins and the liability incident thereto are Pere Marquette R. Co. v. Strange, 171 Ind. 160, 84 N. E. 819, 85 N. E. 1026, 20 L. R. A. (N. S.) 1041 (1908); Fremont, E. & M. V. R. Co. v. Hagblad, 72 Neb. 773, 101 N. W. 1033, 106 N. W. 1041, 4 L. R. A. (N. S.) 254, 9 Ann. Cas. 1096 (1904); Exton v. Central R. R. Co., 63 N. J. Law, 356, 46 A. 1099, 56 L. R. A. 508 (1899); Dieckmann v. Chicago & N. W. Ry. Co., 145 Iowa, 250, 121 N. W. 676, 31 L. R. A. (N. S.) 338, 139 Am. St. Rep. 420 (1909); Metcalf v. Yazoo & Miss. Valley R. R. Co., 97 Miss. 455, 52 So. 355, 28 L. R. A. (N. S.) 311 (1910). To avail one of the protection accorded passengers, one must enter the station or board the train at a proper place and in a proper manner. Webster v. Fitchburg R. Co., 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521 (1894); Ill. Cent. R. Co. v. O'Keefe, 168 Ill. 115, 48 N. E. 294, 39 L. R. A. 148, 61 Am. St. Rep. 68 (1897); Mo., K. & T. Ry. Co. of Texas v. Williams, 91 Tex. 255, 42 S. W. 855 (1897). Concerning the liability of a railroad company to prospective passengers while in a terminal station owned and operated by an independent third party, which the railroad is compelled by statute to use, see Hunt v. N. Y., N. H. & H. R. Co., 212 Mass. 102, 98 N. E. 787, 40 L. R. A. (N. S.) 778 (1912). As to when one taking passage on a street car becomes a passenger, see and compare Duchemin v. Boston Elevated R. Co., 186 Mass. 353, 71 N. E. 780, 66 L. R. A. 980, 104 Am. St. Rep. 580, 1 Ann. Cas. 603 (1904), and Chicago Union Traction Co. v. O'Brien, 219 Ill. 303, 76 N. E. 341 (1905). For a general discussion of the creation of the status of carrier and passenger, see Beale, "The Creation of the Relation of Carrier and Passenger," 19 Harv. Law Rev. 250. But compare the notes in 5 Colum. Law Rev. 53, and 28 Harv. Law Rev. 620. As to the liability of a carrier for injuries arising from the failure to heat waiting room, see 6 Mich. Law Rev. 150; concerning the carrier's duty to make a passenger comfortable, see Williams v. Baltimore & O. R. Co., 99 W. Va. 154, 128 S. E. 96 (1925).

ing from an elevated railway station in Chicago after leaving the train the evening of July 12, 1916. On the trial in the municipal court a judgment for damages of $100 and costs was rendered. On appeal to the Appellate Court this judgment was affirmed. That court granted a certificate of importance, and the case has been brought here by appeal.

The testimony in the record shows that appellee and her husband were returning from a visit to his mother's home in another part of the city on appellant's elevated railroad and had left the cars and passed through the Thirty-Fifth street station and reached the first landing on the stairs going to the street when she slipped on a banana skin and fell, striking her head and back. She had to be assisted in getting up and to her home and was confined to her bed for a time. There is considerable testimony in the record as to the nature and extent of the injury, which we do not think it necessary to refer to at length, in view of the conclusion that we have reached as to the legal questions involved.

The principal contention here is as to the correctness of an instruction given by the trial court in defining the care required of appellant in the maintenance and supervision of its stairway and landing. The instruction in question stated that "in the management and operation of elevated trains and the management and maintenance of the platforms and steps and landings leading to and from said trains for the use of passengers, it is the duty of common carriers to exercise the highest degree of care, skill and diligence for the safety of their passengers consistent with the mode of conveyance adopted and its practical operation."

We have not been favored with a brief and argument on behalf of appellee.

Counsel for appellant contend that as to station grounds, platforms and stairways leading to and from the stations only ordinary care is required on the part of appellant, and that the evidence in this case is insufficient, under proper rules of law, to sustain the verdict. Counsel for appellant concede that in the operation of its trains and the immediate incidents of passenger transportation the highest degree of care is required, but contend that the same degree is not required as to its station platforms and the approaches to and from said stations; that the only degree of care required as to these latter places is the degree of care that would be required, under the law, from the owner of an ordinary business house or concern with reference to its buildings and premises.

This precise question does not seem to have been definitely decided by this court. It has, however, been frequently discussed by text-writers and decided definitely in other jurisdictions. The decisions are not all in harmony, though the weight of authority seems to be that as to station buildings and other appurtenances only ordinary or reasonable care is required. In Knight v. Portland, S. & P. R. R.

Co., 56 Me. 234, 96 Am. Dec. 449, Fremont, E. & M. V. R. R. Co. v. Hagblad, 72 Neb. 773, 101 N. W. 1033, 106 N. W. 1041, 4 L. R. A. (N. S.) 254, 9 Ann. Cas. 1096, and Brackett v. Southern Railway Co., 88 S. C. 447, 70 S. E. 1026, Ann. Cas. 1912C, 1212, the courts stated that the highest degree of care is required on the part of a railroad company as to its station grounds, while Kelly v. Manhattan Railway Co., 112 N. Y. 443, 20 N. E. 383, 3 L. R. A. 74, Pennsylvania Co. v. Marion, 104 Ind. 239, 3 N. E. 874, Moreland v. Boston & Providence Railroad Co., 141 Mass. 31, 6 N. E. 225, Christie v. Chicago, Milwaukee & St. Paul Railway Co., 61 Minn. 161, 63 N. W. 482; Falls v. San Francisco & Northern Pacific Railroad Co., 97 Cal. 114, 31 P. 901, McCormick v. D., G. H. & M. Ry. Co., 141 Mich. 17, 104 N. W. 390, Hiatt v. Des Moines, N. & W. Ry. Co., 96 Iowa, 169, 64 N. W. 766, and Chicago, Rock Island & Pacific Railway Co. v. Owens, 118 Ark. 467, 177 S. W. 8, all hold that as to stations and other appurtenances only ordinary or reasonable care is required on the part of the owners.

"The duty respecting the construction and maintenance of station buildings is not so rigorous as that imposed upon railroad carriers in relation to roadbeds, tracks, cars, appliances and the like. Some of the cases seem to lose sight of the difference between the duty respecting station buildings and that respecting means and modes of conveyance, but the well-reasoned cases recognize the distinction and affirm that a railroad company that exercises ordinary care in constructing and maintaining station buildings and appurtenances in a reasonably safe condition for use is not guilty of negligence. There is really no valid reason why a railroad company should be held to a higher degree of care in maintaining its station buildings than that to which an individual owner of buildings used for ordinary business purposes is held. The reasoning of the cases which laid the foundation for the strict American doctrine as to the degree of care required of carriers using steam as a motive power cannot, it is obvious, have any application to buildings and structures prepared for the use of travelers." 4 Elliott on Railroads (2d Ed.) § 1590. See, to the same effect, 3 Thompson on Negligence (Ed. of 1902) § 2748; 2 Hutchinson on Carriers (3d Ed.) § 941; 6 Cyc. 605; 10 Corpus Juris, § 1341, and cases there cited. The rule is frequently laid down that the degree of care owed to the passenger is justly lessened to the extent of the lessening of the danger involved; that the care required should be commensurate with the danger involved. Taylor v. Pennsylvania Railroad Co. (C. C.) 50 F. 755. A lengthy review of the authorities is found in a note to St. Louis, Iron Mountain & Southern Railway Co. v. Woods (Ark.) 33 L. R. A. (N. S.) 855, and Johns v. Charlotte, C. & A. R. R. Co. (S. C.) 20 L. R. A. 520. "The degree of care is not fixed solely by the relation of carriers and passengers. It is measured by the consequences which may follow the want of care. A railroad company is held to the highest degree of care in respect to the condition and man-

agement of its engines and cars, because negligence in that respect involves extreme peril to passengers, against which they cannot protect themselves. It would not act reasonably if it did not exercise greater care in equipping and running its trains than in regard to the condition of its station grounds." Moreland v. Boston & Providence Railroad Co., supra, page 33 (6 N. E. 226).

This court has had occasion several times to rule on kindred questions. In Toledo, Wabash & Western Railway Co. v. Grush, 67 Ill. 262, 16 Am. Rep. 618, the court had under consideration a case where a passenger had been injured by a defect in the floor in the platform of the company which had existed for nearly two years before the accident, and the court said (page 264): "The obligation of care on the part of a railroad company extends to all the accessories of its business, among which are stations or depots. These must be constructed and arranged with care, properly lighted when dark and otherwise made safe and convenient for persons lawfully entering therein for the transaction of business. But in these as in other matters the company is only bound to use ordinary care, except in favor of passengers. Shearman & Redfield on Negligence, § 447." This statement of the court in that case, which was based on the rule as laid down by Shearman & Redfield on Negligence in the edition of that work then published, it is urged, justified the conclusion that the court held that more than ordinary care was required in such cases in favor of passengers. Expressions may be found in New York, Chicago & St. Louis Railroad Co. v. Blumenthal, 160 Ill. 40, 43 N. E. 809, Pennsylvania Co. v. McCaffrey, 173 Ill. 169, 50 N. E. 713, Chicago & Eastern Illinois Railroad Co. v. Jennings, 190 Ill. 478, 60 N. E. 818, 54 L. R. A. 827, and Lake Street Elevated Railroad Co. v. Burgess, 200 Ill. 628, 66 N. E. 215, which tend to support the same conclusion; but counsel for appellant argue that the facts in all of these cases were so very different from those in this case that they cannot be said to uphold the doctrine laid down by the instruction in question, that the care required of appellant for its station and stairways and approach to the station is the highest degree of care. It is true, as contended by counsel for appellant, that the recent edition of Shearman & Redfield on Negligence clearly does not uphold the doctrine as stated in the earlier edition. In volume 2 of that work (6th Ed.) § 501, it is stated: "The doctrine maintained by the greater number of cases and in most jurisdictions is that only reasonable or ordinary care is owing by the carrier to those using depots, station grounds, platforms and approaches when proposing to take passage and in waiting for trains or leaving them or when using stational facilities for their reasonable convenience and accommodation, whether at the beginning or end of the journey or at intermediate points. The duty owing to passengers in the use of stational facilities is often stated in absolute terms, as 'it is the duty of a carrier to provide reasonably safe depots, platforms and approaches for the use of passengers,' but in the same opinion or elsewhere by the

same court it will generally, but not invariably, appear that by this term, though absolute in form, only ordinary care, as distinguished from the highest care, is intended." See authorities there cited. This court also, on the reasoning in Chicago & Alton Railroad Co. v. Wilson, 63 Ill. 167, and Illinois Central Railroad Co. v. Keegan, 210 Ill. 150, 71 N. E. 321, seems to assume that the rule of law contended for by appellant is the correct one. In New York, Chicago & St. Louis Railroad Co. v. Blumenthal, supra, where a stockman was riding on a pass on a freight train and was injured while in the act of descending from the train, and in Pennsylvania Co. v. McCaffrey, supra, where a passenger was injured in alighting from a train at its destination, and in Chicago & Eastern Illinois Railroad Co. v. Jennings, supra, where it was held a passenger does not have to be actually on the train to be a passenger, also in Lake Street Elevated Railroad Co. v. Burgess, supra, where there was a similar holding—in all these cases it is clear that the accidents happened in boarding or alighting from trains or in the course of their moving, and the reason for the highest degree of care in those cases was fully as great as if the passenger were on the moving train, but it is clear by the great weight of authority, by the text-writers and decisions in other jurisdictions, that the same degree of care is not required as to the stations and approaches to and from them, because the danger incurred in such surroundings is not the same as it is on moving trains. In Chicago Terminal Transfer Railroad Co. v. Schmelling, 197 Ill. 619, at page 627, 64 N. E. 714, 716, where the railroad company had not provided a platform at the regular stopping place, the court said: "It was the duty of the plaintiff in error to provide a safe means of access to and from its station at Twenty-Sixth street for the use of its passengers, and the defendant in error had a right to assume that the place adopted for discharging its passengers at that point was safe."

There is reason and authority in support of the argument of counsel for the appellant that the same distinction should be made in the care required of a railroad when acting strictly as a carrier and the care required as to its station, depots and appurtenances as is made as to an ordinary business house with reference to the care in running its elevators and the care of floors and stairways and other of its premises. This court has held that a business house in the operation of its elevators is held to the same degree of care as any other carrier (Hartford Deposit Co. v. Sollitt, 172 Ill. 222, 50 N. E. 178, 64 Am. St. Rep. 35; O'Callaghan v. Dellwood Park Co., 242 Ill. 336, 89 N. E. 1005, 26 L. R. A. [N. S.] 1054, 134 Am. St. Rep. 331, 17 Ann. Cas. 407, and cases cited), but that in the maintenance and supervision of stairways on its premises a business house is only held to the exercise of reasonable and ordinary care (Pauckner v. Wakem, 231 Ill. 276, 83 N. E. 202, 14 L. R. A. [N. S.] 1118). See, also, Kaufman Department Stores v. Cranston, 258 F. 917, 169 C. C. A. 637. Anything that has been said in any former decision of this court which

might be thought to support the contrary conclusion is hereby overruled.

The court erred in giving the instruction as to degree of care required by appellant as to the stairway in question.[31]

[31] While it is often stated that one alighting from a train remains a passenger for a reasonable time while leaving the railroad platform and station, Powell v. Philadelphia & R. R. Co., 220 Pa. 638, 70 A. 268, 20 L. R. A. (N. S.) 1019 (1908); Glenn v. Lake Erie & W. R. Co., 165 Ind. 659, 75 N. E. 282, 2 L. R. A. (N. S.) 872, 112 Am. St. Rep. 255, 6 Ann. Cas. 1032 (1905), provided he leaves in a proper manner and at a proper place, Legge v. New York, N. H. & H. R. Co., 197 Mass. 88, 83 N. E. 367, 23 L. R. A. (N. S.) 633 (1908), the courts disagree as to the degree of care required of the carrier in keeping its platforms and stations in a safe condition. For the conflicting views, see and compare Pere Marquette R. Co. v. Strange, 171 Ind. 160, 84 N. E. 819, 85 N. E. 1026, 20 L. R. A. (N. S.) 1041 (1908); Fremont, E. & M. V. R. Co. v. Hagblad, 72 Neb. 773, 101 N. W. 1033, 106 N. W. 1041, 4 L. R. A. (N. S.) 254, 9 Ann. Cas. 1096 (1904); Exton v. Central R. R. Co., 63 N. J. Law, 356, 46 A. 1099, 56 L. R. A. 508 (1899); Dieckmann v. Chicago & N. W. R. Co., 145 Iowa, 250, 121 N. W. 676, 31 L. R. A. (N. S.) 338, 139 Am. St. Rep. 420 (1909). In jurisdictions taking the view expressed in the principal case, a passenger injured on the platform or in the station, due to a defective condition of the premises, stands in no better position than an invitee, since an invitee may recover from the carrier for injuries caused by the failure of the carrier to use due care to keep the premises safe. Sink v. Grand Trunk Western Ry. Co., 227 Mich. 21, 198 N. W. 238 (1924); Webb v. West Jersey & S. S. R. Co. (N. J. Sup.) 126 A. 659 (1924). In such jurisdictions, the fact that the plaintiff was a passenger, rather than an invitee, would be of importance only in cases where some special protection owed to passengers, and not owed to invitees, is involved. See and compare Brunswick & W. R. Co. v. Moore, 101 Ga. 684, 28 S. E. 1000 (1897), and Berryman v. Pennsylvania R. Co., 228 Pa. 621, 77 A. 1011, 30 L. R. A. (N. S.) 1049 (1910).

For a discussion of the status of a passenger temporarily leaving the cars (1) at a regular stopping place; (2) at a point not a regular stopping place; (3) for a purpose connected with the journey; (4) for a purpose not connected with the journey—see and compare Alabama G. S. Ry. Co. v. Coggins, 88 F. 455, 32 C. C. A. 1 (1898); Wandell v. Corbin, 49 Hun, 608, 1 N. Y. S. 795 (1888); Chicago, R. I. & P. R. Co. v. Sattler, 64 Neb. 636, 90 N. W. 649, 57 L. R. A. 890, 97 Am. St. Rep. 666 (1902); Payne v. Simmons, 201 Ky. 33, 255 S. W. 863, 33 A. L. R. 814 (1923); Moffitt v. Grand Rapids Ry. Co., 228 Mich. 349, 200 N. W. 274 (1924); Zeccardi v. Yonkers R. Co., 190 N. Y. 389, 83 N. E. 31, 17 L. R. A. (N. S.) 770 (1907); and cases in notes, 35 A. L. R. 757; 51 L. R. A. (N. S.) 899. Concerning the status of passengers leaving the cars on account of an abnormal suspension of the carriage, such as a wreck, see Turk v. Norfolk & W. R. Co., 75 W. Va. 623, 84 S. E. 569, L. R. A. 1915E, 145 (1915), and cases in L. R. A. 1915E, 145. As to when one leaving a street car ceases to be a passenger, see, for the various views, Mahoning & S. Ry. & Light Co. v. Leedy, 104 Ohio St. 487, 136 N. E. 198 (1922); Chattanooga Electric Railway v. Boddy, 105 Tenn. 666, 58 S. W. 646, 51 L. R. A. 885 (1900); Creamer v. West End Street Ry. Co., 156 Mass. 320, 31 N. E. 391, 16 L. R. A. 490, 32 Am. St. Rep. 456 (1892); Alabama Power Co. v. Hall, 212 Ala. 638, 103 So. 867 (1925); Trail v. Tulsa Street Ry. Co., 97 Okl. 19, 222 P. 950 (1924). For a further collection of cases, see 31 A. L. R. 572 and 16 L. R. A. (N. S.) 467.

Concerning the status of one transferring from one street car to another, see and compare Feldman v. Chicago Rys. Co., 289 Ill. 25, 124 N. E. 334, 6 A. L. R. 1291 (1919), and Virginia Ry. & Power Co. v. Dressler, 132 Va. 342, 111 S. E. 243, 22 A. L. R. 301 (1922). On this point see 20 Colum. Law Rev. 343; 18 Mich. Law Rev. 231; and cases collected in notes, 48 L. R. A. (N. S.) 683, and 22 A. L. R. 315.

Counsel for appellant further argue that the trial court, on the evidence in the record, should have given a peremptory instruction at the close of the case, as requested by the defendant, to find the defendant not guilty; that the trial court gave an instruction to the effect that "proof that plaintiff fell on the stairway or railway landing of defendant's station on account of the presence on the said stairway or stairway landing of a banana skin does not raise the presumption that the defendant was negligent," and that there was no evidence except a presumption so raised that justified finding appellant guilty of negligence, and that such finding was entirely in conflict with the rule of law in said instruction; that negligence cannot be predicated on the single fact that the banana skin was there at the time of the accident. In Goddard v. Boston & Maine Railroad Co., 179 Mass. 52, 60 N. E. 486, plaintiff sued for and recovered damages on account of such a fall at the railroad company's station at Boston. The evidence showed that the plaintiff was a passenger who had just alighted from the train and had gone a short distance from the car when he slipped on a banana skin and fell. The opinion said: "The banana skin upon which plaintiff stepped and which caused him to slip may have been dropped within a minute by one of the persons who was leaving the train. It is unnecessary to go further to decide the case"—and the court held the railroad not liable for the accident. De Velin v. Swanson (R. I.) 72 A. 388, was a case where it was held that the storekeeper was not liable for injuries to the plaintiff by slipping on a banana peel in his store, in the absence of evidence that defendant had notice that the peel was on the floor or that it had been there long enough to constitute implied notice, and that under those circumstances the trial court rightly directed a verdict for the defendant. To the same effect is Benson v. Manhattan Railway Co., 31 Misc. Rep. 723, 65 N. Y. S. 271. See, also, 10 Corpus Juris, § 1342.

The reasoning of this court in Heineke v. Chicago Railways Co., 279 Ill. 210, 116 N. E. 761, tends to support the same conclusion. On this record we think the instruction should have been given directing a verdict for appellant. If it had been shown that the banana skin had been permitted to be upon the stairway for a sufficient time that notice might be implied or actual knowledge were shown, that might have justified a verdict against the company under the rule requiring the exercise of ordinary care, but such actual or implied notice was not shown on this record.

The judgments of the municipal court and Appellate Court will be reversed and the cause remanded to the municipal court.

Reversed and remanded.

SECTION 5.—LIABILITY OF CONNECTING CARRIERS

FARLEY v. LAVARY.

(Court of Appeals of Kentucky, 1900. 107 Ky. 523, 54 S. W. 840, 47 L. R. A. 383.)

WHITE, J. This action was brought by appellee for damages for the destruction of certain household goods. The allegations of the petition are that appellant, doing business as the Farley Transfer Company, contracted, for hire, to carry these household goods from Lexington to Nicholasville, and that while the goods were in the possession of appellant they were destroyed by reason of the negligence of the servants and employés of appellant in charge of the wagon. It is alleged that appellant is engaged in the business of, and is, a common carrier. The damage claimed is $500. The answer denied that appellant was a common carrier at all; admitted a contract with appellee to haul by wagon her household goods from Lexington to Nicholasville, and admitted that while in transit certain of the goods were destroyed by fire, and other articles damaged, but denied that by reason thereof appellee was damaged to the extent of $500, or in any sum exceeding $250. The answer further pleaded that the destruction and damage to the goods by fire were without fault on his part, and denied that the fire was caused by the negligence of any of his servants. The issue was tried before a jury, who returned a verdict for $400 for appellee. Judgment was entered accordingly, and from that judgment this appeal is prosecuted.

The facts proven on the trial without material controversy are that appellant, doing business as the Farley Transfer Company, had a number of vehicles running in the city of Lexington, all duly and regularly licensed to haul for hire; that in such business he hauled for any and all persons, and goods and merchandise of all kinds; that he hauled in the city and about the city, to the fair grounds, and other places. There was no dispute as to the contract with appellee to haul the household goods, nor of the fact of damage. As the cause of the fire, there was some proof that the driver was smoking; and, unless the fire caught from his pipe or cigar, it is unexplained how it originated. The proof as to the amount of the loss is conflicting.

The court gave to the jury an instruction as follows: "If the jury believe from the evidence that the fire which damaged or destroyed the goods of the plaintiff was caused by the negligence or carelessness of the defendant's agents or employés in charge of the wagon upon which said goods were being carried, or if the jury believe from the evidence that the defendant at the time of said fire was a common carrier, and was conveying said goods as a common carrier, the jury should

find for the plaintiff." The court then defined a "common carrier," and also gave the counterpart of No. 1, and as to the measure of damages. Appellant seriously objects to instruction No. 1, quoted, and to its counterpart. Counsel insists that there was not sufficient proof of negligence of the employé in charge of the wagon to sustain a recovery on that ground, and also that there was no evidence that appellant was, as to these goods, and this contract with appellee, a common carrier. Counsel therefore insists that instruction No. 1, supra, was error, for which a reversal must be had.

The instruction is based upon two ideas; i. e. appellant is liable if the loss occurred by reason of negligence of his employé; appellant is liable if he was a common carrier. If from the evidence the court was authorized to submit to the jury the question of appellant being a common carrier, the question of negligence becomes unimportant. If appellant was a common carrier in carrying these goods, his liability stands admitted; for he nowhere pleads that the damage was caused by the act of God, the public enemy, or the inherent quality of the goods. We are of opinion that by the evidence of appellant himself it is shown that he was a common carrier within the limits of the city of Lexington. He admits that he hauled for all or any persons, and had obtained a license so to do. Being a common carrier, appellant could have been compelled to haul for appellee within the territory in which he was engaged, but she could not have compelled him to go outside his territorial limit. In this case, however, he contracted to go beyond his territory. Applying the facts to a railroad, we should say he agreed to go beyond the end of his line. It has repeatedly been held that, while a railroad cannot be compelled to accept and agree to carry goods to points beyond its line, yet it might do so. If the carrier contracted to convey beyond its line, it would be liable as a common carrier for the whole distance. In the case of Ireland v. Railroad Co. (Ky.) 49 S. W. 188, 453, this doctrine is well settled. In the dissenting opinion by Mr. Justice Burnam (Justice Du Relle concurring) this principle is admitted and emphasized; the dissent contending that beyond its line a carrier may, by special contract, make its liability less than at common law. It being clear by the proof that appellant was a common carrier, and agreed to carry these goods from some point in Lexington to Nicholasville, without any further contract, the liability of a common carrier attached the whole distance. The instruction given was therefore not error.

There appears to us no error in the record. The judgment is therefore affirmed, with damages.[32]

[32] Accord: Tuckerman v. Stephens & Condit Trans. Co., 32 N. J. Law, 320 (1867).

HOULE v. LEWONIS.

(Supreme Judicial Court of Massachusetts, 1923. 245 Mass. 254, 140 N. E. 427.)

DE COURCY, J.[33] The plaintiff's household furniture, while being transported in the defendant's truck from Brattleboro, Vt., to Easthampton, in this commonwealth, was damaged by fire soon after starting. The first count in the declaration, which alone went to the jury, was in contract, and alleged in substance that the defendant acted as a common carrier in the transaction. There was a verdict for the plaintiff. Exceptions were taken by the defendant to the judge's refusal to direct a verdict in his favor, or to give certain requested rulings, and to specified portions of the charge.[34]

The controlling issue in the case was whether the defendant was moving the plaintiff's furniture as a private carrier or as a common carrier. If the former, he would be liable only in case the damage to the furniture was due to the driver's negligence; but, if acting as a common carrier, his liability was practically that of an insurer. * * *

While a truckman or teamster who holds himself out as a common carrier will be liable as such, yet there may be limitations to the scope of his liability. Thus in Gurley v. Armstead, supra, it was recognized that the duty to receive and transport goods, and the corresponding absolute liability for damage while so doing, are limited to the truckman's facilities for the work. Other cases applying this limitation are Tunnel & Short v. Pettijohn, 2 Harr. (Del.) 48, 49; Thompson v. Matthews, 2 Ed. Ch. 212, 216, 217; Ocean Steamship Co. v. Savannah Supply Co., 131 Ga. 831, 63 S. E. 577, 20 L. R. A. (N. S.) 867, 127 Am. St. Rep. 265, 15 Ann. Cas. 1044. More pertinent to the present case is the limitation that a truckman, like any other common carrier, is subject to the duties of one only within the territorial limits to which he devotes his common service. Thus in Ney v. Haun, 131 Va. 557, 109 S. E. 438, 18 A. L. R. 1310, the defendant was licensed to carry goods in Bridgewater, but had not made a practice of trucking outside the town, although once before for the plaintiff's brother he had made a trip with his truck to Washington. The plaintiff engaged him

[33] Part of the opinion is omitted.

[34] Defendant's exceptions were to the refusal to order a verdict, to the refusal to give four requested rulings, to the charges inconsistent therewith, and to portions of the charge. The requested rulings were as follows:

"(1) That there is no evidence that the defendant was acting as a common carrier in this transaction.

"(2) Unless the defendant held himself out as ready to do moving jobs for all comers of the nature of that undertaken for the plaintiff, in the regular practice of his business, he was not a common carrier.

"(3) If defendant only undertook work of this kind occasionally for such as made a special bargain for such work, then he was not a common carrier with reference to this job.

"(4) The defendant is not liable unless the fire was caused by the negligence of himself or his employees."

to move his goods from Harrisonburg to Washington, and on the trip the goods were injured by the overturning of the truck. It was held not error to refuse a requested instruction of the plaintiff which rested upon a common carrier degree of liability. See, also, Georgia Life Insurance Co. v. Easter, 189 Ala. 472, 479, 66 So. 514; Piedmont Manuf. Co. v. Columbia & Greenfield Railroad, 19 S. C. 353, 370.

In the present case there was evidence from which the jury could find that the defendant held himself out as a common carrier in Easthampton, at least. * * * The evidence indicates that the truck was used mostly in delivering coal and wood in Easthampton. One Tanczar, who had operated it for three years, testified that the only trips he took out of town were two—one when he took the plaintiff to Brattleboro, and the other when moving him back in September, 1920. The plaintiff himself, who had worked for the defendant, did not testify that he knew of any long-distance trucking being done. The most that appears as to out of town trips at or about this period is the plaintiff's testimony (which was contradicted by the defendant) that Lewonis said: "He had done some long trips off in New York and that way." It does not appear whether such trips, if made, were made by the defendant as a common carrier, or under special contract, with a lesser degree of liability. In fact at first he declined to do this work because he did not have the necessary help, and undertook it only when the plaintiff agreed to accompany the driver.

Even assuming that the meager evidence warranted the trial judge in refusing to give the first request, the defendant was entitled to the second and third, which were directed to the distinction between a private and a common carrier. These were not given, in form or substance. On the contrary, the judge instructed the jury: "A railroad, a street railway, teamsters, truckmen and express companies are common carriers." And he called to their attention the fact that the defendant admittedly did a trucking business in Easthampton.

The natural inference to be drawn was that the defendant was a common carrier, as matter of law. And what was said with reference to his doing business outside of Easthampton failed to properly emphasize the important distinction between the nature and responsibility of a common carrier holding himself out to the public as doing such long-distance trucking in the ordinary course of his business, and that of a private carrier or bailee for hire doing this work by special agreement and under less stringent liability. Much was said about liability based on negligence of the defendant; but this was immaterial in view of the elimination of the second count. The defendant duly saved his rights by excepting to the refusal to give his second and third requests, and to specified portions of the charge which were inconsistent with those requested instructions. The errors were prejudicial, because the defendant's main contention was that he was not acting as a

common carrier in transporting the plaintiff's furniture from Brattleboro to Easthampton.

Exceptions sustained.[35]

PERKINS v. PORTLAND, S. & P. R. CO.

(Supreme Judicial Court of Maine, 1859. 47 Me. 573, 74 Am. Dec. 507.)

DAVIS, J.[36] This is an action against the defendants as common carriers, for the value of a quantity of furniture received by them for transportation. The goods were delivered to the station agent at Biddeford, who gave a receipt for them, of which the following is a copy.

"Office of P. S. & P. R. R. Biddeford, Me., Aug. 27, 1855. Received, in apparent good order, from Mrs. Sarah A. Perkins, 8 boxes, 4 chests, 11 packages furniture, marked E. Perkins, Bloomington, Ill., which we promise to deliver to Elisha Perkins in Bloomington, in like good order. J. S. Works, Station Agent."

The furniture was carried by the defendants to Portsmouth, and sent thence to Boston, by an arrangement between them and the Eastern Railroad Company, by which the two corporations mutually conduct their business. The defendants do not appear to have had any care, or to have exercised any control, directly or indirectly, over the property, after it was delivered in Boston. No freight was advanced, nor any rate or sum agreed upon. It was probably understood that the defendants were to receive their usual rates to Boston. From that place the furniture was forwarded from one point to another, by the different railroad or steamboat companies on the line, and, at the time of the loss, by collision, it was on board a steamer on Lake Michigan.

That Works was the general agent of the defendants, to contract for the transportation of freight and passengers from the Biddeford station, admits of no doubt. The only question, therefore, is whether the company were bound by his contract to deliver the goods in Bloomington, in the state of Illinois. Had any agent of the company any authority to make such a contract?

The defendants were incorporated in 1837, with authority to construct a railroad from Portland to Portsmouth, and to exercise their corporate powers "for the transportation of persons, goods, and property of all descriptions." And it is argued that the corporation being the creature of the law, with no powers but those conferred by law, its agents could not bind it by any contract to transport persons or property, except upon its own line of railroad; that the company had no authority to become common carriers on other routes, and in other

[35] Accord: Ney v. Haun, 131 Va. 557, 109 S. E. 438, 18 A. L. R. 1310 (1921). For a further collection of cases, see note, 18 A. L. R. 1310.

[36] The statement of facts and part of the opinion are omitted.

states, and that any agreement to do so, being beyond the scope of the corporate powers, was void.

The question is one of great practical importance, upon which there has been some diversity of opinion.

It is quite clear that a common carrier, if a natural person, may contract to carry persons or property beyond his own line, and thus make the carriers upon the connecting lines his agents. In such case he is responsible for any loss or injury upon any part of the route. Story on Bailments, § 558; 1 Parsons on Contracts, 687; Smith's Mer. Law, 367; Parsons' Mer. Law, 217.

Whether the same rule applies to corporations, chartered as common carriers upon lines designated in the statutes by which they are created, is not so clearly settled. In England, the law is well established, by a series of decisions, not only that the same rule applies to railway companies as to natural persons, but that, in either case, if a common carrier receives goods marked to be delivered at a place beyond the limits of his own line, he undertakes, prima facie, to carry the goods to their destination, and is bound to do so, unless he limits his responsibility by express agreement or notice at the time the goods are received. Muschamp v. L. & P. Railway Co., 8 Mees. & Wels. 421; Watson v. A. N. & B. Railway Co., 3 Eng. Law & Eq. 497; Wilson v. Y. N. & B. Railway Co., 18 Eng. Law & Eq. 557; Crouch v. L. & N. W. Railway Co., 25 Eng. Law & Eq. 287.

This doctrine has been denied in this country; and the rule has been held to be, when a railway company receives goods marked for delivery at a place situated beyond the line of their own road, that they are only bound, in the absence of any special contract, to transport and deliver them, according to the established usage of the business, to the carriers of the connecting line, to be forwarded to their ultimate destination. Nutting v. Conn. River R. R. Co., 1 Gray (Mass.) 502; Van Santvoord v. St. John, 6 Hill (N. Y.) 157; Bank v. C. Trans. Co., 18 Vt. 140; Id., 23 Vt. 209, 56 Am. Dec. 68; Jenneson v. C. & A. R. R. Co., 5 Clark (Pa.) 409.

In all these cases, it is decided or admitted that a railroad company may, by special contract, bind themselves to deliver merchandise at a place beyond the line of their own road, and that, in such case, they are bound as common carriers for the whole route, and can exonerate themselves only by a delivery at the place of destination. But in none of the English cases cited, except the last one, was any question raised in regard to the power of the company under their charter. In that case, though this point was presented, and the contract was to carry goods to a place beyond the realm, the company were held liable as common carriers, on the ground that they held themselves out to the public as common carriers to that place.

Nor was this question directly presented in any of the American cases before cited. But the point was raised in a later case, Noyes v. R. & B. Railroad Co., 27 Vt. 110, and it was held that a contract to send

When the goods have been delivered by the terminal carrier to consignee, then and the goods were in good condition, presumption is that goods remained in good condition until contrary is shown.

barges to a place, not on the line of their road, for a quantity of hay, and to transport it from that point over their road, was within the scope of the powers conferred by the charter, and that the company were bound by it. Redfield, C. J., the learned author of the treatise on Railways, in delivering the opinion of the court, says: "It may be true, in one sense, that this is extending the duties and powers of the company beyond the strictest interpretation of the words of the charter. But the time is now past, when, as between the company and strangers, any such literal interpretation of the charter is attempted to be adhered to."

In the case of Hood v. N. Y. & N. H. R. R. Co., 22 Conn. 502, it was held that a contract to carry a passenger from New Haven to Farmington on their railroad, and thence to Collinsville by stage, was not binding on the company, on the ground that the company had no authority, under their charter, to make a contract to carry a person beyond their own line. We are not aware that the doctrine has been carried to this extent in any other state.

Upon a careful survey of all the authorities, we are satisfied that a railroad company may be bound, by a special contract, to transport persons, or property, beyond the line of their own road. In granting the charter, all incidental powers, which are necessary to the proper and profitable exercise of those which are specially enumerated, may be presumed to be conferred by implication. The business of common carriers between different places is intimately interwoven, branching off into innumerable channels. And it is often of great public convenience, if not of absolute necessity, that several companies should combine their operations, and thus transport passengers and merchandise, by a mutual arrangement, over all their lines, upon one contract, for one price. In such cases, each is held liable for the whole distance. Fairchild v. Slocum, 19 Wend. (N. Y.) 329; F. & W. Railroad Co. v. Hanna, 6 Gray (Mass.) 539, 66 Am. Dec. 427.

And we think a company may be bound, even without any actual arrangement with the connecting lines, if, by their agents, they hold themselves out to the public as common carriers to a place beyond the limits of their own road. If such agents so represent the company to the public, in such a manner, or for such a length of time, that the corporators may be presumed to know it, and therefore, to assent to it, the company would be estopped from denying it. In the language of Redfield, C. J., in the case before cited, "if the corporators acquiesce in the extension of the business of the company, even beyond the strict limits of its charter, and strangers are thereby induced to contract, upon the faith of the authority of the agents of such company, the company are not at liberty to repudiate the authority of such agents, when their transactions prove disastrous." [37] * * *

[37] A contract by a carrier corporation to transport and deliver beyond its own line was held not to be ultra vires in Saunders v. Adams Express Co., 78 N. J. Law, 441, 74 A. 671 (1909); Buffett v. Troy & Boston R. R.

In N.C.
This so called presumption applies against all carriers. That any carrier by sued is liable unless he can prove he it didn't do it.

MULLIGAN v. ILLINOIS CENTRAL RY. CO.

(Supreme Court of Iowa, 1873. 36 Iowa, 181, 14 Am. Rep. 514.)

DAY, J.[38] The court instructed the jury as follows:

"If you find that defendant received the goods in controversy consigned and marked for New Orleans, then in the absence of any agreement, limiting its liability, it was bound to deliver the same at New Orleans, and if it failed so to do it would be liable in this action. But such liability may be changed by a special contract, and if defendant, at the time of receiving the goods, executed to plaintiff the receipts admitted in evidence, and plaintiff received the same knowing their contents, then defendant is not liable in this action."

The defendant excepted to this instruction, and now assigns the giving of the same as error.

This instruction embraces three propositions:

First. The liability incurred by a railroad company by the simple acceptance of goods consigned to a point beyond the terminus of its road.

Second. How this liability is affected by the delivery to, and acceptance by, the shipper, of a bill of lading, limiting liability to its own line of road.

Third. The effect of ignorance, upon the part of the shipper, of the conditions contained in the bill of lading accepted by him.

A discussion of these propositions will embrace the leading questions presented by this appeal.

I. As to the liability which a railroad company incurs by the mere acceptance of goods consigned to a point beyond the terminus of its road.

Upon this question there is a striking lack of uniformity in the decisions. There are three views which have been maintained by their respective advocates, with, perhaps, equal cogency of reasoning:

First. That where carriers receive and receipt for goods consigned to a point beyond the terminus of their road, without any special contract respecting the same, the agreement is one for transportation the whole distance, upon which the first carrier may be sued for a loss occurring after the goods have passed beyond the terminus of its road.

40 N. Y. 168 (1869); Wheeler v. San Francisco & A. R. R. Co., 31 Cal. 46, 89 Am. Dec. 147 (1866). In Ohio & M. Ry. Co. v. McCarthy, 96 U. S. 258, 24 L. Ed. 693 (1878), the Supreme Court declared that such a contract is not ultra vires, but that, even if it were, the carrier would be estopped. See, on the question of estoppel, 20 L. R. A. 765. But in Hood v. New York & N. H. R. Co., 22 Conn. 1 (1852), such a contract was declared to be ultra vires. For a collection of cases dealing with the liability of a carrier under a contract to transport and deliver beyond its own line, see notes, 74 Am. Dec. 512; 89 Am. Dec. 163; 31 L. R. A. (N. S.) 31. Concerning the liability of a railroad to passengers for injuries caused by the negligence of connecting carriers, see note, 17 Harv. Law Rev. 481.

[38] The statement of facts and part of the opinion are omitted.

The first case which has generally been cited as announcing this doctrine is Muschamp v. Lancaster R. R. Co., 8 M. & W. 421, decided in the Court of Exchequer in 1841, followed and re-enforced in Collins v. Bristol & Exeter R. R. Co., 11 Exch. 790, and extended even to goods booked beyond the limits of England. See, also, Illinois Central R. R. Co. v. Copeland, 24 Ill. 332, 76 Am. Dec. 749; Angle & Co. v. Mississippi & Missouri R. R. Co., 9 Iowa, 487.

Second. That where a carrier receives goods marked for a particular designation beyond the terminus of its line, and does not expressly undertake to deliver them at the point designated, the implied contract is only to transport over its own line, and forward, according to the usual course of business, from its terminus.[39] See McMillan et al. v. M. S. & N. I. R. Co., 16 Mich. 120, 93 Am. Dec. 208; Van Santvoord v. St. John, 6 Hill (N. Y.) 157; Farmers' & Mechanics' Bank v. Champlain Transportation Co., 23 Vt. 186, 56 Am. Dec. 68; Brintnall v. Saratoga & Whitehall R. Co., 32 Vt. 665; Hood v. N. Y. & New Haven R. R. Co., 22 Conn. 1, 502; Elmore v. Naugatuck R. Co., 23 Vt. 457, 63 Am. Dec. 143; Naugatuck R. R. Co. v. Waterbury Button Co., 24 Vt. 468; Nulting v. Conn River R. R. Co., 1 Gray (Mass.) 502; Burroughs v. Norwich & Worcester R. Co., 100 Mass. 26, 1 Am. Rep. 78; Darling v. R. R. Co., 11 Allen (Mass.) 295; Root v. Great Western R. R. Co., 45 N. Y. 524; Jenneson v. Camden & Amboy R. R. Co., 4 Am. Law Reg. 234; United States Express Co. v. Rush et al., 24 Ind. 403; Pennsylvania Central R. R. v. Schwarzenberger, 45 Pa. 208, 84 Am. Dec. 490; Rome R. R. Co. v. Sullivan, Cabot & Co., 25 Ga. 228.

Third. That the mere acceptance of goods by a common carrier marked to a designation beyond the terminus of its line as a matter of *law* imports no absolute undertaking upon the part of the carrier beyond the end of its road, but is a matter of evidence to be submitted to the jury, from which, in connection with other evidence produced, they are to determine, as a question of *fact*, the real engagement entered into.

[39] In Michigan Cent. R. Co. v. Myrick, 107 U. S. 102, 1 S. Ct. 425, 27 L. Ed. 325 (1882), the court declared: "A railroad company is a carrier of goods for the public, and as such is bound to carry safely whatever goods are intrusted to it for transportation, within the course of its business, to the end of its route, and there deposit them in a suitable place for their owners or consignees. If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier that of a forwarder by the connecting line; that is, to deliver safely the goods to such line—the next carrier on the route beyond. This forwarding duty arises from the obligation implied in taking the goods for the point beyond its own line. The common law imposes no greater duty than this. If more is expected from the company receiving the shipment there must be a special agreement for it. This is the doctrine of this court, although a different rule of liability is adopted in England and in some of the states." See, in accord, Michigan Cent. R. Co. v. Mineral Springs Mfg. Co., 16 Wall. 318, and note in 21 L. Ed. 297, 298 (1872).

This position was very ably maintained in a recent and elaborate opinion of the supreme court of New Hampshire, reviewing almost the whole current of decisions from Muschamp v. Lancaster Railway Co., 8 M. & W. 421, down to the present period. See Gray v. Jackson, 51 N. H. 9, 12 Am. Rep. 1. The question is not an open one in this state. In Angle v. M. M. Ry. Co., 9 Iowa, 487, the rule was settled as it is understood to exist in England, and it was held that the acceptance by a carrier of goods marked to a designation beyond the terminus of its road, creates a prima facie liability to transport to and deliver at that point, which may be modified by proof of a different usage known to the shipper at the time of making the consignment.

The court did not err, therefore, in the first branch of the foregoing instruction, as applied to the evidence introduced, there being no proof that plaintiff knew of a usage of the defendant not to transport freight beyond Cairo.[40]

SMITH et al. v. NEW YORK CENT. R. CO.

(Supreme Court of New York, 1864. 43 Barb. 225.)

JOHNSON, J.[41] The action was brought against the defendant as a common carrier, to recover damages alleged to have been done to the goods of the plaintiffs' assignee, while in the defendant's possession as such carrier, by carelessness and negligence. The plaintiffs, to maintain the action, proved the delivery of the property in good order to the Western Railroad Company, in Massachusetts, to be transported to R. Milliman in Rochester, New York; that the railroad of that company connected with the defendant's railroad at Albany; that the goods were delivered to Milliman at Rochester by the defendant's freight agent in a condition so damaged as to be entirely worthless. He also gave in evidence copies of entries in the defendant's books tending, in some degree, to show that the goods were received by the defendant at Albany from the Western Railroad Company. This evidence was uncontradicted. The plaintiffs were nonsuited.

I am of the opinion that the nonsuit was wrong, and should be set aside. The defendant's counsel insists that there was no evidence to show that the property was in a sound condition when it was received by the defendant. If this is so, the nonsuit was proper. The plaintiffs must of course give evidence sufficient to show that the goods were in good condition when they came to the possession of the carrier, as part of the evidence that they have been injured while in the carrier's custody. Merely showing a delivery by the carrier in an injured condition is not enough. It must be shown in what condition the carrier received them, in order to prove an injury in his hands. This may be

40 For a collection of cases announcing the various rules on this question, see notes, 72 Am. Dec. 230, 236; 31 L. R. A. (N. S.) 1.

41 The statement of facts and part of the opinion are omitted.

shown by direct affirmative evidence, or by proof of facts and circumstances from which the presumption of fact arises, that the goods were in proper condition when the carrier received them. Enough was, I think, proved in this case to raise such presumption. The property was placed in the possession of the Western Railroad Company in good order and condition, and until the contrary is shown, must be presumed to have continued in that condition while in the possession of that company. It was delivered by the defendant, after being transported over its road from Albany to Rochester, in a damaged condition; and the further presumption necessarily follows, that it received the injury while in the possession of the defendant.

The general rule is that things, once proved to have existed in a particular state, are to be presumed to have continued in that state until the contrary is established by evidence, either direct or presumptive. Best on Presumptions, § 136; Sleeper v. Van Middlesworth, 4 Denio (N. Y.) 431; Walrod v. Ball, 9 Barb. 271; Cooper v. Dedrick, 22 Barb. 516. Unless this rule is to be applied to goods delivered, to be transported over several connecting railroads, there would be no safety to the owner. It would often be impossible for him to prove at what point, or in the hands of which company, the injury happened. But give to such party the benefit of the presumption that the goods he has delivered in good order in such case continued so until they came to the possession of the company which delivers them at the place of destination in a damaged condition, and his rights will be completely protected. The burthen is then shifted upon the latter company of proving that such goods came to its possession in a damaged condition, by way of defense. This proof the latter company can always make, much more easily and readily than the converse can be proved by the owner. This is in perfect harmony with a well-settled rule of law, as an exception to the general rule.

The general rule undoubtedly is, that the burthen of proof is always upon the party who asserts the existence of any fact which infers legal responsibility. But the exception is equally well established, that in every case the onus probandi lies on the party who is interested to support his case by a particular fact which lies more particularly within his knowledge, or of which he must be supposed to be cognizant. If the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disapproved by that party. 1 Greenl. Ev. § 79; 1 Stark. Ev. 362–365; Wills on Circumstantial Ev. 183, 184. This applies in all civil cases. A familiar instance is, the action to recover the penalty for the violation of the excise law. And it applies also in criminal cases in weighing the evidence, after slight evidence has been given, sufficient to raise the presumption that the allegation is true, in the absence of any evidence to the contrary. In this case, and all cases of like nature, I think it is enough for the owner to show that he delivered the property to the connecting road in good condition, and that the burthen is then cast

upon the company delivering the goods injured of proving that they were not injured in their possession, or that they came to their possession thus injured. This evidence in almost every case is all that the owner can possibly give, inasmuch as he is not supposed to accompany his property in the transit. The defendant was unquestionably a common carrier in reference to this property, and subject to all the liabilities of such carrier to the plaintiffs, though it may have received it from the Western Railroad Company alone, and upon its undertaking to transport the property to Rochester.

The statute (2 R. S. 693 [5th Ed.] § 67) expressly makes any railroad company receiving freight for transportation subject to the same liabilities as common carriers. The liability attaches upon the receipt of the property for the purpose of being transported, and is to the owner of the freight. But this liability is for its own acts, or for injuries which such freight receives while it is in its custody for such purpose, and not for the acts of other companies which may have previously injured such freight. The plaintiffs' counsel seems to insist that, under section 67 of the statute above referred to, the defendant would be liable to the plaintiffs, even though the goods were injured while in the possession of the Western Railroad Company, and came to the possession of the defendant in the same injured condition in which it was delivered by the defendant at Rochester. But I do not think the statute was intended to create any such liability against any company except the one which first received and undertook to transport the freight. The language is, "whenever two or more railroads are connected together, any company owning either of said roads receiving freight to be transported to any place on the line of either of said roads so connected, shall be liable as common carriers for the delivery of such freight at such place." It is obvious, I think, that this was intended to apply only to the company originally receiving and undertaking to convey and deliver the freight.

In this respect the statute is only declaratory of the common-law obligation of the carrier making the contract. He undertakes for all the carriers intermediate the points of shipment and delivery. Burtis v. Buffalo & State Line R. R. Co., 24 N. Y. 269. But an intermediate carrier, who was not a party to the original undertaking, would, I apprehend, be liable only as an ordinary carrier, for loss or damage arising while the goods were in his possession as such carrier. This gives the owner his election, in case of loss or damage, to bring his action either against the carrier with whom the original undertaking was entered into, or against the particular carrier in whose hands the loss or injury has occurred. There can be no doubt, I suppose, that the latter is clearly liable for his own default, without any aid from the statute.

Courts may take judicial notice of whatever ought to be generally known, within the limits of their jurisdiction. 1 Greenl. Ev. § 6. This would, I think, include notice of the great lines of public travel and

transportation of property, and their connection with each other, and the general course of trade and transportation through the country. In a case like this the court would infer, without further proof than was given, a delivery of the property by the Western Railroad Company to the defendant to be transported by the latter, as carrier, to Rochester. I am clearly of the opinion, therefore, that enough was proved by the plaintiff to put the defendant upon its defense, and to authorize a recovery by the plaintiffs, as no counter evidence was given. If these views are correct, it follows that the nonsuit should be set aside and a new trial granted, with costs to abide the event.[42] * * *

MARQUETTE, H. & O. R. v. KIRKWOOD.

(Supreme Court of Michigan, 1880. 45 Mich. 51, 7 N. W. 209, 40 Am. Rep. 453.)

CAMPBELL, J.[43] Defendant in error sued plaintiff in error and recovered damages for breakage of two marble soda fountains, taken by the railroad agents at Marquette and carried, one to Negaunee, and one to Ishpeming. The fountains were packed in New York and

[42] The common-law rule announced in the principal case was approved by the Supreme Court of the United States in Chicago & N. W. Ry. Co. v. C. C. Whitnack Produce Co., 258 U. S. 369, 42 S. Ct. 328, 66 L. Ed. 665 (1922), and has been adopted by most of the state courts. Missouri Pac. R. Co. v. American Fruit Growers, 163 Ark. 318, 260 S. W. 39 (1924); American Fruit Growers v. Cleveland, C., C. & St. L. Ry. Co. (Mo. App.) 263 S. W. 488 (1924); Cote v. New York, N. H. & H. R. Co., 182 Mass. 290, 65 N. E. 400, 94 Am. St. Rep. 656 (1902); Colbath v. Bangor & Aroostook R. Co., 105 Me. 379, 74 A. 918, 134 Am. St. Rep. 569 (1909); Philadelphia, Balt. & Wash. R. Co. v. Diffendal, 109 Md. 494, 72 A. 193, 458 (1909); Blumenthal v. Central R. Co. of N. J., 88 N. J. Law, 254, 95 A. 973 (1915); Pennsylvania R. Co. v. Naive, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443 (1903); Willett v. Southern Ry. Co., 66 S. C. 477, 45 S. E. 93 (1903); Laughlin v. Chicago & Northwestern R. Co., 28 Wis. 204, 9 Am. Rep. 493 (1871). For a further collection of cases, see note, 31 L. R. A. (N. S.) 102. In Wichita Falls & N. W. Ry. Co. v. Benton, 66 Okl. 114, 167 P. 633 (1917), it was held that the presumption was equally applicable to shipments of live stock. In Cane Hill Cold Storage & Orchard Co. v. San Antonio & A. P. Ry. Co. (Tex. Civ. App.) 95 S. W. 751 (1906), it was declared that, when the terminal carrier has rebutted the presumption, a similar presumption arises against the next preceding carrier, and so on to the initial carrier. Furthermore, in case of a total nondelivery, it has been held that there is no presumption against the terminal carrier. Southern Express Co. v. Saks, 160 Ala. 621, 49 So. 392 (1909). But where part of the goods are delivered, there is a presumption that the remainder was lost by the terminal carrier. Ingram v. Davis, 131 S. C. 326, 125 S. E. 920 (1924); Oklahoma, N. M. & P. Ry. Co. v. H. M. S. Drilling Co., 100 Okl. 260, 229 P. 420 (1924); Northern Industrial Chemical Co. v. Director General of Railroads, 249 Mass. 246, 144 N. E. 64 (1924); Louisville & N. R. Co. v. Lynne, 196 Ala. 21, 71 So. 338 (1916); Faison v. Alabama & V. Ry. Co., 69 Miss. 569, 13 So. 37, 30 Am. St. Rep. 577 (1891). However, since the presumption against the terminal carrier is one solely for the convenience of the shipper or consignee, it has been held that it

[43] Part of the opinion is omitted.

forwarded by the New York Central Railroad, and by that company, as is claimed, turned over at Buffalo to the Lake Superior Transit Company, which is a connecting line. The transit company delivered the property at Marquette to the plaintiff in error, with which it had no business arrangements, but which was the proper carrier from Marquette to the destination of the articles. The boxes, which were marked to be handled with care, were then apparently sound except that a handle of one consisting of a strip of board was injured. Each box when opened at its destination was found to contain a fountain of which some of the marble was broken.

The testimony for plaintiff as well as that for defendant indicates that there was no appearance in either package which would indicate damages at any time, except the broken handle. There was no evidence of neglect on the part of the railroad company, and there was affirmative evidence to the contrary. It was conceded the railroad company has no means of inspecting the property. Under these circumstances the circuit court told the jury that if the goods were delivered in New York in good order to the first carrier they would have a right to infer that they continued so when received by defendant below, unless evidence was given which showed the contrary. * * * The case comes directly within the principle laid down by this court in M., H. & O. R. v. Langdon, 32 Mich. 251, where it was sought to hold these same parties responsible for delivering hay in a damaged condition, by showing that it was in good condition when delivered to a previous carrier at Sheboygan. In that case as in this the court below held that such a showing shifted the burden of proof upon the railroad company, and we held that this was error, and that the plaintiff was bound to show affirmatively that the hay was delivered in good order at Marquette, to the railroad.

We think this rule is just, and are not at all disposed to depart from it. A carrier has no means in a case like this of opening packages and examining their contents. Unless there is some outward token which is suspicious he may and must take the articles and forward them on the usual terms. He is bound in law to deliver them in the condition in which he receives them. But there can be no further responsibility; and any rule of law which would make him responsible actually or presumptively for the conduct of previous independent carriers, would be grossly unfair, and subject him to losses against which he could have no protection. He has nothing to do with any of the previous dealings with the property, and no means of informing himself about them. We cannot see how this case is different from what it would have been if the plaintiffs themselves had delivered the boxes to the company at Marquette. In law the transit company acted merely as plaintiffs' agent in turning them

cannot be invoked by an initial or intermediate carrier for its own protection. Galveston, H. & S. A. Ry. Co. v. Jones (Tex. Civ. App.) 123 S. W. 737 (1910).

over, and cannot be treated as representing the Marquette Railroad Company for any purpose without reversing the whole order of business. Fitch v. Newburry, 1 Doug. (Mich.) 1.

In view of our previous decision we should not feel justified in going into this question at all if it did not seem to be imagined that if the case of Laughlin v. Railway, 28 Wis. 204, had been fully called to our attention it might have changed our views. The other cases cited on the argument, except one from North Carolina following it, do not have any particular bearing. In that case the court, treating it as a question not directly covered by previous precedents, held that it would be more convenient and less onerous to the owners of goods to adopt such a rule as is contended for by the plaintiffs below. The only ground discovered for it was the presumption that things remain as they once have been shown to exist. The cases cited as resting on that presumption were not at all in point except by some assumed analogy. We certainly have the highest respect for the decisions of the court which so decided. But we cannot convince ourselves that the decision is well founded on legal analogies, or correct in principle.

The presumption that things remain unchanged applies in such a case as the present just as forcibly backward as forward. It may quite as reasonably be presumed that the goods were delivered at Negaunee and Ishpeming in the condition in which they were received at Marquette, as that they came to Marquette as they left New York. The goods were certainly damaged when they reached their destination. To assume that they were damaged after they left Marquette, and not on any of their previous removals, is to make a very arbitrary assumption which has no more foundation in probability than any other. If it were worth while to enlarge on what is confessedly a presumption not resting on any sure foundation in experience, it might very well be questioned whether such a presumption is admissible at all as applied to things the position of which does not remain either fixed in place or free from disturbance by human agencies. But we need not enlarge on this because the nature of the suit itself raises different presumptions which are well recognized.

This suit is based on the negligence of the carrier. It can only be maintained on the theory that the carrier or its servants did not properly care for or handle the goods. There is no rule better established or more righteous than the rule that any one who claims a right to damages for negligence must prove it. The presumption that a party sued has done no wrong must prevail till wrong is shown. A carrier's obligation to carry safely what he received safely is independent of care or negligence. But in the absence of proof that there was property delivered to him, or safely delivered to him, any presumption that he received it is one which goes beyond and behind the duty of a carrier and enters into the origin and making of the contract. Until such property comes into his hands there is nothing for a contract to act upon, and the contract is not proved until that is proved.

In a somewhat similar case, Muddle v. Stride, 9 C. & P. 380, Lord Denman told the jury that if it were left in doubt what the cause of damage was, the defendants were entitled to their verdict, "because you are to see clearly that they were guilty of negligence before you can find your verdict against them. If it turns out, in the consideration of the case, that the injury may as well be attributable to the one cause as to the other, then also the defendants will not be liable for negligence."

In Gilbert v. Dale, 5 Ad. & El. 543, the same rule was laid down, and it was held that there could be no recovery without proof, and that the presumption could not be raised without foundation. And in Midland Railway v. Bromley, 17 Q. B. 372, the same principle was affirmed and it was held that if the evidence was as consistent with the claim of one side as with that of the other the plaintiff must fail, because he must make his proof preponderate.

There is no reason for presuming that the Marquette Railroad did the mischief, that would not arise with equal force, according to the Wisconsin decision, against either of the previous carriers had they been sued instead. Had the first carrier been sued it would unquestionably have been bound to show a safe transit, because that carrier received the articles in actual good order. A presumption that has no better foundation, and that applies to one as readily as to another, ought not to prevail to raise a further presumption of negligence without proof.

The judgment must be reversed with costs and a new trial granted.[44]

The other justices concurred.

LOUISVILLE & N. R. CO. v. JONES.

(Supreme Court of Alabama, 1893. 100 Ala. 263, 14 So. 114.)

Action by Thomas Jones against the Louisville & Nashville Railroad Company for damages for a breach of duty, growing out of a contract entered into by plaintiff and defendant, as a common carrier. There was judgment for plaintiff, and defendant appeals.

The breach of duty complained of was for the breaking of a stove, which the defendant railroad, as common carrier, had contracted to carry to a point of destination beyond its line, a station on the

44 In Rolfe v. Lake Shore & M. S. R. Co., 144 Mich. 169, 107 N. W. 899, 115 Am. St. Rep. 388 (1906), the court, after citing the principal case and the earlier case of Marquette, H. & O. R. Co. v. Langton, 32 Mich. 251 (1875), declared: "These two cases establish the rule for this state that where goods are transported by successive carriers, and an action is brought against the terminal carrier for damage to the goods, it is not enough to show that the goods were delivered to the initial carrier in good condition, but it is incumbent upon the plaintiff to show that they were in good order when received by the defendant. We feel bound to adhere to this rule, which has prevailed in this state for more than 30 years."

Georgia Pacific Railroad, the connecting line. The defendant pleaded the general issue and a special plea, setting up that its liability ceased, under its contract with the plaintiff, when it had delivered safely the stove to the connecting carrier, and that it had so delivered the stove. Issue was joined on these pleas. The other facts are sufficiently stated in the opinion. The cause was tried without the intervention of a jury, and upon the hearing of the evidence the court rendered judgment for the plaintiff.

McCLELLAN, J. Where goods are delivered to a common carrier for transportation to a point beyond its own line, under a through bill of lading, which, however, contains a stipulation exempting the receiving carrier from liability for loss or damage occurring beyond its own terminal, and the goods are not delivered to the consignee at all, the presumption of law is that they were lost by the receiving carrier, and he will be liable, unless he can show that the consignment was safely delivered to the connecting carrier. The burden is on him, in such case; and plaintiff, having shown nondelivery by the discharging carrier, is entitled to recover without more. Railway Co. v. Hughart, 90 Ala. 36, 8 So. 62, and cases cited.[45] On the other hand, where, upon such shipment and bill of lading, the goods have been delivered by the connecting or final carrier to the consignee, or have been carried to the place of consignment for delivery, and are then in a damaged condition, the presumption of law is that they were delivered by the receiving to the connecting carrier in good condition, and that the damage occurred while they were in the possession of the delivering carrier; and therefore, in an action against the receiving carrier for damages occasioned, not by the loss, destruction, or nondelivery of the property, but by the injuries inflicted upon it at some time before delivery to the consignee, the presumption of safe delivery by the first to the second carrier must be overcome by evidence that the damage occurred before the shipment passed out of the possession of the first carrier. The burden, in this latter case, is upon the plaintiff, and unless he discharges it he fails to make out his cause of action, and must be cast. The presumption of law being that the delivering carrier has damaged the property, in an action by the owner against him, the plaintiff need only prove the shipment in good condition, and the delivery in damaged condition. Railway Co. v. Culver, 75 Ala. 587; Cooper v. Railway Co., 92 Ala. 329, 9 So. 159.

The present action is by the consignor against the receiving carrier, the goods being destined to a point on the line of a connecting carrier. There was a through bill of lading, but it stipulated for the nonliability of the defendant for loss, destruction or injury occurring

[45] For a discussion of the common-law presumption against the initial carrier, where the goods do not arrive at destination, see Brintnall v. Saratoga & W. R. Co., 32 Vt. 665 (1860).

beyond its own line. The evidence showed, without conflict, that the goods were delivered to the consignee by the connecting carrier, but in a damaged condition, and a recovery of damages for injuries, and not for nondelivery, is sought. There was no evidence that the damage to the property occurred on defendant's line, or before delivery to the connecting line. The case was, therefore, not made out; and the circuit judge, the trial being without jury, should have rendered judgment for the defendant. The judgment for plaintiff is reversed, and a judgment for the defendant will be here entered.

Reversed and rendered.[46]

ATLANTIC COAST LINE R. CO. v. RIVERSIDE MILLS.

(Supreme Court of the United States, 1911. 219 U. S. 186, 31 S. Ct. 164, 55 L. Ed. 167, 31 L. R. A. [N. S.] 7.)

Statement by Mr. Justice LURTON:

This was an action to recover the value of goods received by the Atlantic Coast Line Railroad at a point on its line in the state of Georgia for transportation to points in other states. The agreed statement of facts showed that the goods were safely delivered by the Atlantic Coast Line Railroad to connecting carriers, and were lost while in the care of such carriers, and the question is whether the initial carrier is liable for such loss. * * *[47]

After making the above statement, Mr. Justice LURTON delivered the opinion of the court:

The goods of the defendants in error were lost by a connecting carrier to whom they had been safely delivered. Though received for a point beyond its own line, and for a point on the line of a succeeding carrier, there was no agreement for their safe carriage beyond the line of the plaintiff in error, but, upon the contrary, an express agreement that the initial carrier should not be liable for "a loss or damage not occurring on its own portion of the route." Such a provision is not a contract for exemption from a carrier's liability as such, but a provision making plain that it did not assume

[46] Accord: Shockley v. Pennsylvania R. Co., 109 Md. 123, 71 A. 437 (1908); Connelly v. Illinois Cent. Ry. Co., 133 Mo. App. 310, 113 S. W. 233 (1908). But, where goods were partially damaged while in the possession of the initial carrier, the latter was presumed to have caused the entire damage. Cincinnati, N. O. & T. P. Ry. Co. v. Pless & Slade, 3 Ga. App. 400, 60 S. E. 8 (1908). Furthermore, where the goods arrive at destination in a damaged condition, the North Carolina courts have held that there is a presumption against any one of the carriers which the shipper or consignee may elect to sue. Watson v. Atlantic Coast Line R. Co., 145 N. C. 236, 59 S. E. 55 (1907), holding there is a presumption against the initial carrier. Produce Trading Co. v. Norfolk Southern R. Co., 178 N. C. 175, 100 S. E. 316 (1919), holding there is a presumption against the intermediate carrier. Dixon v. Richmond & D. R. Co., 74 N. C. 538 (1876), holding there is a presumption against the terminal carrier.

[47] Part of the statement of facts is omitted.

the obligation of a carrier beyond its own line, and that each succeeding carrier in the route was but the agent of the shipper for a continuance of the transportation. It is therefore obvious that at the common law an initial carrier under such a state of facts would not be liable for a loss through the fault of a connecting carrier to whom it had, in due course, safely delivered the goods for further transportation. Ogdensburg & L. C. R. Co. v. Pratt, 22 Wall. 123, 22 L. Ed. 827; Myrick v. Michigan C. R. Co., 107 U. S. 102, 27 L. Ed. 325, 1 S. Ct. 425; Southern P. R. Co. v. Interstate Commerce Commission, 200 U. S. 536, 554, 50 L. Ed. 585, 593, 26 S. Ct. Rep. 330. Liability is confessedly dependent upon the provision of the act of Congress regulating commerce between the states, known as the Carmack Amendment of June 29, 1906 (34 Stat. at L. 584, 595, c. 3591, U. S. Comp. Stat. Supp. 1909, pp. 1149, 1166). The twentieth section of the Act of February 4, 1887 (24 Stat. at L. 379, c. 104, U. S. Comp. Stat. 1901, p. 3154), as changed by the Carmack Amendment, reads as follows:

"That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property, caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed. Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

The power of Congress to enact this legislation has been denied, first, because it is said to deprive the carrier and the shipper of their common-law power to make a just and reasonable contract in respect to goods to be carried to points beyond the line of the interstate carrier; and, second, that in casting liability upon the initial carrier for loss or damage upon the line of a connecting carrier, the former is deprived of its property without due process of law.

The indisputable effect of the Carmack Amendment is to hold the initial carrier engaged in interstate commerce and "receiving property for transportation from a point in one state to a point in another

state" as having contracted for through carriage to the point of destination, using the lines of connecting carriers as its agents.

Independently of the Carmack Amendment the carrier, when tendered property for such transportation, might elect to contract to carry to destination, in which case it necessarily agreed to do so through the agency of other and independent carriers in the line; or, it might elect to carry safely over its own lines only, and then deliver to the next carrier, who would then become the agent of the shipper. In the first case the receiving carrier's liability as carrier extends over the whole route, for, on obvious grounds, the principal is liable for the acts of its agent. In the other case its carrier liability ends at its own terminal, and its further liability is merely that of a forwarder. Having this power to make the one or the other contract, the only question which has occasioned a conflict in the decided cases was whether it, in the particular case, made the one or the other.

The general doctrine accepted by this court, in the absence of legislation, is, that a carrier, unless there be a special contract, is only bound to carry over its own line, and then deliver to a connecting carrier. That such an initial carrier might contract to carry over the whole route was never doubted. It is equally indisputable that if it does so contract, its common-law carrier liability will extend over the entire route. Ohio & M. R. Co. v. McCarthy, 96 U. S. 258, 266, 24 L. Ed. 693, 696; Ogdensburg & L. C. R. Co. v. Pratt, supra; Northern P. R. Co. v. American Trading Co., 195 U. S. 439, 49 L. Ed. 269, 25 S. Ct. 84; Muschamp v. Lancaster & P. R. Co., 8 Mees. & W. 421.

The English cases beginning with Muschamp v. Lancaster & P. R. Co. supra, decided in 1841, down to Bristol & E. R. Co. v. Collins, 7 H. L. Cas. 194, have consistently held that the mere receipt of property for transportation to a point beyond the line of the receiving carrier, without any qualifying agreement, justified an inference of an agreement for through transportation, and an assumption of full carrier liability by the primary carrier. The ruling is grounded upon considerations of public policy and public convenience, and classes the receipt of goods so designated for a point beyond the carrier's line as a holding out to the public that the carrier has made its own arrangements for the continuance by a connecting carrier of the transportation after the goods leave its own line. There are American cases which take the same view of the question of evidence thus presented. Some of them are Louisville & N. R. Co. v. Campbell, 7 Heisk. 257, Alabama & G. S. R. Co. v. Mt. Vernon Co., 84 Ala. 175, 4 So. 356; Central R. Co. v. Hasselkus, 91 Ga. 384, 44 Am. St. Rep. 37, 17 S. E. 838; Beard v. St. Louis, A. & T. H. R. Co. 79 Iowa, 531, 44 N. W. 803; Kyle v. Laurens R. Co., 10 Rich. L. 382, 70 Am. Dec. 231; Erie R. Co. v. Wilcox, 84 Ill. 240, 25 Am. Rep. 451; East Tennessee & V. R. Co. v. Rogers, 6 Heisk. 143, 19 Am. Rep. 589.

Upon the other hand, many American courts have repudiated the English rule which holds the carrier to a contract for transportation over the whole route, in the absence of a contract clearly otherwise, and have adopted the rule that unless the carrier specifically agrees to carry over the whole route, its responsibility as a carrier ends with its own line; and that, for the continuance of the shipment, its liability is only that of a forwarder. The conflict has therefore been one as to the evidence from which a contract for through carriage to a place beyond the line of the receiving carrier might be inferred.

In this conflicting condition of the decisions as to the circumstances from which an agreement for through transportation of property designated to a point beyond the receiving carrier's line might be inferred, Congress, by the act here involved, has declared, in substance, that the act of receiving property for transportation to a point in another state, and beyond the line of the receiving carrier, shall impose on such receiving carrier the obligation of through transportation, with carrier liability throughout. But this uncertainty of the nature and extent of the liability of a carrier receiving goods destined to a point beyond its own line was not all which might well induce the interposition of the regulating power of Congress. Nothing has perhaps contributed more to the wealth and prosperity of the country than the almost universal practice of transportation companies to co-operate in making through routes and joint rates. Through this method, a situation has been brought about by which, though independently managed, connecting carriers become in effect one system. This practice has its origin in the mutual interests of such companies and in the necessities of an expanding commerce.

In the leading case of Muschamp v. Lancaster & P. R. Co., cited above, Lord Abinger defended the inference of a contract for through carriage from the mere receipt of a package destined to a point beyond the line of the receiving carrier upon the known practice in his day of such carriers. Upon this subject, in speaking of connecting lines of railway, he said: "These railway companies, though separate in themselves, are in the habit, for their own advantage, of making contracts, of which this was one, to convey goods along the whole line, to the ultimate terminus, each of them being agents of the other to carry them forward, and each receiving their share of the profits from the last."

The tenth clause of the conditions annexed to this bill of lading, and shown elsewhere, affords a fair illustration of the customary methods of connecting carriers to co-operate for their mutual benefit in carrying on transportation begun by one which must be continued by other lines over which the thing to be transported must go. The receiving carrier makes the rate and the route, and as the agent of every such connecting carrier executes a contract which is to bind each of them, "severally, but not jointly," one of the terms of the

agreement being that each carrier shall be liable only for loss or damage occurring on its own line. Through this well known and necessary practice of connecting carriers there has come about, without unity of ownership or physical operation, a singleness of charge and a continuity of transportation greatly to the advantage of the carrier, and beneficial to the great and growing commerce of the country.

Along with this singleness of rate and continuity of carriage there grew up the practice by receiving carriers, illustrated in this case, of refusing to make a specific agreement to transport to points beyond its own line, whereby the connecting carrier, for the purpose of carriage, would become the agent of the primary carrier. The common form of receipt, as the court may judicially know, is one by which the shipper is compelled to make with each carrier in the route over which his package must go a separate agreement limiting the carrier liability of each separate company to its own part of the through route. As a result the shipper could look only to the initial carrier for recompense for loss, damage, or delay occurring on its part of the route. If such primary carrier was able to show a delivery to the rails of the next succeeding carrier, although the packages might and usually did continue the journey in the same car in which they had been originally loaded, the shipper must fail in his suit. He might, it is true, then bring his action against the carrier so shown to have next received the shipment. But here, in turn, he might be met by proof of safe delivery to a third separate carrier. In short, as the shipper was not himself in possession of the information as to when and where his property had been lost or damaged, and had no access to the records of the connecting carriers, who in turn had participated in some part of the transportation, he was compelled in many instances to make such settlement as should be proposed.

This burdensome situation of the shipping public in reference to interstate shipments over routes including separate lines of carriers was the matter which Congress undertook to regulate. Thus, when this Carmack Amendment was reported by a conference committee, Judge William Richardson, a congressman from Alabama, speaking for the committee of the matter which it was sought to remedy, among other things, said:

"One of the great complaints of the railroads has been—and, I think, a reasonable, just, and fair complaint—that when a man made a shipment, say, from Washington, for instance, to San Francisco, California, and his shipment was lost in some way, the citizen had to go thousands of miles, probably, to institute his suit. The result was that he had to settle his damages at what he could get. What have we done? We have made the initial carrier, the carrier that takes and receives the shipment, responsible for the loss of the article in the way of damages. We save the shipper from going to California or some distant place to institute his suit. Why? The reasons in-

ducing us to do that were that the initial carrier has a through-route connection with the secondary carrier, on whose route the loss occurred, and a settlement between them will be an easy matter, while the shipper would be at heavy expense in the institution of a suit. If a judgment is obtained against the initial carrier, no doubt exists but that the secondary carrier would pay it at once. Why? Because the arrangement, the concert, the co-operation, the through route courtesies between them, would be broken up if prompt payment were not made. We have done that in conference." 40 Cong. Rec. pt. 10, p. 9580.

It must be conceded that the effect of the act in respect of carriers receiving packages in one state for a point in another, and beyond its own lines, is to deny to such an initial carrier the former right to make a contract limiting liability to its own line. This, it is said, is a denial of the liberty of contract secured by the 5th Amendment to the Constitution. To support this, counsel cited such cases as Allgeyer v. Louisiana, 165 U. S. 589, 41 L. Ed. 835, 17 S. Ct. 427, Lochner v. New York, 198 U. S. 45, 49 L. Ed. 937, 25 S. Ct. 539, 3 Ann. Cas. 1133, and Adair v. United States, 208 U. S. 161, 52 L. Ed. 436, 28 S. Ct. 277, 13 Ann. Cas. 764.

This power to regulate is the right to prescribe the rules under which such commerce may be conducted. "It is," said Chief Justice Marshall, in Gibbons v. Ogden, 9 Wheat. 1, 196, 6 L. Ed. 23, 70, "the power * * * vested in Congress as absolutely as it would be in a single government having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." It is a power which extends to the regulation of the appliances and machinery and agencies by which such commerce is conducted. Thus, in Johnson v. Southern P. Co., 196 U. S. 1, 49 L. Ed. 363, 25 S. Ct. 158, an act prescribing safety appliances was upheld. And in Interstate Commerce Commission v. Illinois C. R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 S. Ct. 155, it was held that the equipment of an interstate railway, including cars used for the transportation of its own fuel, was subject to the regulation of Congress. In Interstate Commerce Commission v. Chicago & A. R. Co., 215 U. S. 479, 54 L. Ed. 291, 30 S. Ct. 163, it was held to extend to the distribution of coal cars to the shipper, so as to prevent discrimination. In the Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141, power to pass an act which regulated the relation of master and servant, so as to impose on the carrier, while engaged in interstate commerce, liability for the negligence of a fellow servant, for which at common law there was no liability, and depriving such carrier of the common-law defense of contributory negligence save by way of reduction of damages, was upheld. In Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. Ed. 136, 20 S. Ct. 96, and Northern Securities Co. v. United States, 193 U. S. 197, 48 L.

Ed. 679, 24 S. Ct. 436, it was held that this power of regulation extended to and embraced contracts in restraint of trade between the states.

It is obvious, from the many decisions of this court, that there is no such thing as absolute freedom of contract. Contracts which contravene public policy cannot be lawfully made at all; and the power to make contracts may in all cases be regulated as to form, evidence, and validity as to third persons. The power of government extends to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interests. Undoubtedly the United States is a government of limited and delegated powers, but in respect of those powers which have been expressly delegated, the power to regulate commerce between the states being one of them, the power is absolute, except as limited by other provisions of the Constitution itself.

Having the express power to make rules for the conduct of commerce among the states, the range of congressional discretion as to the regulation best adapted to remedy a practice found inefficient or hurtful is a wide one. If the regulating act be one directly applicable to such commerce, not obnoxious to any other provision of the Constitution, and reasonably adapted to the purpose by reason of legitimate relation between such commerce and the rule provided, the question of power is foreclosed. "The test of power," said Mr. Justice White, speaking for this court in the Employers' Liability Cases, cited above, "is not merely the matter regulated, but whether the regulation is directly one of interstate commerce, or is embraced within the grant [of power] conferred on Congress to use all lawful means necessary and appropriate to the execution of the power to regulate commerce."

That a situation had come about which demanded regulation in the public interest was the judgment of Congress. The requirement that carriers who undertook to engage in interstate transportation, and as a part of that business held themselves out as receiving packages destined to places beyond their own terminal, should be required, as a condition of continuing in that traffic, to obligate themselves to carry to the point of destination, using the lines of connecting carriers as their own agencies, was not beyond the scope of the power of regulation. The rule is adapted to secure the rights of the shipper by securing unity of transportation with unity of responsibility. The regulation is one which also facilitates the remedy of one who sustains a loss, by localizing the responsible carrier. Neither does the regulation impose an unreasonable burden upon the receiving carrier. The methods in vogue, as the court may judicially know, embrace not only the voluntary arrangement of through routes and rates, but the collection of the single charge made by the carrier at one or the other end of the route. This involves frequent and prompt settlement of traffic balances. The routing in a measure depends upon the certainty and promptness of such traffic balance

settlements, and such balances have been regarded as debts of a preferred character when there is a receivership. Again, the business association of such carriers affords to each facilities for locating primary responsibility as between themselves which the shipper cannot have. These well-known conditions afford a reasonable security to the receiving carrier for a reimbursement of a carrier liability which should fall upon one of the connecting carriers as between themselves.

But it is said that any security resulting from a voluntary agreement constituting a through route and rate is destroyed if the receiving carrier is not at liberty to select his own agencies for a continuance of the transportation beyond his own line. This is an objection which has no application to the present case. This action was for loss and damage arising from several distinct shipments to different places beyond the line of the plaintiff in error, who was the initial or receiving carrier. The presumption, from the absence of anything to the contrary in the record, is that the routing was over connecting lines with whom the plaintiff in error had theretofore made its own arrangements and rate. This record presents no question as to the right of the initial carrier to refuse a shipment designated for a point beyond its own line, nor its right to refuse to make a through route or joint rate when such route and rate would involve the continuance of a transportation over independent lines. We therefore refrain from any consideration of the large question thus suggested. The shipments involved in the present case were voluntarily received by an initial carrier who undertook to escape carrier's liability beyond its own line by a provision limiting liability to loss upon its own line. This was forbidden by the Carmack Amendment, and any stipulation and condition in the special receipt which contravenes the rule in question is invalid.

Reduced to the final results, the Congress has said that a receiving carrier, in spite of any stipulation to the contrary, shall be deemed, when it receives property in one state, to be transported to a point in another, involving the use of a connecting carrier for some part of the way to have adopted such other carrier as its agent, and to incur carrier liability throughout the entire route, with the right to reimbursement for a loss not due to his own negligence. The conditions which justified this extension of carrier liability we have already adverted to. The rule of the common law which treated a common carrier as an insurer grew out of a situation which required that kind of security for the protection of the public. To quote the quaint but expressive words of Lord Holt, in Coggs v. Bernard, 2 Ld. Raym. 909, when defending and applying the doctrine of absolute liability against loss not due to the act of God or the public enemy, "This rule," said he, "is a politick establishment contrived by the policy of the law for the safety of all persons the necessity of whose

affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing."

If it is to be assumed that the ultimate power exerted by Congress is that of compelling co-operation by connecting lines of independent carriers for purposes of interstate transportation, the power is still not beyond the regulating power of Congress, since, without merging identity of separate lines or operation, it stops with the requirement of oneness of charge, continuity of transportation, and primary liability of the receiving carrier to the shipper, with the right of reimbursement from the guilty agency in the route. That there is some chance that this right of recoupment may not be always effective may be conceded without invalidating the regulation. If the power existed and the regulation is adapted to the purpose in view, the public advantage justifies the discretion exercised, and upholds the legislation as within the limit of the grant conferred upon Congress. Touching the range of legislative discretion of the states in respect to occupations or trades which are affected by a public use, this court, in Gundling v. Chicago, 177 U. S. 183, 188, 44 L. Ed. 725, 728, 20 S. Ct. 633, 635, said:

"Unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference. As stated in Crowley v. Christensen, 137 U. S. 86, 34 L. Ed. 620, 11 S. Ct. 13: 'The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community.'"

But it is said that the act violates the Fifth Amendment by taking the property of the initial carrier to pay the debt of an independent connecting carrier whose negligence may have been the sole cause of the loss. But this contention results from a surface reading of the act, and misses the true basis upon which it rests. The liability of the receiving carrier which results in such a case is that of a principal for the negligence of his own agents.

In substance Congress has said to such carriers: "If you receive articles for transportation from a point in one state to a place in another, beyond your own terminal, you must do so under a contract to transport to the place designated. If you are obliged to use the services of independent carriers in the continuance of the transit, you must use them as your own agents, and not as agents of the shipper." It is therefore not the case of making one pay the debt of another. The receiving carrier is, as principal, liable not only for its own negligence, but for that of any agency it may use, although, as between themselves, the company actually causing the loss may be primarily liable.

In Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 78, 52 L. Ed. 108, 110, 28 S. Ct. 28, 30, legislation by the state of Georgia imposing a penalty on common carriers for failure to adjust damage claims within forty days was held to neither deny due process nor the equal protection of the law. Speaking by Mr. Justice Brewer, the court said of the reasonableness of the requirement and classification, that "the matter to be adjusted is one peculiarly within the knowledge of the carrier. It receives the goods and has them in its custody until the carriage is completed. It knows what it received and what it delivered. It knows what injury was done during the shipment, and how it was done. The consignee may not know what was in fact delivered at the time of the shipment, and the shipper may not know what was delivered to the consignee at the close of the transportation. The carrier can determine the amount of the loss more accurately and promptly and with less delay and expense than anyone else, and for the adjustment of loss or damage to shipments within the state forty days cannot be said to be an unreasonably short length of time."

The conclusion we reach in respect to the validity of the amendment has the support of some well-considered cases. Among them we cite: Smeltzer v. St. Louis & S. F. R. Co., 158 F. 649; Pittsburg, C., C. & St. L. R. Co. v. Mitchell (Ind.) 91 N. E. 735; Louisville & N. R. Co. v. Scott, 133 Ky. 724, 118 S. W. 992.

The judgment included an attorneys' fee, taxed as part of the costs. The authority for this is supposed to be found in the eighth section of the act to regulate commerce of February 4, 1887 (24 Stat. at L. pp. 379, 382, c. 104, U. S. Comp. Stat. 1901, pp. 3154, 3159). The section reads as follows:

"That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorneys' fees shall be taxed and collected as part of the costs in the case."

But that section applies to cases where the cause of action is the doing of something made unlawful by some provision of the act, or the omission to do something required by the act, and there is a recovery "of damages sustained in consequence of any such violation of this act," etc. The cause of action in the present case is not for damages resulting from "any violation of the provisions of this act." True, the plaintiff in error attempted by contract to stipulate for a limitation of liability to a loss on its own line, and in this action has defensively denied liability for a loss not occurring on its own

line. But the cause of action was the loss of the plaintiff's property which had been intrusted to it as a common carrier, and that loss is in no way traceable to the violation of any provision of the act to regulate commerce. Having sustained no damage which was a consequence of the violation of the act, the section has no application to this case.

The judgment was erroneous to this extent, and the provision for an attorney's fee is stricken out, and the judgment thus modified is affirmed.

INTERNATIONAL WATCH CO. v. DELAWARE, L. & W. R. CO.

(Supreme Court of New Jersey, 1910. 80 N. J. Law, 553, 78 A. 49.)

REED, J.[48] This action was brought to recover the value of 401 watches claimed to have been delivered by the International Watch Company to the Delaware, Lackawanna & Western Railroad Company, to be carried from Hoboken, N. J., to Portland, Or., which watches were lost to the plaintiff in transit. No testimony was offered by the defendant. At the close of the plaintiff's case a nonsuit was moved and denied, and a verdict was directed by the trial court in favor of the plaintiff. There was an exception to the refusal of the court to nonsuit. There was no objection entered to the direction of a verdict for the plaintiff.

The nonsuit was moved for on several grounds. The principal ground argued on this appeal is that there was not adequate proof that the watches in question were delivered by the International Watch Company to the Delaware, Lackawanna & Western Railroad Company.

The evidence of the transportation of these goods from the plaintiff's factory into the possession of the defendant was such that the court had a right to assume it as proved; at any rate there was no such defect in proof as to justify a nonsuit. The same may also be said of the evidence that the goods were received in the condition in which they left the factory of the plaintiff, with the seals unbroken and the contents undisturbed.

If shipped, the loss of 401 of these watches is admitted; for it is stipulated that upon the crates being opened, that number of watches were missing, and bricks wrapped in paper were substituted. It is stipulated that the defending company are engaged in interstate commerce; that the crates were carried by it from Hoboken to Black Rock, and were there turned over to the Wabash Railroad Company, the next connecting carrier, and that the cars with seals numbered

[48] Part of the opinion is omitted.

C29928 and C29929 were turned over to the Wabash Railroad Company on January 4, 1909, the car seals being intact. * * *

It is again insisted that the crates containing the boxes in question were turned over by the Delaware, Lackawanna & Western Railroad Company to the Wabash Railroad Company, the next connecting carrier, in good condition, and that the seals of the boxes were broken when received by the consignee at Portland, Or., a point far beyond the termination of the appellant's route.

It is also insisted that the rule is that the last of a line of connecting carriers is presumed, in the absence of proof to the contrary, to have received the freight in the same condition it was delivered to the initial carrier; and it being proved that it was received by the defendant in good order, the presumption is that the injury resulted from the negligence of the last carrier.

Aside from the question last propounded, the question supervenes whether, it being admitted that the defendant was engaged in interstate commerce in the transportation of the crates in question, its liability is not controlled by section 20 of the Interstate Commerce Act of Feb. 4, 1887, c. 104, 24 Stat. 386 (U. S. Comp. St. 1901, p. 3169), as amended June 29, 1906 (Act June 29, 1906, c. 3591, § 7, 34 Stat. 593, 595 [U. S. Comp. St. Supp. 1909, p. 1163]).

This section provides that "any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed."

The defendant claims that this clause of the interstate commerce act does not impose a liability upon the initial carrier, unless such initial carrier shall issue a receipt or bill of lading for the property received. This contention, in substance, is that although the defendant upon receipt of these goods for shipment, failed in its duty to issue a receipt or bill of lading therefor, it, by reason of such failure, escaped the liability which would have rested upon it had it performed its statutory duty.

With this construction of the twentieth section of the act, I am unable to agree. The words "lawful holder," in the clause which provides that a common carrier shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, etc., were used to include not only the shipper, but any assignee of the bill of lading; and where no bill of lading is given, the shipper himself stands in the same position as if he was the lawful holder of

such bill of lading, and the liability of the company to such shipper is the same liability as is imposed in favor of the lawful holder of a receipt or bill of lading. So we think that under the federal statute the shipper was entitled to bring this action against the defendant.

Respecting the refusal of the court to grant a continuance of the trial because of the absence of some records which the counsel for the defendant wished further time to obtain, we think the judicial action was clearly within the discretion of the court.

We think there was no error of which the appellant can avail itself, and that the judgment should be affirmed.[49]

ADAMS SEED CO. v. CHICAGO GREAT WESTERN R. CO. et al.

(Supreme Court of Iowa, 1917. 181 Iowa, 1052, 165 N. W. 367.)

GAYNOR, C. J.[50] This action is brought to recover the value of certain wool delivered to the Chicago Great Western Railway Company for shipment, and claimed to have been lost or destroyed. The plaintiff makes defendants all the companies over whose lines the shipment passed, and asks judgment against each and all of them. The defendants are railway companies engaged in interstate commerce. The plaintiff is a copartnership doing business under the name of the Adams Seed Company, at Decorah, in this state. * * * The defendants filed separate answers.

The Chicago Great Western Railway Company, answering, admits: That on or about the 29th day of May, 1909, at the station of McIntyre on its line of road, it received a consignment of wool from the plaintiff consigned to the plaintiff at St. Louis, Mo.; that it carried said wool on its line to the city of Des Moines, and there delivered it to the Wabash Railway Company, its codefendant; that the Wabash

[49] Accord: Dionne v. American Express Co., 91 Vt. 521, 101 A. 209 (1917); Gamble-Robinson Commission Co. v. Union Pac. R. Co., 262 Ill. 400, 104 N. E. 666, Ann. Cas. 1915B, 89 (1914); Aton Piano Co. v. Chicago, M. & St. P. Ry. Co., 152 Wis. 156, 139 N. W. 743 (1913); Barrett v. Northern Pac. Ry. Co., 29 Idaho, 139, 144, 157 P. 1016 (1916), semble. The above cases were decided under the Carmack Amendment, which made the initial carrier liable, without qualification as to the issuance or form of the bill of lading, for losses caused by the connecting carrier. Accordingly, in Norfolk & Western Ry. Co. v. Dixie Tobacco Co., 228 U. S. 593, 33 S. Ct. 609, 57 L. Ed. 980 (1912), the initial carrier was held liable for losses on a connecting carrier's line, although there was no through route and the bill of lading expressly restricted the carrier's liability to losses occurring on its own line. The present wording of section 20 of the Interstate Commerce Act (U. S. Comp. St. § 8604a), while stating that the initial carrier is liable for losses caused by it, "whether a bill of lading has been issued or not," also provides that the initial carrier is liable for losses caused by a connecting carrier "when transported on a through bill of lading." Consider the effect of these provisions upon the liability of the initial carrier, where no bill of lading is issued, or where the bill of lading issued is not a "through bill of lading."

[50] Parts of the opinion are omitted.

Company carried it to St. Louis; that after it had delivered the wool to the Wabash this defendant received instructions from the plaintiff or one of its agents to reconsign the wool to Philadelphia; that it immediately issued instructions by telegram to the Wabash Company to reconsign the wool to Philadelphia; that said wool was thereupon reconsigned, and carried by the Wabash Railway Company and other carriers to Philadelphia; that immediately upon the arrival of the wool in Philadelphia there was a notice mailed to the Adams Seed Company, addressed "General Delivery, Philadelphia, Pa.," of the receipts of said goods, and that after the expiration of four days from the date of the mailing of the notice the Philadelphia & Reading Company moved and stored said wool in a public licensed warehouse in Philadelphia, where the same remained without being claimed by the plaintiff or any one for it until October, 1913, when the same was sold by said warehouse company to the account of plaintiff; that at the time the said Philadelphia & Reading Railway Company delivered the wool to the warehouse the liability of the railway company as a common carrier had ceased, and it was holding the same as warehouseman, and that, if there was any conversion by the Philadelphia & Reading Company in the delivering of said goods to the warehouse, it was while said company was acting as a warehouseman, and not as a common carrier. * * *

The Wabash Railway Company makes practically the same answer as the other.

The answer of the Philadelphia & Reading Company we need not set out, for the reason that at the conclusion of all the testimony the plaintiff dismissed its claim as to the Philadelphia & Reading Company.

Thereupon, on motion of other defendants, the court directed a verdict for them, and a verdict being returned in accordance with the direction of the court, plaintiff's petition was dismissed, and plaintiff appeals. * * *

It will be noticed that these companies are charged with the negligence of the Philadelphia & Reading Company only on the theory that they were initial and connecting carriers in the transportation of these goods. If the goods arrived over these connecting lines in safety, and were delivered in proper condition to the Philadelphia & Reading Company, and the Philadelphia & Reading Company received them as delivering carrier, and transported them in safety to Philadelphia, and held them there for a reasonable time for delivery to the consignee, after such time its liability ceased as a carrier, and it became charged with duties to the consignee as a warehouseman only, then no negligence of the Philadelphia & Reading Company, after it had ceased to be a carrier and became warehouseman, could be charged to these other defendants, for the reason that the Philadelphia & Reading Company thereafter ceased to sustain any relationship to the other carriers upon which liability could be predicated for its negligence. If the goods

shipped over the lines of these other defendants reached the lines of the Philadelphia & Reading Company in proper condition, and were transported by the Philadelphia & Reading Company to the place of destination in safety, and were there held by the Philadelphia & Reading Company for a reasonable time, as carrier, for delivery to the consignee named there, while the goods remained in the Philadelphia & Reading Company's possession as carrier, for any loss that occurred through the negligence of the Philadelphia & Reading Company as carrier, the initial carrier would be liable under the Carmack Amendment. But in no event could the connecting carrier, the Wabash, be liable for the negligence of the Philadelphia & Reading Company even as carrier, for it did no wrong on which liability could be predicated.

We are considering this case now on the theory that there was a through shipment from McIntyre to Philadelphia authorized by the plaintiff; that the Chicago Great Western was the initial carrier; that the Wabash was the connecting carrier, and the Philadelphia & Reading Company the delivering carrier. Under the Carmack Amendment, the initial carrier is liable for any loss or injury to the goods while in the possession of any of the carriers as carriers. The connecting carrier, however, is only liable for its own wrong. It is fundamental that the initial carrier is only liable for the negligence of the delivering carrier when the negligence occurs while the delivering carrier holds possession of the goods as carrier. Even the initial carrier is not liable for the negligence of the delivering carrier after the relationship to the goods as carrier has ceased. * * *

It follows, therefore, that upon the receipt of the goods at Philadelphia by the Philadelphia & Reading Company this Philadelphia & Reading Company was required to hold the goods for delivery to the consignee for a reasonable time. During that time the initial carrier, the Chicago Great Western, remained liable for any loss or injury to the goods while so in possession of the Philadelphia & Reading Company as delivering carrier. After a reasonable time the relationship of the Philadelphia & Reading Company to the goods as common carrier ceased. It thereafter held the goods as warehouseman only, and for any loss or injury to the goods while it remained in the possession of the Philadelphia & Reading Company the Philadelphia & Reading Company would not be liable as carrier, but only for negligence as warehouseman. Under the Carmack Act the initial carrier is not liable for the negligence of the delivering carrier after its relationship as carrier has ceased, and its duty to the plaintiff and to the goods becomes that of warehouseman only. Or, in other words, if the transit was at an end, if the delivering carrier had ceased to have possession of the goods as carrier, and held them in another capacity, as warehouseman, then the delivering carrier was responsible only for the care and diligence which the law attached to that relation, and the loss occurring while held in that relation does not reach back and involve the initial carrier or any connecting carrier. * * *

We find no ground for reversing the action of the court. The cause is therefore affirmed.

Affirmed.[51]

WEAVER, PRESTON, and STEVENS, JJ., concur.

FLESHNAR & ADAR v. SOUTHERN RY. CO.

(Supreme Court of Georgia, 1925. 160 Ga. 205, 127 S. E. 768.)

The Court of Appeals certified the following question: This was a suit by Fleshnar & Adar against the Southern Railway Company, to recover damages for the alleged loss of goods shipped by them. The case was tried upon the following agreed statement of facts:

"On March 7, 1922, the plaintiff, a partnership, delivered to the Southern Railway Company, in Atlanta, Ga., a certain shipment of shoes consigned to H. Rothenberg, New York City. Said shipment was refused by the consignee, and the consignors were not notified that the shipment had been refused until after the same had been sold for charges. Fleshnar & Adar, the plaintiff, have been in business in Atlanta, Ga., at the same address, to wit, 154 Decatur street, in said city, for more than 15 years. The defendant agreed to handle said shipment. We agree that the items set out as bill of particulars in plaintiff's suit are correct, and that the original or copy bills of lading, covering same, may be admitted, and that correspondence between plaintiff and defendant, including copy of letters, may be admitted. The same are identified as copies of the originals. Title to the goods was in and remained in Fleshnar & Adar at all times. This shipment moved from Atlanta, Ga., on March 7, 1922, via Southern Railway Company, and by said Southern Railway Company was delivered to its agent, the Pennsylvania Railroad, consigned to H. Rothenberg, 221 Canal street, New York. The shipment arrived in New York on March 15, and consignee was notified that the goods were stored with Duvall & Company, 341 Spring street, New York, on March 27, 1922. On June 19, 1922, a notice was sent by the Southern Railway Company to the consignor, advising that the shipment arrived at the destination on March 15, and on March 20, was stored with Duvall & Company, where it remained unclaimed. In reply to this letter, the consignor on June 29, 1922, requested the Southern Railway Company to call back the shipment in question. The notice of June 19, 1922, was the first notice which the consignor had of the failure of the consignee to accept said shipment, and this was after the goods had

[51] Accord: Jennings Automatic Dump Body v. Virginian Ry. Co., 137 Va. 207, 119 S. E. 147 (1923); Efland Hosiery Mills v. Hines, 184 N. C. 356, 114 S. E. 472 (1922); Briggs Hardware Co. v. Aroostook Valley R. Co., 117 Me. 321, 104 A. 8 (1918); Hogan Milling Co. v. Union Pac. R. Co., 91 Kan. 783, 139 Pac. 397 (1914). See comment on the principal case in 18 Colum. Law Rev. 361. See, also, 15 Mich. Law Rev. 426.

been sold by the Pennsylvania Railroad. The contract for the shipment was made between Fleshnar & Adar, the plaintiff, and the Southern Railway Company, the defendant."

The bill of lading under which the property was shipped contained the following provision:

"Sec. 5. Property not removed by the party entitled to receive it within 48 hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be at the option of the carrier removed to and stored in a public or licensed warehouse at the cost of the owner, and there sold at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage."

Under these facts, was the initial carrier, the Southern Railway Company, liable for the negligence or conversion of its connecting carrier where the negligence or conversion occurred after the goods were stored in a warehouse?

GILBERT, J.[52] The Hepburn Amendment (34 Stat. 584, c. 3591 [U. S. Comp. St. § 8563]) to the "act to regulate commerce" contains the following provision:

"The term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. * * * All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful." * * *

The meaning of that portion of the Carmack Amendment just quoted, as applied to a shipment under a standard bill of lading, such as was issued in our case, was discussed by the Supreme Court in the case of Cleveland, etc., Ry. v. Dettlebach, 239 U. S. 588, 36 S. Ct. 177, 60 L. Ed. 453, and in Southern Ry. Co. v. Prescott, 240 U. S. 632, 36 S. Ct. 469, 60 L. Ed. 836. Mr. Justice Hughes, speaking the unanimous opinion of the Supreme Court in the latter case, reaffirming what was said in the former case, said:

"By the act to regulate commerce (section 1), the 'transportation' it regulates is defined as including 'all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.' It is made the duty of the carrier 'to provide * * * such transportation

[52] Parts of the opinion are omitted.

upon reasonable request therefor.' All charges made for 'any service' rendered in such transportation must be 'just and reasonable.' Section 6 requires that the carrier's schedules, printed as provided, 'shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee.' And it is further provided, in the same section, that no carrier shall 'extend to any shipper or person any privileges or facilities in the transportation'—that is, as defined—'except such as are specified in such tariffs.' The bill of lading in accordance with the published regulations provided that 'every service' to be performed under it, including the service of the connecting or terminal carrier, should be subject to the conditions specified, and among these was the express condition governing the company's responsibility as warehouseman for property not removed within 48 hours after notice of arrival. Such a retention of the goods was undoubtedly a terminal service forming a part of the 'transportation' in the sense of the federal act and governed by that act."

The construction placed upon the statute by the Supreme Court, being absolutely controlling upon this court, we indulge in no discussion of our own upon that point.

It is somewhat surprising to find that the identical question propounded by the Court of Appeals has not been decided by the Supreme Court of the United States. If it had been, of course, the question would not now be presented to this court, because on such a question the decision of the Supreme Court would be controlling. In the briefs of counsel a number of decisions rendered by state courts are presented for consideration. Decisions by courts of other states are always entitled to and do receive great respect. While not binding upon this court, they often afford great assistance in arriving at a satisfactory conclusion. In the present instance, however, a federal question only is involved; and in such cases, where state courts reach conclusions different from those of the federal court, the latter must be accepted. The federal statute regulating interstate commerce, as amended by the Carmack and Cummins Acts, in so far as material to our question, is as follows:

"Any common carrier, railroad, or transportation company subject to the provisions of this act receiving property for transportation from a point in one state * * * to a point in another state * * * shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose * * * lines such property may pass, * * * when transported on a through

bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one state * * * to a point in another state * * * shall be liable to the lawful holder of said receipt or bill of lading * * * for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass * * * when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, * * * and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void." 4 Fed. Stat. Ann. 506.

Under the facts stated, the issue is narrowed to the question whether the Southern Railway Company, the initial carrier, is liable for the "negligence or conversion of its connecting carrier, where the negligence or conversion occurred after the goods were stored in the warehouse" by such connecting carrier. * * *

The defendant contends that, if the terminal carrier was bound only as warehouseman, then the defendant's duty as a common carrier strictly speaking had ceased, and consequently the provisions of the federal statute did not make the initial carrier liable. The Court of Appeals invites our attention, in this connection, to the cases of Southern Railway Co. v. Prescott, 240 U. S. 632, 36 S. Ct. 469, 60 L. Ed. 836, and Cleveland, etc., Ry. Co. v. Dettlebach, 239 U. S. 588, 36 S. Ct. 177, 60 L. Ed. 453. It should be noted that in both of these cases suit was brought against terminal carriers, and, as stated in the third headnote, the federal act regulating commerce, as amended, does not deal with or modify the law in regard to the duty of terminal carriers. However, in these two cases we think it is shown that a common carrier may owe a duty to a shipper in more than one capacity, for instance, that of a carrier's duty strictly, and also that of a warehouseman. These duties differ; in the one case the carrier owes the duty of an insurer, in the other he does not. The duty required may differ in other respects, for instance, if acting in the capacity of warehouseman, the carrier may be liable for negligence. We are not now required to decide these subsidiary questions. See Southern Ry. v. Prescott, supra, page 640 (36 S. Ct. 469). Nevertheless we deem it settled by the Prescott and Dettlebach decisions that a carrier or transportation company, though acting as a warehouseman, is still performing one of the duties of a carrier or transportation company.

Under the federal act quoted above, the initial carrier is liable to the holder of the bill of lading for the full actual loss or damage to the

property caused by "any common carrier, railroad, or transportation company to which the property was delivered." "The spirit of the Interstate-Commerce Act with the Carmack Amendment (Act Cong. Feb. 4, 1887, c. 104, § 20, 24 Stat. 386, as amended by act Cong. June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 595 [U. S. Comp. St. §§ 8604a, 8604aa]) is to treat connecting lines of transportation as one line so far as the shipper is concerned, and to compel the different companies forming a through route to deal as a unit with the shipper and to then adjust all differences as to individual liability among themselves." Lancaster v. Schreiner, 277 Mo. 527, 212 S. W. 19. "In order, therefore, to determine whether the initial carrier is liable in the present case, we have only to determine whether it would have been liable for the loss if it had owned and operated the connecting lines as one railroad. And since under the Hepburn Act [34 Stat. 584, c. 3591] the initial carrier may make any defense which was available to any connecting carrier on whose line the loss occurred" (Riverside Mills v. Atlantic Coast Line R. Co. [C. C.] 168 F. 987; Hogan Milling Co. v. Union Pacific, 91 Kan. 788, 139 P. 399), it follows that whatever liability the terminal carrier incurred, under the facts of the case, that liability attaches to the initial carrier.

Since it has been shown that the handling of the shipper's goods in the capacity of warehouseman was part of the transportation for which the initial carrier became responsible, we necessarily reply that the latter is liable, assuming, as the question does, that the terminal carrier was liable. Briggs Hardware Co. v. Aroostook Valley R. Co., 117 Me. 321, 104 A. 8, and Winget v. Grand Trunk Western Ry. Co., 210 Mich. 100, 177 N. W. 277, were cases decided by state courts in which the above conclusion was reached. See, also, 1 Roberts, Federal Liability of Carriers, 592, § 338 et seq. There are cases decided by state courts contrary to what has been decided above, but they do not accord with the construction given by the Supreme Court to the term "transportation" as employed in the federal statute. Moreover, it will be observed that the shipper does not seek to hold the initial carrier liable for injury or conversion of the property by Duvall & Co., public warehousemen. Although the goods were stored, not in a warehouse of the terminal carrier, but in a public warehouse, they were sold by virtue of an order or instructions from the terminal carrier. The question states that the goods were "sold by the Pennsylvania Railroad." Therefore, irrespective of where the goods were sold, the sale was the act of the terminal carrier; and, whatever the liability of the terminal carrier in making the sale, it is the same as if the sale had been ordered by the initial carrier. If the lines of the initial carrier had been extended from Atlanta, Ga., where the goods were received for shipment, to the city of New York, where they were transported for delivery to the consignee, and the Southern Railway Company had disposed of the goods in exactly the same way as was done by the Pennsylvania Railroad Company, the liability would be exactly the same. Compare Georgia, Florida &

Alabama Ry. Co. v. Blish Milling Co., 241 U. S. 190, 36 S. Ct. 541, 60 L. Ed. 948; and Alabama G. S. R. Co. v. McKenzie, 139 Ga. 410, 77 S. E. 647, 45 L. R. A. (N. S.) 18, where similar though not identical questions were discussed.[53]

All the Justices concur.

MISSOURI, O. & G. RY. CO. v. FRENCH.

(Supreme Court of Oklahoma, 1915. 52 Okl. 222, 152 P. 591.)

This action was instituted to recover damages from the plaintiff in error, for injury to two mules, and certain household goods, shipped by the defendant in error from Arma, Kan., to Big Wells, Tex. The Missouri Pacific Railroad was the initial carrier, who transported the goods to Rex, Okl., where they were delivered to the plaintiff in error, whose road was one of the links in the interstate carriage from Kansas to the destination in Texas, and while being transported over the road of the plaintiff in error, to be delivered to a connecting road, which was to complete the journey, the car in which the goods were loaded was derailed and overturned, and the damage sued for was done to the property of the defendant in error. It also appears that the property in the car consisted of household goods, grain, hay, and live stock.

In regard to the household goods, the contract of carriage was that made by the Missouri Pacific, which contained the provision, "Emigrant outfit, H. H. goods Rel $10 Cwt." In regard to the live stock a bill of lading was issued by the plaintiff in error, which contained a provision that the defendant was not a common carrier in the transportation of the live stock, but was only a forwarder or private carrier for hire, and that the defendant was not liable unless it was negligent, and that the burden of proof should be on the plaintiff to show negligence. The court charged the jury:

"The railroad being a common carrier, becomes an insurer of goods placed in its care for shipment, and is responsible to the shipper for any injury that may occur to the goods while in the course of transportation, except that caused by the act of God or public enemy, and subject to certain limitations in the shipment of live stock or perishable goods, which is not necessary to mention now. The derailment of the car in which the goods were being transported by the defendant having been

[53] The initial carrier has been held liable for a misdelivery by the terminal carrier. See Louisville & N. R. Co. v. B. F. Roden Grocery Co., 209 Ala. 694, 96 So. 912 (1923), where goods were delivered to wrong person; King v. Barbarin, 249 F. 303, 161 C. C. A. 311 (1917), where goods were delivered upon a forged bill of lading; Thomas v. Blair, 185 Mich. 422, 151 N. W. 1041 (1915), where goods were delivered without surrender of the bill of lading. In Stoddard Lumber Co. v. Oregon-Washington R. & Nav. Co., 84 Or. 399, 165 P. 363, 4 A. L. R. 1275 (1917), the initial carrier was held liable for damages caused by the failure of the terminal carrier to notify the shipper of the nonacceptance of the goods by the consignee.

admitted by it, and there being no proof that it was attributed to the act of God or public enemy, the only question left for you, gentlemen, to determine is the measure of damages the plaintiff has sustained, by reason of the said derailment, to the goods. The measure of damages would be the difference in the value of the goods immediately before the accident happened and the value of the goods after the wreck, as plaintiff may have shown by a fair preponderance of the evidence."

The jury returned a verdict in favor of the plaintiff for $761.96, less $261.96, due the defendant for articles improperly loaded in the car, which it had set up in a cross-petition. There was a judgment on the verdict for $500.00, motion for new trial overruled, and exceptions duly saved, and the plaintiff in error brings the case to this court by petition in error and case-made. * * *

DEVEREUX, C.[54] (after stating the facts as above). Under the first assignment of error it is argued that the court erred in giving the instruction above set out, and this raises the question whether in interstate traffic the carrier can make a contract with the shipper by which it is released from its obligations, as a common carrier, and assume those of a forwarder only, and further contract that it shall only be liable for negligence, and that the burden of proof to show negligence shall be assumed by the shipper. It will be seen from the instruction that the trial court must have treated this contract as void, for it charged that the plaintiff in error, being a common carrier, became an insurer, and the only question left to the jury was the amount of the damages.

The Carmack Amendment (Act June 29, 1906, ch. 3591, § 7; Fed. Stats. Ann. Sup. 1909, p. 273) provides: "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, * * * or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

The act then provides that the company issuing the bill of lading shall be entitled to recover from the common carrier on whose lines the loss occurred the amount of such damage as it may be required to pay to the owner, as may be evidenced by any receipt, judgment, or transcript thereof. This section was construed in Adams Express Co. v. Croninger, 226 U. S. 491, 33 S. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, in which case it was held by this act Congress showed a

[54] Parts of the statement of facts and opinion are omitted.

purpose to take entire control of the subject, and that any state laws attempting to deal with it were void. * * *

It thus appears that the object of Congress in passing this act was to make a uniformity of liability on all the common carriers who might form a link in the chain necessary to transport the interstate shipment to its destination, and thus protect this branch of interstate commerce from the diversity of liability to the owner of the property transported, which had theretofore existed by reason of the diversity of legislative and judicial holdings of the several states. But this object would be as completely defeated if each carrier over whose line the property was transported could make a different contract, changing its liability, as it would if each state could pass statutes effecting the same end. Under the provisions of the Carmack Amendment, the initial carrier in the case at bar would be liable to the defendant in error for the damage he had suffered, and the act provides that when the initial carrier is required to pay such loss, the railroad on whose line the loss was sustained should repay it, as evidenced by any receipt, judgment, or transcript thereof. This would indicate a clear intent on the part of Congress that the liability should be uniform, which uniformity would be destroyed if each line of railroad over which the property was transported could make an independent contract, varying its liability to the shippers. It cannot have been the intention of Congress to allow an intermediate carrier to contract for a lesser degree of liability to the shipper than the act had imposed on it in favor of the initial carrier. * * *

We therefore are of the opinion that this provision of the contract was void. But if it was void, can the charge of the court be sustained? The court, treating this part of the contract as void, instructed the jury that the liability of the plaintiff in error was that of an insurer, but in so doing the trial judge lost sight of the interstate character of this shipment, and of the provisions of the Carmack Amendment, as construed by the Supreme Court of the United States in Adams Express Co. v. Croninger, 226 U. S. 491, 33 S. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, supra. In that case it is held:

"What is the liability imposed upon the carrier? It is a liability to any holder of the bill of lading which the primary carrier is required to issue 'for any loss, damage or injury to such property caused by it,' or by any connecting carrier to whom the goods are delivered. The suggestion that an absolute liability exists for every loss, damage, or injury, from any and every cause, would be to make such a carrier an absolute insurer and liable for unavoidable loss or damage, though due to uncontrollable forces. That this was the intent of Congress is not conceivable. To give such emphasis to the words, 'any loss or damage,' would be to ignore the qualifying words, 'caused by it.' The liability thus imposed is limited to 'any loss, injury or damage caused by it or a succeeding carrier to whom the property may be delivered,' and

plainly implies a liability for some default in its common-law duty as a common carrier."

It was therefore error to instruct the jury that the liability of the plaintiff in error was that of an insurer, because it had the right to have the question of its negligence submitted to the jury. * * *

We therefore recommend that the judgment below be reversed, and the cause remanded, with instructions to grant a new trial.

PER CURIAM. Adopted in whole.[55]

JOHN LYSAGHT, Limited, v. LEHIGH VALLEY R. CO.

(District Court of the United States, S. D. New York, 1918. 254 F. 351.)

Demurrer to three pleas interposed to a complaint.

The complaint alleged: That on June 17, and June 22, 1916, the plaintiff caused to be delivered to the receiver of the Missouri, Kansas & Texas Railway two carloads of spelters to be transferred from the state of Kansas to the state of New York for export, consigned to the Iola Zinc Company, New York, and that for each carload the Missouri, Kansas & Texas Railway issued a bill of lading in standard form as approved by the Interstate Commerce Commission. That the defendant as connecting carrier received these two carloads for the completion of the transportation through the states of New York, Pennsylvania, and New Jersey, and to the city of New York. That thereafter, and on the 30th day of July, 1916, while in possession of the defendant, and at the port of New York, the carloads were destroyed by fire, to the damage of the plaintiff in the sum of $15,544.23. * * *

The defendant pleaded, for a first plea: That the spelters were destroyed as the natural result of certain explosives and munitions of war, in the course of transportation in interstate and foreign commerce as a necessary incident to the great European war, and that they exploded without fault of the defendant, for reasons beyond its control. That such explosion was a great public calamity, of which both the plaintiff and the defendant were innocent victims, and for which the defendant was in no wise responsible.

The second plea alleges: That the defendant and its connecting carriers were common carriers of freight and passengers in interstate commerce, and as such subject to the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379). That the defendant and its con-

[55] See, in accord with the view expressed in this case, In the Matter of Released Rates, 13 Interst. Com. Com'n R. 550, 552 (1908); In re Cummins Amendment, 33 Interst. Com. Com'n R. 682, 695 (1915); A. B. Crouch Grain Co. v. Atchison, T. & S. F. Ry., 41 Interst. Com. Com'n R. 717 (1916); Bernard v. Adams Express Co., 205 Mass. 254, 258, 91 N. E. 325 (1910). But compare Matter of Bills of Lading, 52 Interst. Com. Com'n R. 671, 695, 708 (1919).

necting carriers duly published as required by law their rates, charges, bill of lading provisions, and rules and regulations for the transportation of freight, including explosives and munitions of war. That on July 30, 1916, a large amount of explosives and munitions of war were in possession of the defendant at Jersey City, N. J., in the course of transportation in interstate foreign commerce, and that the spelters mentioned in the complaint were destroyed without any fault or negligence of the defendant, and as the proximate and natural result of the explosion on the date in question of certain of the aforesaid explosives and munitions of war. That the defendant, in the course of its handling and transportation, and while holding the aforesaid explosives and munitions of war, had fully complied with all the requirements of the act of Congress and the rules of the Interstate Commerce Commission applicable, as well as with its own tariffs, classifications, and bill of lading provisions for the transporting of such explosives and munitions of war.

The third plea alleges the same facts as the second, and in addition that the damage resulted from certain explosives and munitions of war, which were not in the possession or under the control of the defendant, but were on barges lying in the waters of New York Bay in the vicinity of defendant's terminal at Jersey City, N. J., which were wholly out of the control of the defendant.

The defendant by the three pleas raises the following points: * * * That furthermore, the liability of a common carrier is only for damages caused by it, and does not include any liability for explosions in which neither it nor its servants can be shown to have any part. Third. That, if the explosion was due to materials not in possession of the defendant, it is not responsible for the same, as in no aspect can it be said to be caused by the carrier itself.

LEARNED HAND, District Judge[56] (after stating the facts as above). This case depends directly upon the Carmack Amendment of the Interstate Commerce Law, which the Supreme Court has many times declared completely to regulate all the liabilities of common carriers engaged in interstate commerce. Adams Express Co. v. Croninger, 226 U. S. 491, 505, 33 S. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; Erie R. R. Co. v. New York, 233 U. S. 671, 681, 34 S. Ct. 756, 58 L. Ed. 1149, 52 L. R. A. (N. S.) 266, Ann. Cas. 1915D, 138; N. Y. & Norfolk R. R. Co. v. Peninsula Exchange, 240 U. S. 34, 36 S. Ct. 230, 60 L. Ed. 511, L. R. A. 1917A, 193; Southern Express Co. v. Byers, 240 U. S. 612, 614, 36 S. Ct. 410, 60 L. Ed. 825, L. R. A. 1917A, 197; Southern Railway v. Prescott, 240 U. S. 632, 639, 36 S. Ct. 469, 60 L. Ed. 836; Georgia, Florida, etc., Ry. v. Blish Milling Co., 241 U. S. 190, 194, 36 S. Ct. 541, 60 L. Ed. 948; Cincinnati, etc., Ry. v. Rankin, 241 U. S. 319, 36 S. Ct. 555, 60 L. Ed. 1022, L. R. A. 1917A, 265; Atchison, etc.,

[56] Parts of the statement of facts and opinion are omitted.

Ry. v. Harold, 241 U. S. 371, 378, 36 S. Ct. 665, 60 L. Ed. 1050. The Interstate Commerce Law, § 20, as now amended (Act Feb. 4, 1887, c. 104, 24 Stat. 386, as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat. 595 [Comp. St. 1916, §§ 8604a, 8604aa]), provides that an initial carrier shall be liable for all loss or damage "caused by it," but that the section as a whole shall not affect "any remedy or right of action" which the shipper shall have "under the existing law." The phrase "existing law" means existing common law as understood in the federal courts, and excludes changes effected by state statutes. Adams Express Co. v. Croninger, supra, 226 U. S. 504, 33 S. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; Southern Express Co. v. Byers, supra, 240 U. S. 614, 36 S. Ct. 410, 60 L. Ed. 825, L. R. A. 1917A, 197; Southern Railway Co. v. Prescott, supra, 240 U. S. 639, 36 S. Ct. 469, 60 L. Ed. 836. A connecting or terminal carrier's liability is subject to the same rules as the initial carrier's. Georgia, etc., Ry. v. Blish Milling Co., 241 U. S. 190, 36 S. Ct. 541, 60 L. Ed. 948. * * *

There cannot be any doubt, from the latest expression of the Supreme Court (Cincinnati, etc., Ry. Co. v. Rankin, 241 U. S. 319, 326, 36 S. Ct. 555, 60 L. Ed. 1022, L. R. A. 1917A, 265), that section 20 was intended to adopt the carrier's liability as it was understood at that time, and that the language of Mr. Justice Lurton in Adams Express Co. v. Croninger, 226 U. S. 491, 506, 507, 33 S. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, is not to be taken as interpreting the phrase "caused by it" as in limitation of any pre-existing liability. He was indeed discussing, not that question, but only whether the language extended the carrier's liabilities as fixed at common law, which he thought it did not, but that rather it implied "a liability for some default in its common-law duty as a common carrier." It may, perhaps, be too much to assert that the proviso of section 20 incorporates unyieldingly the exact status of the federal common law into the statute in its whole concreteness, yet it certainly does affirm in general the liability of carriers so derived as a part of the statute itself. Any radical departure from that law would violate the fair import of the phrase, and if there is to be any such it must be by express act of Congress. So much follows from the scheme of the section, which since 1906 has been obviously molded with an eye to the generally accepted liabilities of carriers as a foundation for the very specific changes prescribed from time to time.

It is, of course, possible to conceive the common law so incorporated to be such only as the courts might after a historical scrutiny accept, leaving them free even for radical modifications in the doctrine as generally expressed when the language first appeared in section 20. But I do not so understand the substance of the matter. Whether ill or well founded historically, the exceptions to a carrier's absolute liability had come to have a classic form, and I do not agree that a nice inquiry into the foundations of the current doctrine was con-

templated by the statute. The section incorporated what was generally accepted in the form in which it had become accepted, and rendered irrelevant the conclusions at which historical scholarship might arrive as to its justification. The structure of the system created by the act presupposed the existing law as then understood, and if it bears too heavily on the railroads their only relief is by an application to the Commission or to Congress. The courts have no such powers.

Therefore it seems to me quite beside the mark to engage in the examination which the defendant invites. Moreover, the implicit assumption of its case I do not accept, that justice necessarily lies on its side. I am aware of no long-accepted convention, which usage has made into an axiom of justice, and which throws a loss like this upon the shipper as against the carrier. Each party is quite innocent, and while it may be that the ordinary risks of ownership should fall upon the shipper, it is not apparent to me that the custody of the carrier may not be thought to modify those risks as between the two. The fact seems rather to be that all such a priori considerations are in vacuo, and that the relative rights of the parties may be only settled in the light of the function assigned to the carrier in the economic system of the country. That is a matter so obviously out of the province of a court and within that of Congress, where the conflicting economic interests may exert their mutual political powers, that I need hardly express any opinion upon it, even if I were in any position to do so. Whatever may be the debatable limitations of a carrier's liability still left open within the accepted general formulas, they do not raise any questions here. * * *

Demurrer sustained.[57]

NEW YORK, PHILADELPHIA & NORFOLK R. CO. v. PENINSULA PRODUCE EXCHANGE OF MARYLAND.

(Supreme Court of the United States, 1916. 240 U. S. 34, 36 S. Ct. 230, 60 L. Ed. 511, L. R. A. 1917A, 193.)

Mr. Justice HUGHES delivered the opinion of the court.[58]

On May 26, 1910, the Peninsula Produce Exchange of Maryland delivered to the New York, Philadelphia & Norfolk Railroad Company at Marion, Maryland, a carload of strawberries for transportation to New York City. The conditions of the transportation were set forth in the bill of lading issued by the railroad company.

57 Accord: Louisville & N. R. Co. v. Warfield & Lee, 6 Ga. App. 550, 65 S. E. 308 (1909). It is clear, however, that the initial carrier is not liable for a loss occurring on the connecting carrier's line where the carrier on whose line the loss occurred would not be liable. Cleveland, C., C. & St. L. Ry. Co. v. Hayes, 181 Ind. 87, 102 N. E. 34, 103 N. E. 839 (1913). For an excellent discussion of the question raised in the principal case, see note, 19 Colum. Law Rev. 316.

58 Parts of the opinion are omitted.

The property was delivered at destination some hours later than the customary time of arrival, and this action was brought to recover damages for the failure to transport and deliver with reasonable despatch. Judgment in favor of the shipper was affirmed by the court of appeals of Maryland. 122 Md. 215, 89 A. 433.

The plaintiff in error, in its brief, states that "the questions involved are two":

"1: Does the Carmack Amendment [34 Stat. at L. 593, c. 3591, Comp. Stat. 1913, § 8592] impose on the 'initial carrier' liability for delay occurring on the line of its connection without physical damage to the property? * * *

The first question, arising from the fact that it did not appear that the delay occurred on the line of the initial carrier (the defendant) was raised by an unsuccessful demurrer to the declaration, and both questions were presented by prayers for instructions which were denied.

The amendment of section 20 of the Interstate Commerce Act, known as the Carmack Amendment (Act of June 29, 1906, c. 3591, § 7, 34 Stat. at L. 584, 595, Comp. Stat. 1913, § 8592), provides "that any common carrier * * * receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier * * * to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier * * * from the liability hereby imposed."

We need not review at length the considerations which led to the adoption of this amendment. These were stated in Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 199–203, 55 L. Ed. 167, 179–181, 31 L. R. A. (N. S.) 7, 31 S. Ct. 164. It was there pointed out that along with singleness of rate and continuity of carriage in through shipments there had grown up the practice of requiring specific stipulations limiting the liability of each separate company to its own part of the through route, and, as a result, the shipper could look to the initial carrier for recompense only "for loss, damage, or delay" occurring on its own line. This "burdensome situation" was "the matter which Congress undertook to regulate." And it was concluded that the requirement that interstate carriers holding themselves out as receiving packages for destinations beyond their own terminal should be compelled "as a condition of continuing in that traffic to obligate themselves to carry to the point of destination, using the lines of connecting carriers as their own agencies," was within the power of Congress. The rule, said the court in defining the purpose of the Carmack Amendment, "is adapted to secure the rights of the shipper by securing unity of transportation with unity of responsibility." And, again, we said in Adams Exp. Co. v. Croning-

er, 226 U. S. 491, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, 33 S. Ct. 148, that this legislation embraces "the subject of the liability of the carrier under a bill of lading which he must issue." "The duty to issue a bill of lading and the liability thereby assumed are covered in full, and though there is no reference to the effect upon state regulation, it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject." Id. 506.

It is now insisted that Congress failed to accomplish this paramount object; that while unity of responsibility was secured if the goods were injured in the course of transportation or were not delivered, the statute did not reach the case of a failure to transport with reasonable despatch. In such case it is said that, although there is a through shipment, the shipper must still look to the particular carrier whose neglect caused the delay. We do not think that the language of the amendment has the inadequacy attributed to it. The words "any loss, damage, or injury to such property," caused by the initial carrier or by any connecting carrier, are comprehensive enough to embrace all damages resulting from any failure to discharge a carrier's duty with respect to any part of the transportation to the agreed destination. It is not necessary, nor is it natural, in view of the general purpose of the statute, to take the words "to the property" as limiting the word "damage" as well as the word "injury," and thus as rendering the former wholly superfluous. It is said that there is a different responsibility on the part of the carrier with respect to delay from that which exists where there is a failure to carry safely. But the difference is with respect to the measure of the carrier's obligation; the duty to transport with reasonable despatch is none the less an integral part of the normal undertaking of the carrier. And we can gather no intent to unify only a portion of the carrier's responsibility.

Further, it is urged that the amendment provides that the initial carrier may recover from the connecting carrier "on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property;" and this, it is said, shows that the "loss, damage, or injury" described is that which may be localized as having occurred on the line of one of the carriers, and therefore should be limited to physical loss or injury. But we find no difficulty in this, as the damages required to be paid by the initial carrier are manifestly regarded as resulting from some breach of duty, and the purpose is simply to provide for a recovery against the connecting carrier if the latter, as to its part of the transportation, is found to be guilty of that breach. The view we have expressed finds support in the explicit terms of the Act of January 20, 1914, c. 11, 38 Stat. at L. 278, which provides "that no suit brought in any state court of competent jurisdiction against a railroad company * * * to recover damages for delay, loss of, or injury to property received for transporta-

tion by such common carrier under section twenty of the act to regulate commerce * * * shall be removed to any court of the United States where the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of $3,000." If the language of section 20 can be regarded as ambiguous, this legislative interpretation of it as conferring a right of action for delay, as well as for loss or injury to the property in the course of transportation, is entitled to great weight.[59] Alexander v. Alexandria, 5 Cranch, 1, 7, 8, 3 L. Ed. 19–21; United States v. Freeman, 3 How. 556, 564, 565, 11 L. Ed. 724, 727, 728; Cope v. Cope, 137 U. S. 682, 688, 34 L. Ed. 832, 834, 11 S. Ct. 222. * * *

Judgment affirmed.[60]

GEORGIA, FLORIDA & ALABAMA RY. CO. v. BLISH MILLING CO.

(Supreme Court of the United States, 1916. 241 U. S. 190, 36 S. Ct. 541, 60 L. Ed. 948.)

Mr. Justice HUGHES delivered the opinion of the court:

The Blish Milling Company brought this action in trover against the Georgia, Florida & Alabama Railway Company, and recovered judgment, which was affirmed by the court of appeals of Georgia. 15 Ga. App. 142, 82 S. E. 784. The facts are these:

On May 13, 1910, the Blish Milling Company shipped from Seymour, Indiana, to Bainbridge, Georgia, a carload of flour consigned to its own order, with direction to notify Draper-Garrett Grocery Company at Bainbridge. The bill of lading was issued by the Baltimore & Ohio Southwestern Railroad Company. The shipper's sight draft upon the Draper-Garrett Grocery Company, for $1,109.89, covering the price of the flour, with a carrying charge, was attached to the bill of lading and forwarded to a bank in Bainbridge for collection. The flour was transferred to another car by the Central of Georgia Railway Company, a connecting carrier, and reached Bainbridge on June 2, 1910, over the line of the Georgia, Florida & Alabama Railway Company, the plaintiff in error, in accordance with routing. The plaintiff in error, without requiring payment of the draft and surrender of the bill of lading (which were ultimately returned to the Blish Milling Company), delivered the car to the Draper-Garrett Grocery Company immediately on its arrival by placing it on the sidetrack of that com-

[59] The language of the Carmack Amendment has been construed in various decisions by state courts as embracing damages for delay. Ft. Smith & W. R. Co. v. Awbrey, 39 Okl. 270, 134 P. 1117 (1913); Southern P. Co. v. Lyon, 107 Miss. 777, 66 So. 209 (1914); Pecos & N. T. R. Co. v. Cox (Tex. Civ. App.) 150 S. W. 265 (1912); Norfolk Truckers Exch. v. Norfolk Southern R. Co., 116 Va. 466, 82 S. E. 92 (1914). Contra, Byers v. Southern Exp. Co., 165 N. C. 542, 81 S. E. 741 (1914).—[Footnote by the Court.]

[60] See note, 64 U. of Penna. Law Rev. 494.

pany. In the course of unloading, the Grocery Company discovered that some of the flour was wet, and thereupon reloaded the part removed and returned the flour to the plaintiff in error. The subsequent course of events is thus stated by the court of appeals (Id. pp. 144, 145):

"The railway company" (that is, the plaintiff in error) "retook possession of the car and unloaded it, and in a few days sold, as perishable property, a part of the flour alleged to be damaged, and on December 23, 1910, sold the remainder. On June 3, 1910, after the Grocery Company had turned the flour back to the railway company, B. C. Prince, traffic manager of the Georgia, Florida & Alabama Railway Company, telegraphed to the Blish Milling Company as follows: 'Flour order notify Draper-Garrett Grocery Company refused account damage. Hold at your risk and expense. Advise disposition.' On the next day the Milling Company replied by telegraphing to Prince, 'Sending our representative there. What is nature of damage?' To this Prince replied: 'Flour transferred in route. Slight damage by water, apparently rough handling. When will your representative reach Bainbridge?' The Blish Milling Company replied that its man would be there that night or the next day. On June 7 (after the Milling Company's representative had reached Bainbridge and conferred with the agents of the railway company and with the Grocery Company) the Milling Company sent a final telegram, saying, 'We will make claim against railroad for entire contents of car at invoice price. Must refuse shipment as we cannot handle.' It appears, from the evidence of Mr. Draper, that the price of flour declined after his order was given and before the flour reached Bainbridge. There is conflict in the evidence as to a tender of the flour by the railway company to the Milling Company's representative. According to some of the testimony, about 18 barrels of the flour had been sold by the railway company before the alleged tender was made, and therefore it was not within the power of the carrier to tender the shipment in its entirety."

The verdict in favor of the Milling Company was for $1,084.50, from which the court of appeals required a deduction of the amount of the unpaid freight, which was held to have been erroneously included.

With other defenses the railway company pleaded that the shipper had failed to comply with the following provision of the bill of lading, issued by the initial carrier: "Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after the delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made, the carrier shall not be liable." This defense was overruled. The court of appeals stated that "so far as appears from the record, no claim was filed by the shipper," but deemed the provision to be inapplicable. Id., p. 149.

There are only two questions presented here, and these are thus set forth in the brief of the plaintiff in error:

"(1) That the plaintiff's exclusive remedy was against the initial carrier, the Baltimore & Ohio Southwestern Railroad Company, under the Carmack Amendment of section 20 of the Hepburn bill [34 Stat. at L. 593, c. 3591, Comp. Stat. 1913, § 8592].

"(2) That, under the stipulation in the bill of lading providing for the filing of claims for loss or damage, the action was barred."

The first contention is met by repeated decisions of this court. The connecting carrier is not relieved from liability by the Carmack Amendment, but the bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation, and thus fixes the obligations of all participating carriers to the extent that the terms of the bill of lading are applicable and valid. "The liability of any carrier in the route over which the articles were routed, for loss or damage, is that imposed by the act as measured by the original contract of shipment, so far as it is valid under the act." Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 648, 57 L. Ed. 683, 686, 33 S. Ct. 391. See Adams Exp. Co. v. Croninger, 226 U. S. 491, 507, 508, 57 L. Ed. 314, 320, 321, 44 L. R. A. (N. S.) 257, 33 S. Ct. 148; Cleveland, C. C. & St. L. R. Co. v. Dettlebach, 239 U. S. 588, 591, 60 L. Ed. 453, 36 S. Ct. 177; Southern R. Co. v. Prescott, 240 U. S. 632, 637, 60 L. Ed. 836, 36 S. Ct. 469; Northern P. R. Co. v. Wall, decided April 24, 1916 [241 U. S. 87, 60 L. Ed. 905, 36 S. Ct. 493].

These decisions also established that the question as to the proper construction of the bill of lading is a federal question. The clause with respect to the notice of claims—upon which the plaintiff in error relies in its second contention—specifically covers "failure to make delivery." It is said that this is not to be deemed to include a case where there was not only failure to deliver to the consignee, but actual delivery to another, or delivery in violation of instructions. But "delivery" must mean delivery as required by the contract, and the terms of the stipulation are comprehensive—fully adequate in their literal and natural meaning to cover all cases where the delivery has not been made as required. When the goods have been misdelivered there is as clearly a "failure to make delivery" as when the goods have been lost or destroyed; and it is quite as competent in the one case as in the other for the parties to agree upon reasonable notice of the claim as a condition of liability.[61]

It may be urged that the carrier is bound to know whether it has delivered to the right person or according to instructions. This argument, however, even with respect to the particular carrier which makes a misdelivery, loses sight of the practical object in view. In fact,

61 Concerning the validity of stipulations requiring notice of claim, filing of claim, and the institution of suit within a specified time, see section 20 of the Interstate Commerce Act (U. S. Comp. St. § 8604a).

the transactions of a railroad company are multitudinous, and are carried on through numerous employees of various grades. Ordinarily the managing officers, and those responsible for the settlement and contest of claims, would be without actual knowledge of the facts of a particular transaction. The purpose of the stipulation is not to escape liability, but to facilitate prompt investigation. And, to this end, it is a precaution of obvious wisdom, and in no respect repugnant to public policy, that the carrier by its contracts should require reasonable notice of all claims against it even with respect to its own operations.

There is, however, a further and controlling consideration. We are dealing with a clause in a bill of lading issued by the initial carrier. The statute casts upon the initial carrier responsibility with respect to the entire transportation. The aim was to establish unity of responsibility (Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 199–203, 55 L. Ed. 167, 179–181, 31 L. R. A. (N. S.) 7, 31 S. Ct. 164; New York, P. & N. R. Co. v. Peninsula Produce Exch., 240 U. S. 34, 38, 60 L. Ed. 511, 36 S. Ct. 230, L. R. A. 1917A, 193), and the words of the statute are comprehensive enough to embrace responsibility for all losses resulting from any failure to discharge a carrier's duty as to any part of the agreed transportation, which, as defined in the federal act, includes delivery. It is not to be doubted that if, in the case of an interstate shipment under a through bill of lading, the terminal carrier makes a misdelivery, the initial carrier is liable; and when it inserts in its bill of lading a provision requiring reasonable notice of claims "in case of failure to make delivery," the fair meaning of the stipulation is that it includes all cases of such failure, as well those due to misdelivery as those due to the loss of the goods. But the provision in question is not to be construed in one way with respect to the initial carrier, and in another with respect to the connecting or terminal carrier. As we have said, the latter takes the goods under the bill of lading issued by the initial carrier, and its obligations are measured by its terms (Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 648, 57 L. Ed. 683, 686, 33 S. Ct. 391; Southern R. Co. v. Prescott, 240 U. S. 632, 637, 60 L. Ed. 836, 36 S. Ct. 469); and if the clause must be deemed to cover a case of misdelivery when the action is brought against the initial carrier, it must equally have that effect in the case of the terminal carrier, which, in the contemplation of the parties, was to make the delivery. The clause gave abundant opportunity for presenting claims, and we regard it as both applicable and valid.

In this view, it necessarily follows that the effect of the stipulation could not be escaped by the mere form of the action. The action is in trover, but, as the state court said: "If we look beyond its technical denomination, the scope and effect of the action is nothing more than that of an action for damages against the delivering carrier." 15 Ga. App. 147. It is urged, however, that the carrier, in making the misdelivery, converted the flour and thus abandoned the contract. But

the parties could not waive the terms of the contract under which the shipment was made pursuant to the federal act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct, and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed. Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 166, 56 L. Ed. 1033, 1038, 32 S. Ct. 648, Ann. Cas. 1914A, 501; Kansas City Southern R. Co. v. Carl, supra; Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 181, 58 L. Ed. 901, 905, 34 S. Ct. 556; Southern R. Co. v. Prescott, supra. We are not concerned in the present case with any question save as to the applicability of the provision, and its validity, and as we find it to be both applicable and valid, effect must be given to it.

But, while this is so, we think that the plaintiff in error is not entitled to succeed in its ultimate contention under the stipulation for the reason that it appears that notice of the claim was in fact given. It is true that in the statement made by the court of appeals it is said that, so far as appears from the record, "no claim was filed by the shipper." We must assume, however, that this was in effect a construction of the provision as requiring a more formal notice than that which was actually sent. For the court had already set forth the uncontroverted facts in detail showing that the shipper (having made an investigation in response to the communication of the traffic manager of the railway company) had telegraphed to the latter, on June 7, 1910, only five days after the arrival of the goods at destination, as follows: "We will make claim against railroad for entire contents of car at invoice price. Must refuse shipment as we cannot handle."

In the preceding telegrams which passed between the parties, and are detailed by the state court in stating the facts, the shipment had been adequately identified, so that this final telegram, taken with the others, established beyond question the particular shipment to which the claim referred, and was in substance the making of a claim within the meaning of the stipulation—the object of which was to secure reasonable notice. We think that it sufficiently apprised the carrier of the character of the claim, for while it stated that the claim was for the entire contents of the car "at invoice price," this did not constitute such a variance from the claim for the value of the flour as to be misleading; and it is plain that no prejudice resulted.

Granting that the stipulation is applicable and valid, it does not require documents in a particular form. It is addressed to a practical exigency and it is to be construed in a practical way. The stipulation required that the claim should be made in writing, but a telegram which, in itself, or taken with other telegrams, contained an adequate statement, must be deemed to satisfy this requirement. See Ryan

v. United States, 136 U. S. 68, 83, 34 L. Ed. 447, 453, 10 S. Ct. 913; Kleinhans v. Jones, 15 C. C. A. 644, 37 U. S. App. 185, 68 F. 742, 745; Godwin v. Francis, L. R. 5 C. P. 295, 39 L. J. C. P. N. S. 121, 22 L. T. N. S. 338; Reg. v. Riley, [1896] 1 Q. B. 309, 314, 321, 65 L. J. Mag. Cas. N. S. 74, 74 L. T. N. S. 254, 44 Week. Rep. 318, 18 Cox, C. C. 285, 65 J. P. 519, 10 Am. Cr. Rep. 402; Howley v. Whipple, 48 N. H. 487, 488; State v. Holmes, 56 Iowa, 588, 590, 41 Am. Rep. 121, 9 N. W. 894.

Judgment affirmed.

CHARLESTON & WESTERN CAROLINA RY. CO. v. VARNVILLE FURNITURE CO.

(Supreme Court of the United States, 1915. 237 U. S. 597, 35 S. Ct. 715, 59 L. Ed. 1137, Ann. Cas. 1916D, 333.)

Mr. Justice HOLMES delivered the opinion of the court.

This is an action for $14.75, damage to furniture in transit from High Point, North Carolina, to Varnville, South Carolina, $4.60 overcharge, and $50 penalty under a South Carolina statute (Civil Code 1912, § 2573), for a failure to pay the claims within forty days. The defendant contended that the law imposing the penalty was invalid under the act to regulate commerce, especially section 20 [24 Stat. at L. 386, c. 104], as amended by the Act of June 29, 1906, c. 3591, 34 Stat. at L. 584, 593, Comp. Stat. 1913, §§ 8563, 8592, known as the Carmack Amendment. The lower courts gave judgment for the plaintiff, and the judgment was affirmed by the supreme court of the state. Atlantic Coast Line R. Co. v. Mazursky, 216 U. S. 122, 54 L. Ed. 411, 30 S. Ct. 378, was relied upon as still sustaining the law notwithstanding the amendments of the federal act. 98 S. C. 63, 79 S. E. 700.

The defendant (plaintiff in error) received the goods from the Southern Railway Company and delivered them in damaged condition. Where the damage was done does not appear. But by section 2572, in such cases the initial, intermediate, or terminal carrier who fails within forty days from notice to inform the notifying party when, where, and by which carrier the property was damaged is made liable for the amount of the claim and a penalty of $50, although it may escape by proof that it used due diligence and was unable to trace the property, etc. By section 2573 a similar liability is imposed on carriers for failure to pay claims for freight overcharge or damage to property while in the possession of such carriers, "within forty days in case of shipments from without the state, after the filing of such claim," etc. If the property never came into their possession, they are remitted to section 2572. It seems to follow from the decision in this case, that the terminal carrier is held for a loss anywhere along the line, and for the penalty, unless it proves that the

property never came into its possession, etc., or succeeds in shifting the loss within the forty days allowed. Therefore the assumption of this court in Atlantic Coast Line R. Co. v. Mazursky, 216 U. S. 122, 129, 54 L. Ed. 411, 416, 30 S. Ct. 378, that the statute only concerned property lost or damaged while in the possession of a carrier in South Carolina, no longer is correct; perhaps because of amendments in what now is section 2572.

It is true that in the opinion of the supreme court the judgment is spoken of as being for damage done to a shipment "while in defendant's possession in this state," and it is said that the statute limits the liability to such damage. But in view of the record this can mean no more than that there is a presumption that the carrier that fails on notice to point out some other as responsible is itself in fault. The defendant happened to be the last carrier of the line, and in many states, including South Carolina, a so-called presumption has been established at common law that property starting in good condition remained so until the latest moment when it could have been harmed. But while this seems to have made its first appearance in the guise of a true presumption of fact, it became, if it was not always, a rule of substantive law, a rule of convenience, calling on the last carrier to explain. Willett v. Southern R. Co., 66 S. C. 477, 479, 45 S. E. 93, 14 Am. Neg. Rep. 635; Moore v. New York, N. H. & H. R. Co., 173 Mass. 335, 337, 73 Am. St. Rep. 298, 53 N. E. 816. The rule is stated as a rule of policy in South Carolina, and the statute makes it still more clearly so, since with the limits that we have stated, it applies indifferently to any carrier in the line, if within the state, according to the accident of the plaintiff's demand. The case, then, we repeat, is that a carrier in interstate commerce has been held liable for a loss not shown to have happened while the goods were in its possession or within the state, or to have been caused by it, if those facts are now in any way material, on the strength of a rule of substantive law.

The claims dealt with in Atlantic Coast Line R. Co. v. Mazursky, 216 U. S. 122, 54 L. Ed. 411, 30 S. Ct. 378, all arose before June 29, 1906, the date of the Carmack Amendment. The South Carolina law has been amended and enlarged in scope since that decision, but it is less necessary to scrutinize those changes than to consider the modifications of the United States law. As it now stands that law requires the initial carrier to issue a through bill of lading, and makes it liable for all damage anywhere on the route. Section 20. By section 1 as amended by the Act of June 18, 1910, c. 309, § 7, 36 Stat. at L. 539, 546, Comp. Stat. 1913, § 8563, it is made the duty of carriers to secure the safe transportation and delivery of property subject to the act, upon reasonable terms. As was said in Missouri, K. & T. R. Co. v. Harris, 234 U. S. 412, 420, 58 L. Ed. 1377, 1382, 34 S. Ct. 790, the result of many recent cases there cited, beginning with Adams Exp. Co. v. Croninger, 226 U. S. 491, 57

L. Ed. 314, 44 L. R. A. (N. S.) 257, 33 S. Ct. 148, and coming down through Boston & M. R. Co. v. Hooker, 233 U. S. 97, 58 L. Ed. 868, L. R. A. 1915B, 450, 34 S. Ct. 526, is that "the special regulations and policies of particular states upon the subject of the carrier's liability for loss or damage to interstate shipments, and the contracts of carriers with respect thereto, have been superseded."

It is true that in that case the inclusion of the attorney's fee, not exceeding $20, in the costs upon judgments for certain small claims was upheld, although incidently including some claims arising out of interstate commerce. But, apart from the effect being only incidental, the ground relied upon was that the statute did not "in any way enlarge the responsibility of the carrier" for loss or "at all affect the ground of recovery, or the measure of recovery" (pages 420, 422). The South Carolina act, on the other hand, extends the liability to losses on other roads in other jurisdictions, and increases it by a fine difficult to escape. It overlaps the federal act in respect of the subjects, the grounds, and the extent of liability for loss. We leave on one side the remote analogies put forward in the decision of the state court, as, in our opinion, the cases and principle to which we have referred are sufficient and direct. We should add that the item for overcharges also falls under the act of Congress, section 2, as it now stands, since that section makes the receiving of greater compensation than is received from others for similar services an unjust and unlawful discrimination. The penalty, the only matter that we are considering, was exacted for a failure to pay both claims, within forty days, irrespective of the question whether adequate investigation had been possible, as required by the Interstate Commerce Commission's rulings, Nos. 462, 236, and 68.

It is suggested that the act is in aid of interstate commerce. The state law was not contrived in aid of the policy of Congress, but to enforce a state policy differently conceived; and the fine of $50 is enough to constitute a burden. Southern R. Co. v. Reid, 222 U. S. 424, 443, 56 L. Ed. 257, 262, 32 S. Ct. 140. But that is immaterial. When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go. Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co., 226 U. S. 426, 435, 57 L. Ed. 284, 287, 46 L. R. A. (N. S.) 203, 33 S. Ct. 174; Southern R. Co. v. Railroad Commission, 236 U. S. 439, 446, 447, 59 L. Ed. 661, 35 S. Ct. 304. The legislation is not saved by calling it an exercise of the police power, or by the proviso in the Carmack Amendment saving the rights of holders of bills of lading under existing law. Adams Exp. Co. v. Croninger, 226 U. S. 491, 506, 507, 57 L. Ed. 314, 320, 321, 44 L. R. A. (N. S.) 257, 33 S. Ct. 148.

Judgment reversed.

CHICAGO & N. W. RY. CO. v. C. C. WHITNACK PRODUCE CO.

(Supreme Court of the United States, 1922. 258 U. S. 369, 42 S. Ct. 328, 66 L. Ed. 665.)

Mr. Justice McREYNOLDS delivered the opinion of the Court.

The respondent Produce Company recovered a judgment against petitioner, the delivering carrier, for damages to two carloads of apples transported during November, 1914, upon through bills of lading over connecting lines from points in New York state to one in Nebraska. The evidence tended to show that the apples were in good condition when received by the initial carrier, but were frozen when delivered at destination. Where the damage occurred was not shown.

Petitioner moved for a directed verdict, claiming no recovery could be had against it without affirmative evidence that it caused the damage. Having denied this motion, the court instructed the jury that there was a presumption of damage upon the line of the last carrier, and the Supreme Court of Nebraska approved the charge.

The single question now presented for consideration is whether, since the Carmack Amendment (Comp. St. §§ 8604a, 8604aa) a presumption arises that the injury occurred on the delivering carrier's line, when goods moving in interstate commerce upon a through bill of lading are delivered in bad condition and the evidence shows they were sound when received by the initial carrier, but does not affirmatively establish where the loss occurred.

It is established doctrine that the rights and liabilities in respect of damage to goods moving in interstate commerce under through bills of lading depend upon acts of Congress, agreements between the parties and common-law principles accepted and enforced in the federal courts. New York Central, etc., R. R. v. Beaham, 242 U. S. 148, 151, 37 S. Ct. 43, 61 L. Ed. 210. While this court has not expressly approved it, we think the common-law rule, supported both by reason and authority, is correctly stated in section 1348, Hutchinson on Carriers (3d Ed.):

"A connecting carrier, who has completed the transportation and delivered the goods to the consignee in a damaged condition or deficient in quantity, will be held liable in an action for the damage or deficiency, without proof that it was occasioned by his fault, unless he can show that he received them in the condition in which he has delivered them. The condition and quantity of the goods when they were delivered to the first of the connecting carriers being shown, the presumption will arise that they continued in that condition down to the time of their delivery to the carrier completing the transportation and making the delivery to the consignee, and that the injury or loss occurred while they were in his possession."

Some of the pertinent cases are collected in the note below.[62]

The petitioner insists that this common-law rule conflicts with the Carmack Amendment to the Interstate Commerce Act, c. 3591, 34 Stat. 584, 595, which requires issuance of a through bill of lading by initial carrier and declares it liable for damage occurring anywhere along the route, as interpreted and applied by this court. But we find no inconsistency between the amendment or any other federal legislation and the challenged rule. Properly understood, Charleston, etc., Ry. Co. v. Varnville Furniture Co., 237 U. S. 597, 35 S. Ct. 715, 59 L. Ed. 1137, Ann. Cas. 1916D, 333, especially relied upon gives no support to the contrary view.

That cause involved the South Carolina statute which imposed a penalty of $50 upon the carrier for failure to pay within 40 days for damages suffered by goods transported in interstate commerce. The opinion expressly states, "The defendant contended that the law imposing the penalty was invalid under the Act to Regulate Commerce, especially section 20, as amended by the Act of June 29, 1906, * * * known as the Carmack Amendment," refers to the penalty as "the only matter that we are considering," and points out that "the state law was not contrived in aid of the policy of Congress, but to enforce a state policy differently conceived." As the Supreme Court of South Carolina sustained the act and permitted recovery of the penalty, its judgment was necessarily reversed.

Here there is no question of conflict between a state statute and any federal policy; and nothing in the words of the amendment indicates

[62] Smith v. New York Cent. R. R. Co., 43 Barb. (N. Y.) 225 (1864); Cote v. N. Y., N. H. & H. R. Co., 182 Mass. 290, 65 N. E. 400, 94 Am. St. Rep. 656 (1902); Laughlin v. Chicago & Northwestern R. Co., 28 Wis. 204, 9 Am. Rep. 493 (1871); Philadelphia, Balt. & Wash. R. R. Co. v. Diffendal, 109 Md. 494, 72 A. 193, 458 (1909); Blumenthal v. Central R. R. Co. of N. J., 88 N. J. Law, 254, 95 A. 973 (1915); Pennsylvania R. R. Co. v. Naive, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443 (1903); Colbath v. Bangor & Aroostook R. Co., 105 Me. 379, 74 A. 918 (1909); Willett v. Southern Ry. Co., 66 S. C. 477, 45 S. E. 93 (1903).

The following cases hold that the presumption is not in conflict with the Carmack Amendment: Erisman v. C., B. & Q. Ry. Co., 180 Iowa, 759, 163 N. W. 627 (1917); Glassman v. C., R. I. & P. Ry. Co., 166 Iowa, 255, 147 N. W. 757 (1914); T. W. Mewborn & Co. v. L. & N. R. R. Co., 170 N. C. 205, 87 S. E. 37 (1915); Chicago, R. I. & P. Ry. Co. v. Harrington, 44 Okl. 41, 143 P. 325 (1914); Eastover Mule, etc., Co. v. A. C. L. R. Co., 99 S. C. 470, 83 S. E. 599 (1914).

Carmack Amendment: "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

[Footnote by the Court.]

a legislative purpose to abrogate the accepted common-law doctrine concerning presumption. The suggestion that by imposing additional liability upon the initial carrier the amendment provides an adequate remedy for shippers, and thereby removes the necessity for any presumption against the terminal one and impliedly abrogates the rule, is unsound. There are adequate reasons why shippers should have the benefit of both; and we think Congress so intended.

The judgment of the court below is affirmed.

Mr. Justice CLARKE took no part in the consideration or decision of this cause.

OREGON-WASHINGTON R. & NAV. CO. v. McGINN.

(Supreme Court of the United States, 1922. 258 U. S. 409, 42 S. Ct. 332, 66 L. Ed. 689.)

Mr. Justice CLARKE delivered the opinion of the court.

The respondent shipped two carloads of horses from Grand Island, Neb., to Spokane, Wash., for which the initial carrier, the Union Pacific Railroad Company, issued a through bill of lading, in the form of the customary live stock contract, and routed the shipment over its own lines to Granger, Wyo., thence over the line of the Oregon Short Line Railroad Company to Huntington, Or., and thence over the lines of petitioner to Spokane, Wash.

While in transit the animals developed disease, which resulted in the death of several and in such condition of the others that they were delivered to the shipper consignee on the line of the petitioner before reaching the destination to which they were billed. The illness is alleged to have been caused by the stock having been given unwholesome food and water at Pocatello, Idaho, a station on the line of the intermediate carrier, the Oregon Short Line Railroad Company.

This suit to recover damages is against the delivering, the terminal, carrier; the allegation of the complaint, however, being that the unwholesome food and water were given to the stock while in transit over the route of the intermediate carrier, the Oregon Short Line Railroad Company. Thus we have presented for decision the question: Is a terminal carrier liable to a shipper who, in this case, is also the consignee, for injury to horses caused by the negligence of a prior and independent carrier from which they were received?

The live stock contract, under which the shipment moved contained the following provision: "(1) Except as otherwise provided by statute law, the carrier undertakes to transport said shipment only over its own line, and acts only as the agent of the shipper with respect to the portion of the route beyond its own line. No carrier shall be liable for damages for loss, death, injury or delay to said animals, or any thereof, not caused by it, but nothing contained in this contract shall be deemed to exempt the initial carrier in case of a through interstate

transportation from any liability for loss, death, damage or injury caused by it or any common carrier, railroad or transportation company to which the livestock may be delivered under this contract."

It is plain that this paragraph was framed to comply with the requirements of the Cummins Amendment to the Carmack Amendment to the Interstate Commerce Act (34 Stat. § 20, 593, 595; 38 Stat. 1196, c. 176 [Comp. St. § 8604a]); but, except as therein provided, the initial carrier limits its undertaking to its own line, declares that it acts only as the agent of the shipper with respect to the route beyond its own line, and the express contract is that "no carrier shall be liable for damages for loss, death, injury or delay to said animals not caused by it."

A verdict was rendered in favor of the shipper consignee, subject to the court's action on a question reserved by stipulation of the parties, and the court, acting thereunder, set aside the verdict and rendered judgment for the defendant. The Circuit Court of Appeals reversed the District Court, and held that Georgia, Florida & Alabama Railway Co. v. Blish Milling Co., 241 U. S. 190, 36 S. Ct. 541, 60 L. Ed. 948, required that, under the Carmack (now Cummins) Amendment, the terminal carrier should be bound by the contract of the initial carrier to deliver, precisely as the initial carrier is bound, and was therefore liable for any loss or damage to the property that had been occasioned in transit through the conduct of any of the carriers.

In this we think the Circuit Court of Appeals fell into error. The settled federal rule is that, in the absence of statute or special contract, each connecting carrier on a through route is bound only to safely carry over its own line and safely deliver to the next connecting carrier, Myrick v. Michigan Central Railroad Co., 107 U. S. 102, 107, 1 S. Ct. 425, 27 L. Ed. 325; Railroad Co. v. Manufacturing Co., 16 Wall. 318, 324, 21 L. Ed. 297; and the liability of a connecting carrier for the safety of property delivered to it for transportation, commences when it is received and is discharged by its delivery to and acceptance by a succeeding carrier, or its authorized agent, Pratt v. Railway Co., 95 U. S. 43, 24 L. Ed. 336.

The Cummins Amendment deals with and modifies the common-law liability only of the initial carrier. It renders that carrier liable for loss or damage to the property committed to its care throughout the entire route by which it is billed until delivered to the consignee, but it leaves the relation of all connecting carriers, including the terminal carrier, to the shipper or consignee and to each other, entirely unaffected (Atlantic Coast Line Railroad Co. v. Riverside Mills, 219 U. S. 186, 195, 196, 197, 31 S. Ct. 164, 55 L. Ed. 167, 31 L. R. A. [N. S.] 7; Adams Express Co. v. Croninger, 226 U. S. 491, 511, 33 S. Ct. 148, 57 L. Ed. 314, 44 L. R. A. [N. S.] 257), and therefore their liability is as we have stated it unless modified by contract, and in this case, as we have seen, the live stock contract, under which the shipment moved, by expressly providing that "no carrier (other

than the initial carrier) shall be liable for damage for loss, death, injury or delay to said animals, or any thereof, not caused by it" leaves the common-law liability of the intermediate carrier entirely unaffected, just as the statute leaves it.

The Blish Case, supra, was against the terminal carrier, and one contention in that case was that under the Carmack (now Cummins) Amendment the shipper's remedy against the initial carrier was exclusive, even where the default claimed was misdelivery by the terminal carrier. In denying this, this court said:

"The connecting carrier is not relieved from liability by the Carmack [Cummins] Amendment, but the bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation and thus fixes the obligations of all participating carriers *to the extent that the terms of the bill of lading are applicable and valid.*"

We have seen that the amendment did not alter the common-law liability of other than the initial carrier, and in this case the "applicable and valid" terms of the bill of lading, expressly negative liability of any connecting carrier for damage not caused by it.

The other contention in the Blish Case, supra, was that the action was barred because notice of claim, in writing, had not been given within the time required by the bill of lading.

In the discussion of this question this Court used the language following, by which the Circuit Court of Appeals was misled, viz.: "When it [the initial carrier] inserts in its bill of lading a provision requiring reasonable notice of claims 'in case of failure to make delivery' the fair meaning of the stipulation is that it includes all cases of such failure, as well those due to misdelivery as those due to the loss of the goods. But the provision in question is not to be construed in one way with respect to the initial carrier and in another with respect to the connecting or terminal carrier. As we have said, the latter takes the goods under the bill of lading issued by the initial carrier and its obligations are measured by its terms; and if the clause must be deemed to cover a case of misdelivery when the action is brought against the initial carrier, it must equally have that effect in the case of the terminal carrier which in the contemplation of the parties was to make the delivery."

From this language the Circuit Court of Appeals concludes that under the amendment the terminal carrier is bound, by the bill of lading and the contract of the initial carrier, to deliver as the initial carrier is bound, and is therefore liable for any loss or damage to the property which has been occasioned through the conduct of any of the carriers while in transit, and this led the court to the holding that the terminal carrier was liable for the loss and injury "although occasioned while in transit over the Oregon Short Line."

We think the Circuit Court of Appeals misinterpreted the only relevant expression in the above quotation from the language by this

court, viz.: The terminal carrier "takes the goods under the bill of lading issued by the initial carrier, and its obligations are measured by its terms; and if the clause must be deemed to cover a case of misdelivery when the action is brought against the initial carrier, it must equally have that effect in the case of the terminal carrier which in the contemplation of the parties was to make the delivery."

What was decided in the Blish Case was that the terminal carrier was liable for failure to make delivery, just as the initial carrier would have been if it had been sued for misdelivery, because by the terms of the bill of lading each was under obligation to make final delivery. The suit before us is not for misdelivery or other fault of the carrier sued, but for the fault, as alleged, of a prior connecting carrier. In express terms the bill of lading we have here declares that no carrier shall be liable for loss or damage not caused by it, and, therefore, the statute not providing otherwise the petitioner cannot be liable for the damage alleged to have been caused before the stock reached its line.

The Carmack and Cummins Amendments were enacted to enable the holder of a bill of lading to sue the initial carrier for any loss or damage to property suffered on any part of a through route, and thereby to relieve him from the necessity of searching out and proving a case against a terminal or intermediate carrier. 219 U. S. 186, supra, page 200, 31 S. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7. Having regard to the customary methods of doing a through business in this country it may have been important to have given like rights against others of connecting carriers, but plainly, either from design or accident, the terms of the amendment limit its application to the initial carrier.

We think that the Circuit Court of Appeals was mistaken in its interpretation of the language used in the Blish Case opinion, and its judgment must be reversed and the judgment of the District Court affirmed.

Reversed.[63]

63 Concerning the liability of an intermediate carrier, see Hansen-Peterson Co. v. Atchison, T. & S. F. Ry. Co. (Minn.) 205 N. W. 605 (1925).

SECTION 6.—LIMITATION OF LIABILITY

NEW YORK CENT. R. CO. v. LOCKWOOD.

(Supreme Court of the United States, 1873. 17 Wall. 357, 21 L. Ed. 627.)

Error to the Circuit Court for the Southern District of New York; the case being thus:

Lockwood, a drover, was injured whilst traveling on a stock train of the New York Central Railroad Company, proceeding from Buffalo to Albany, and brought this suit to recover damages for the injury. He had cattle in the train, and had been required, at Buffalo, to sign an agreement to attend to the loading, transporting, and unloading of them, and to take all risk of injury to them and of personal injury to himself, or to whomsoever went with the cattle; and he received what is called a drover's pass; that is to say, a pass certifying that he had shipped sufficient stock to pass free to Albany, but declaring that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the train. The agreement stated its consideration to be the carrying of the plaintiff's cattle at less than tariff rates. It was shown on the trial, that these rates were about three times the ordinary rates charged, and that no drover had cattle carried on those terms; but that all signed similar agreements to that which was signed by the plaintiff, and received similar passes. Evidence was given on the trial tending to show that the injury complained of was sustained in consequence of negligence on the part of the defendants or their servants, but they insisted that they were exempted by the terms of the contract from responsibility for all accidents, including those occurring from negligence, at least the ordinary negligence of their servants; and requested the judge so to charge. This he refused, and charged that if the jury were satisfied that the injury occurred without any negligence on the part of the plaintiff, and that the negligence of the defendants caused the injury, they must find for the plaintiff, which they did. Judgment being entered accordingly, the railroad company took this writ of error. * * *

Mr. Justice BRADLEY delivered the opinion of the court.[64]

It may be assumed in limine, that the case was one of carriage for hire; for though the pass certifies that the plaintiff was entitled to pass free, yet his passage was one of the mutual terms of the arrangement for carrying his cattle. The question is, therefore, distinctly raised, whether a railroad company carrying passengers for hire, can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage.

[64] Parts of the statement of facts and opinion are omitted.

As the duties and responsibilities of public carriers were prescribed by public policy, it has been seriously doubted whether the courts did wisely in allowing that policy to be departed from without legislative interference, by which needed modifications could have been introduced into the law. But the great hardship on the carrier in certain special cases, where goods of great value or subject to extra risk were delivered to him without notice of their character, and where losses happened by sheer accident without any possibility of fraud or collusion on his part, such as by collisions at sea, accidental fire, etc., led to a relaxation of the rule to the extent of authorizing certain exemptions from liability in such cases to be provided for, either by public notice brought home to the owners of the goods, or by inserting exemptions from liability in the bill of lading, or other contract of carriage. A modification of the strict rule of responsibility, exempting the carrier from liability for accidental losses, where it can be safely done, enables the carrying interest to reduce its rates of compensation; thus proportionally relieving the transportation of produce and merchandise from some of the burden with which it is loaded.

The question is, whether such modification of responsibility by notice or special contract may not be carried beyond legitimate bounds, and introduce evils against which it was the direct policy of the law to guard; whether, for example, a modification which gives license and immunity to negligence and carelessness on the part of a public carrier or his servants, is not so evidently repugnant to that policy as to be altogether null and void; or, at least null and void under certain circumstances. * * *

The courts of New York, where this case arose, for a long time resisted the attempts of common carriers to limit their common-law liability, except for the purpose of procuring a disclosure of the character and value of articles liable to extra hazard and risk. This, they were allowed to enforce by means of a notice of non-liability, if the disclosure was not made. But such announcements as "all baggage at the risk of the owner," and such exceptions in bills of lading as "this company will not be responsible for injuries by fire, nor for goods lost, stolen, or damaged," were held to be unavailing and void, as being against the policy of the law.[65]

[65] Cole v. Goodwin, 19 Wend. (N. Y.) 257, 32 Am. Dec. 470 (1838); Gould v. Hill, 2 Hill (N. Y.) 623 (1842). In Cole v. Goodwin, supra, the court, following the dictum in the earlier case of Hollister v. Nowlen, 19 Wend. 234, 32 Am. Dec. 455 (1838), held that a common carrier for hire could not limit its common-law liability by mere notice. The English courts had reached a contrary conclusion. See Perkins, Judicial Relaxation of the Carrier's Liability, 3 Iowa Law Bulletin, 197–209. "In the leading case of Hollister v. Nowlen, 19 Wend. 234 (1838), Justice Bronson has traced the departure in England from the wholesome rule of the common law, beginning with Nicholson v. Willan, 5 East, 507, in 1804, and the disastrous results, calling for legislation by Parliament to bring the law back to its condition before the departure by this piece of judicial legislation. This unfortunate change was accomplished by allowing the carrier to limit the common-

But since the decision in the case of New Jersey Steam Navigation Company v. Merchants' Bank,[66] by this court, in January Term, 1848, it has been uniformly held, as well in the courts of New York as in the federal courts, that a common carrier may, by special contract,

law liability by public notice. The New York court refused to follow the English rule, and Hollister v. Nowlen has become authority in every state in this country for the doctrine that the carrier cannot by notice, even though it be brought home to the shipper, limit his common-law liability. 'Putting the matter in the most favorable light for the carrier, the mere delivery of goods after seeing a notice cannot warrant a stronger presumption that the owner intended to consent to a restricted liability on the part of the carrier, than it does that he intended to insist on the liabilities imposed by law; and a special contract cannot be implied where there is such equipoise of probabilities.' Hollister v. Nowlen, supra, at page 248. This logic was so clear and convincing that it has been accepted by all our courts." Goddard, The Liability of the Common Carrier as Determined by Recent Decisions of the United States Supreme Court, 15 Colum. Law Rev. 398, 402. In Gould v. Hill, supra, the court held that a common carrier for hire could not by express contract with the shipper relieve himself of his liability as insurer. "This is the only case in which we find such a decision, but it was entirely in harmony with the judicial opinion in this country at that time. In fact, Professor Goddard, after considering the many indications in this direction, comes to the conclusion (15 Colum. Law Rev. 399, 404), that the '* * * rule that the common carrier was an insurer and could not in any way change its liability * * *' would have become the established rule for all time in this country if it had not been for the dictum of Mr. Justice Nelson in New Jersey Steam Navigation Company v. Merchants' Bank, 3 How. 344, 12 L. Ed. 465 (1848)." Perkens, op. cit. 4 Iowa Law Bull. 21, 22. Gould v. Hill, supra, was subsequently overruled by the New York Court of Appeals in Dorr v. New Jersey Steam Nav. Co., 11 N. Y. 485, 62 Am. Dec. 125 (1854), but the rule announced in Hollister v. Nowlen, supra, and followed in Cole v. Goodwin, supra, that a carrier may not restrict his liability by mere notice, has been followed by the American courts. However, the courts disagree as to whether a telegraph company may limit its liability by mere notice. See and compare Clement v. Western Union Tel. Co., 137 Mass. 463 (1884), permitting a limitation by notice, and Pearsall v. Western Union Tel. Co., 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662 (1891), refusing to permit a limitation by notice. Since most courts hold that the sender is bound by lawful stipulations printed on the telegraph blank on which the message is written, Kiley v. Western Union Telegraph Co., 109 N. Y. 231, 16 N. E. 75 (1888), and cases cited in footnote to Cau v. Texas & Pacific Ry. Co., post, p. 895, this question becomes pertinent only where a message is delivered to the company on a sheet of paper containing no limitations of the company's liability, or is communicated to the company orally, viz. by telephone. As to whether the sender is bound by the rules of the company 1) of which he has knowledge, or (2) of which he has no knowledge, see and compare Shawnee Milling Co. v. Postal Telegraph-Cable Co., 101 Kan. 307, 166 P. 493, L. R. A. 1917F, 844 (1917); Carland v. Western Union Tel. Co., 118 Mich. 369, 76 N. W. 762, 43 L. R. A. 280, 74 Am. St. Rep. 394 (1898); Harris v. Western Union Tel. Co., 121 Ala. 519, 25 So. 910, 77 Am. St. Rep. 70 (1899); Western Union Tel. Co. v. Douglass, 104 Tex. 66, 133 S. W. 877 (1911); Simpson v. Western Union Tel. Co., 104 S. C. 393, 89 S. E. 321 (1916), and cases collected in notes, 56 L. R. A. 742, and L. R. A. 1917F, 848. As to whether the published tariffs of a telegraph company filed with the Interstate Commerce Commission are binding on one who has no actual knowledge thereof, see Western Union Tel. Co. v. Esteve Bros. & Co., post, p. 927.

[66] 6 How. 344, 12 L. Ed. 465 (1848). "The case was perhaps the most momentous ever decided in this country upon the carrier's liability." Goddard, Liability of the Common Carrier, 15 Colum. Law Rev. 398, 404.

limit his common-law liability; although considerable diversity of opinion has existed as to the extent to which such limitation is admissible.

The case of New Jersey Steam Navigation Company v. Merchants' Bank, above adverted to, grew out of the burning of the steamer Lexington. Certain money belonging to the bank had been intrusted to Harnden's Express, to be carried to Boston, and was on board the steamer when she was destroyed. By agreement between the steamboat company and Harnden, the crate of the latter and its contents were to be at his sole risk. The court held this agreement valid, so far as to exonerate the steamboat company from the responsibility imposed by law; but not to excuse them for misconduct or negligence, which the court said it would not presume that the parties intended to include, although the terms of the contract were broad enough for that purpose; and that inasmuch as the company had undertaken to carry the goods from one place to another, they were deemed to have incurred the same degree of responsibility as that which attaches to a private person engaged casually in the like occupation, and were, therefore, bound to use ordinary care in the custody of the goods, and in their delivery, and to provide proper vehicles and means of conveyance for their transportation; and as the court was of opinion that the steamboat company had been guilty of negligence in these particulars, as well as in the management of the steamer during the fire, they held them responsible for the loss.

As this has been regarded as a leading case, we may pause for a moment to observe that the case before us seems almost precisely within the category of that decision. In that case, as in this, the contract was general, exempting the carrier from every risk and imposing it all upon the party; but the court would not presume that the parties intended to include the negligence of the carrier or his agents in that exception.

It is strenuously insisted, however, that as negligence is the only ground of liability in the carriage of passengers, and as the contract is absolute in its terms, it must be construed to embrace negligence as well as accident, the former in reference to passengers, and both in reference to the cattle carried in the train. As this argument seems plausible, and the exclusion of a liability embraced in the terms of exemption on the ground that it could not have been in the mind of the parties is somewhat arbitrary, we will proceed to examine the question before propounded, namely, whether common carriers may excuse themselves from liability for negligence. * * * A review of the cases decided by the courts of New York shows that though they have carried the power of the common carrier to make special contracts to the extent of enabling him to exonerate himself from the effects of even gross negligence, yet that this effect has never been given to a contract general in its terms. So that if we only felt bound by those proceedings, we could, perhaps, find no authority for reversing the

judgment in this case. But on a question of general commercial law, the federal courts administering justice in New York have equal and co-ordinate jurisdiction with the courts of that state. And in deciding a case which involves a question of such importance to the whole country; a question on which the courts of New York have expressed such diverse views, and have so recently and with such slight preponderancy of judicial suffrage, come to the conclusion that they have, we should not feel satisfied without being able to place our decision upon grounds satisfactory to ourselves, and resting upon what we consider sound principles of law. * * *

It is argued that a common carrier, by entering into a special contract with a party for carrying his goods or person on modified terms, drops his character and becomes an ordinary bailee for hire, and, therefore, may make any contract he pleases. That is, he may make any contract whatever, because he is an ordinary bailee; and he is an ordinary bailee because he has made the contract.

We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest. Those responsibilities may vary in different countries, and at different times, without changing the character of the employment. The common law subjects the common carrier to insurance of the goods carried, except as against the act of God or public enemies. The civil law excepts, also, losses by means of any superior force, and any inevitable accident. Yet the employment is the same in both cases. And if by special agreement the carrier is exempted from still other responsibilities, it does not follow that his employment is changed, but only that his responsibilities are changed. The theory occasionally announced, that a special contract as to the terms and responsibilities of carriage changes the nature of the employment, is calculated to mislead. The responsibilities of a common carrier may be reduced to those of an ordinary bailee for hire, whilst the nature of his business renders him a common carrier still. Is there any good sense in holding that a railroad company, whose only business is to carry passengers and goods, and which was created and established for that purpose alone, is changed to a private carrier for hire by a mere contract with a customer, whereby the latter assumes the risk of inevitable accidents in the carriage of his goods. Suppose the contract relates to a single crate of glass or crockery, whilst at the same time the carrier receives from the same person twenty other parcels, respecting which no such contract is made. Is the company a public carrier as to the twenty parcels and a private carrier as to the one?

On this point there are several authorities which support our view, some of which are noted in the margin.[67]

[67] Davidson v. Graham, 2 Ohio St. 131 (1853); Graham v. Davis & Co., 4 Ohio St. 362, 62 Am. Dec. 285 (1854); Swindler v. Hilliard, 2 Rich. (S. C.) 286, 45 Am. Dec. 732 (1846); Baker v. Brinson, 9 Rich. 201, 67 Am. Dec. 548

A common carrier may, undoubtedly, become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. For example, if a carrier of produce, running a truck boat between New York City and Norfolk, should be requested to carry a keg of specie, or a load of expensive furniture, which he could justly refuse to take, such agreement might be made in reference to his taking and carrying the same as the parties chose to make, not involving any stipulation contrary to law or public policy. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character.

But it is contended that though a carrier may not stipulate for his own negligence, there is no good reason why he should not be permitted to stipulate for immunity for the negligence of his servants, over whose actions, in his absence, he can exercise no control. If we advert for a moment to the fundamental principles on which the law of common carriers is founded, it will be seen that this objection is inadmissible. In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties—an object essential to the welfare of every civilized community. Hence the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers the highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the *essential duties* of his employment. And to assert that he may do so seems almost a contradiction in terms.

Now, to what avail does the law attach these essential duties to the employment of the common carrier, if they may be waived in respect to his agents and servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants? It is carefulness and diligence in performing the service which the law demands, not an abstract carefulness and diligence in proprietors and stockholders who take no active part in the business. To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive of the very object of the law.

(1856); Steele v. Townsend, 37 Ala. 247, 79 Am. Dec. 49 (1861).—[Footnote by the Court.]

It is a favorite argument in the cases which favor the extension of the carrier's right to contract for exemption from liability, that men must be permitted to make their own agreements, and that it is no concern of the public on what terms an individual chooses to have his goods carried. Thus, in Dorr v. New Jersey Steam Navigation Company,[68] the court sums up its judgment thus: "To say the parties have not a right to make their own contract, and to limit the precise extent of their own respective risks and liabilities, in a matter no way affecting the public morals, or conflicting with the public interests, would, in my judgment, be an unwarrantable restriction upon trade and commerce, and a most palpable invasion of personal right."

Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers in effect, by introducing new rules of obligation.

The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases, he has no alternative but to do this, or abandon his business. In the present case, for example, the freight agent of the company testified that though they made forty or fifty contracts every week like that under consideration, and had carried on the business for years, no other arrangement than this was ever made with any drover. And the reason is obvious enough,—if they did not accept this, they must pay tariff rates. These rates were 70 cents a hundred pounds for carrying from Buffalo to Albany, and each horned animal was rated at 2000 pounds, making a charge of $14 for every animal carried, instead of the usual charge of $70 for a car-load; being a difference of three to one. Of course no drover could afford to pay such tariff rates. This fact is adverted to for the purpose of illustrating how completely in the power of the railroad companies parties are; and how necessary it is to stand firmly by those principles of law by which the public interests are protected.

If the customer had any real freedom of choice, if he had a reasonable and practical alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment; then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified ar-

[68] 11 N. Y. 485, 62 Am. Dec. 125 (1854).

rangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse (to say the least) to the dictates of public policy and morality. The status and relative position of the parties render any such conditions void. Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness. It was for the reason that the limitations of liability first introduced by common carriers into their notices and bills of lading were just and reasonable, that the courts sustained them. It was just and reasonable that they should not be responsible for losses happening by sheer accident, or dangers of navigation that no human skill or vigilance could guard against; it was just and reasonable that they should not be chargeable for money or other valuable articles liable to be stolen or damaged, unless apprised of their character or value; it was just and reasonable that they should not be responsible for articles liable to rapid decay, or for live animals liable to get unruly from fright and to injure themselves in that state, when such articles or live animals became injured without their fault or negligence. And when any of these just and reasonable excuses were incorporated into notices or special contracts assented to by their customers, the law might well give effect to them without the violation of any important principle, although modifying the strict rules of responsibility imposed by the common law. The improved state of society and the better administration of the laws, had diminished the opportunities of collusion and bad faith on the part of the carrier, and rendered less imperative the application of the iron rule, that he must be responsible at all events. Hence, the exemptions referred to were deemed reasonable and proper to be allowed. But the proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law. * * *

Conceding, therefore, that special contracts, made by common carriers with their customers, limiting their liability, are good and valid so far as they are just and reasonable; to the extent, for example, of excusing them for all losses happening by accident, without any negligence or fraud on their part; when they ask to go still further, and to be excused for negligence—an excuse so repugnant to the law of their foundation and to the public good—they have no longer any plea of justice or reason to support such a stipulation, but the contrary.

And then, the inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity. * * *

The defendants endeavor to make a distinction between gross and ordinary negligence, and insist that the judge ought to have charged that the contract was at least effective for excusing the latter.

We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party and which he fails to perform, than of the amount of inattention, carelessness, or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate perhaps to call it simply "negligence." And this seems to be the tendency of modern authorities.[69] If they mean more than this, and seek to abolish the distinction of degrees of care, skill, and diligence required in the performance of various duties and the fulfilment of various contracts, we think they go too far; since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed. The compilers of the French Civil Code undertook to abolish these distinctions by enacting that "every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it." [70] Toullier, in his commentary on the code, regards this as a happy thought, and a return to the law of nature.[71] But such an iron rule is too regardless of the foundation principles of human duty, and must often operate with great severity and injustice.

In the case before us, the law, in the absence of special contract, fixes the degree of care and diligence due from the railroad company to the persons carried on its trains. A failure to exercise such care and diligence is negligence. It needs no epithet properly and legally to describe it. If it is against the policy of the law to allow stipulations which will relieve the company from the exercise of that care and diligence, or which, in other words, will excuse them for negligence

[69] 1 Smith's Leading Cases (7th Am. Ed.) 453; Story on Bailments, 571; Wyld v. Pickford, 8 Mees. & W. 460 (1841); Hinton v. Dibbin, 2 Q. B. 646 (1842); Wilson v. Brett, 11 Mees. & W. 115 (1843); Beal v. South Devon Railway Co., 3 Hurl. & C. 337 (1864); Grill v. General Iron Screw Collier Co., L. R. 1 C. P. 600 (1866); Philadelphia & Reading R. Co. v. Derby, 14 How. 468, 14 L. Ed. 502 (1852); The New World v. King, 16 How. 474, 14 L. Ed. 1019 (1853).—[Footnote by the Court.]

[70] Article 1382.

[71] Volume 6, p. 243.

in the performance of that duty, then the company remains liable for such negligence. The question whether the company was guilty of negligence in this case, which caused the injury sustained by the plaintiff, was fairly left to the jury. It was unnecessary to tell them whether, in the language of law writers, such negligence would be called gross or ordinary.

The conclusions to which we have come are—

First. That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.

Secondly. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.

Thirdly. That these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter.

Fourthly. That a drover traveling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire.

These conclusions decide the present case, and require a judgment of affirmance. We purposely abstain from expressing any opinion as to what would have been the result of our judgment had we considered the plaintiff a free passenger instead of a passenger for hire.

Judgment affirmed.[72]

[72] The rule of policy announced in the principal case applies to the carriage of goods as well as to the transportation of persons. Bank of Kentucky v. Adams Express Co., 93 U. S. 174, 23 L. Ed. 872 (1876). Moreover, a common carrier for hire may not exempt itself from liability for the negligence of another to whom the carrier delegates the performance of its undertaking. Bank of Kentucky v. Adams Express Co., supra. But a railroad may contract against liability for negligence in connection with transportation service which is not a part of its public business. Santa Fé, P. & P. Ry. Co. v. Grant Bros. Const. Co., 228 U. S. 177, 33 St. Ct. 474, 57 L. Ed. 787 (1912). See note, 26 Harv. Law Rev. 742. Many cases have also held that a telegraph company, like a common carrier, may not by contract restrict its liability for negligence. Ayer v. Western Union Tel. Co., 79 Me. 493, 10 A. 495, 1 Am. St. Rep. 353 (1887); Gillis v. Western Union Tel. Co., 61 Vt. 461, 17 A. 736, 4 L. R. A. 611, 15 Am. St. Rep. 917 (1889); Pepper v. Western Union Tel. Co., 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. Rep. 699 (1889); Western Union Tel. Co. v. Short, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744 (1890); Rhyne v. Western Union Tel. Co., 164 N. C. 394, 80 S. E. 152 (1913); Strong v. Western Union Tel. Co., 18 Idaho, 389, 109 P. 910, 30 L. R. A. (N. S.) 409, Ann. Cas. 1912A, 55 (1910). The Supreme Court, in Primrose v. Western Union Tel. Co., 154 U. S. 1, 14 S. Ct. 1098, 38 L. Ed. 883 (1894), while stating that a telegraph company may not by contract exempt itself from liability for negligence, nevertheless intimated that a restriction of liability which might be unreasonable in the case of a carrier might be reasonable in the case of a telegraph company, and upheld a stipulation limiting the company's liability to the amount paid for sending the message. Similar conclusions have been reached by a number of the state courts. Stone & Co. v. Postal-Telegraph Co., 31 R. I. 174, 76 A. 762 (1910); Grinnell v. Western Union Tel. Co., 113 Mass. 299, 18 Am. Rep. 485 (1873); United States Telegraph Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519 (1868); Western Union Tel. Co. v. Carew, 15 Mich. 525 (1867). For a discussion of this question, see McClain, Limitation of Liability for Negligence, 28 Harv. Law Rev. 550, 561.

CRAGIN et al. v. NEW YORK CENT. R. CO.

(Commission of Appeals of New York, 1872. 51 N. Y. 61, 10 Am. Rep. 559.)

This was an action brought to recover damages for the loss of forty-three hogs out of a lot of hogs transported for the plaintiffs by the defendant, from Buffalo to Albany, in June, 1858. The hogs died from the effects of heat, the result of the negligence of the defendant's agents in not watering, wetting, washing and cooling off said hogs on the way to their destination. It appeared that they were transported under a written agreement, signed by the agents of both parties, which provided, among other things, as follows:

"Now, in consideration that the said railroad company will transport such live stock at the reduced rate of eighty-five dollars per car load, the said Cragin & Co. hereby agree to take the risk of injuries which the animals or either of them may receive in consequence of any of them being wild, vicious, unruly, weak, escaping or maiming themselves or each other, or from delays, or in consequence of heat, suffocation or other ill effects of being crowded, either upon the cars of the company, or on account of being injured by the burning of hay, straw, or any other material used by the drover for feeding the stock or otherwise, and from damage occasioned thereby, and also all risk, any loss or damage which may be sustained by reason of any delay in such transportation."

The court charged the jury that if they were satisfied from the evidence that the defendant, through its agents, was guilty of negligence in the manner in which the hogs were transported, they should find for the plaintiffs.

The defendant's counsel excepted to the judge charging the jury that the defendant was liable for negligence in respect of the matters of which the plaintiffs were, by their contract, to take the risk. * * *

The jury returned a verdict for the plaintiffs for the value of the hogs, with interest. Upon this verdict judgment was entered.[73]

EARL, C. The rule of the common law makes a common carrier responsible for the safe carriage and delivery of property intrusted to his care, unless he be prevented by the act of God, or of the public enemy. But this rule is not applied to its full extent to the carriage of live stock. (Angell on Car. 214; Clarke v. Rochester & Syracuse R. R. Co., 14 N. Y. 570, 67 Am. Dec. 205; Bissell v. New York Central R. R. Co., 25 N. Y. 442, 82 Am. Dec. 369; Smith v. New Haven & Northampton R. R. Co., 12 Allen (Mass.) 531, 90 Am. Dec. 166. In the transportation of such stock, in the absence of negligence, the carrier is relieved from responsibility for such injuries as occur in consequence of the vitality of the freight. He does not absolutely warrant live freight against the consequences of its own vitality. Animals may injure or destroy themselves or each other, they may die from fright or from starvation

[73] Part of the statement of facts is omitted.

because they refuse to eat, or they may die from heat or cold. In all such cases the carrier is relieved from responsibility if he can show that he has provided all suitable means of transportation, and exercised that degree of care which the nature of the property requires. Therefore in this case it was not sufficient to establish the common-law liability of the defendant to show that the hogs died from heat; but it was incumbent on the plaintiff to show further, that there was some negligence or omission of duty on the part of the defendant.

In this state it is well settled that a carrier may, by express contract, exempt himself from liability for damages resulting from any degree of negligence on the part of his servants, agents and employees. Lee v. Marsh, 43 Barb. 102; French v. Buffalo, N. Y. & Erie R. Co., *43 N. Y. 108; Keeney v. Grand Trunk R. R. Co., 59 Barb. 104; Bissell v. N. Y. Central R. R. Co., supra. In some of the states it is held that a carrier cannot be exempted from responsibility for gross negligence. But so long as the freighter can insist that the carrier shall carry his property under the common-law responsibility, there can be no reason founded in justice, convenience or public policy why he may not voluntarily enter into a contract founded upon sufficient consideration exempting the carrier from all responsibility for any degree of negligence, whether it be gross or slight.

In this case the plaintiffs assumed and agreed to take the risk of injuries to the hogs in consequence of heat. Effect should be given to this stipulation. The parties must be held to have meant something by it. In consideration that the plaintiff would assume and take certain risks, which would otherwise devolve upon the defendant, it agreed to carry at a reduced rate. If it be held that this stipulation simply exempts the defendant from liability for injuries to the hogs from heat without any fault on its part, then it gets nothing; for in such case, without the stipulation, it would not be responsible. Force and effect can be given to this stipulation only by holding that it was intended to exempt the defendant from negligence, in consequence of which, the hogs died from heat.

The judge at the trial, however, entirely ignored this special contract and put the case to the jury upon the defendant's common-law responsibility, charging that it was liable if they found it guilty of negligence in the transportation of the hogs. And he refused to the defendant any benefit whatever from the special contract. In this I cannot doubt the learned judge erred.

The judgment should, therefore, be reversed and new trial granted, costs to abide event. All concur.

Judgment reversed.[74]

[74] Compare section 38, New York Public Service Commissions Law (Consol. Laws N. Y. c. 48), which provides, among other things, as follows: "No contract, stipulation or clause in any receipt or bill of lading shall exempt or be held to exempt any common carrier, baggage company, transfer company, railroad corporation or street railroad corporation from any lia-

89 NC
152 NC 247
152 NC 125
203 NC 462

NICHOLAS et al. v. NEW YORK CENT. & H. R. R. CO.

(Court of Appeals of New York, 1882. 89 N. Y. 370.)

ANDREWS, C. J. We have recently held in Mynard v. Syracuse, Binghamton & New York R. R. Co., 71 N. Y. 180, 27 Am. Rep. 28, that a shipping contract, made by a common carrier for the carriage of live stock, whereby the shipper, in consideration of a reduced rate for the carriage, agreed "to release and discharge the carrier from all claims, demands, and liabilities of every kind whatsoever, for, or on account of, or connected with any damage or injury to, or the loss of said stock or any portion thereof, from whatsoever causes arising," did not operate to exempt the carrier from liability for loss occasioned by its own negligence.

The words "from whatsoever cause arising," were as broad and comprehensive as possible. The court, however, refused to construe them as covering a loss arising from the negligence of the carrier, not, as I understand the decision, because the words, in their ordinary signification and interpretation, did not include a loss of this character, but because it is a part of the rule, which in this state allows a common carrier to contract against his liability for negligence, that the contract must, in terms and expressly, exempt the carrier from liability on this account.

The practice of common carriers making special acceptances, exempting them from their ordinary responsibility, though contrary to the policy of the common law, liable to abuse, and productive of inconvenience, has obtained too long to be now questioned. In this state it has been extended so as to authorize a special acceptance, exempting them from liability for their own negligence. But a contract exempting a bailee for hire from the obligation of care on his part, in respect to the goods in his custody, is, to say the least, unreasonable, and, while the law does not go to the extent of making it void on that ground, yet the qualification that to have that effect it must be plainly and distinctly expressed, so that it cannot be misunderstood by the shipper, is so obviously just, in view of the methods of business, and the want of knowledge of the force and construction of contracts, on the part of the great mass of persons dealing with the transportation lines of the country, that it ought not to be relaxed.

This case is an illustration. The plaintiff desiring to ship trees from New York to Geneva, applied to the defendant in New York, to have them carried, and a printed paper which occupies nearly two printed pages of the appeal book, is presented to him by the carrier as the shipping contract, containing a large number of special exemp-

bility for loss, damage or injury caused by it to property from the time of its delivery for transportation until the same shall have been received at its destination and a reasonable time shall have elapsed after notice to consignee of such arrival to permit of the removal of such property."

Common carrier for hire can not reduce their liability for negligence but can reduce liability for insurer

tions, and among others for "damage occasioned by delays from any cause, or change of weather." The plaintiff signs the paper, and the trees are, as we must assume upon the case, lost by the negligent delay on the part of the defendant and its servants in transporting them, and the defense is that the contract included an exemption from loss by the carrier's negligence. It may be admitted that a careful reading of the contract would apprise a person skilled in the interpretation of contracts, that loss by negligent delay was included. Some of the exemptions in the paper relate to extraordinary liabilities imposed upon carriers by the common law, not connected with fault on their part. But in case of loss by delay in the transportation, the carrier is not an insurer, and is by the common law liable only when the delay was negligent, and the argument is that the shipper must be presumed to have understood this, and therefore to have known when he signed the contract, that it was intended to cover a loss arising from negligent delay in transporting the property. This is theoretically true. But we think it may be safely assumed that in the great majority of cases it is practically untrue, and shippers would not generally understand that the contract absolved the carrier from responsibility for the consequences of its own negligence. The circumstances under which contracts of this kind are usually made, preclude a careful consideration by the shipper of their language and effect, and it is not too much to require that the carrier who usually prepares the contracts in advance, and exacts the consent of the shipper as a condition of taking his property, shall, in explicit language, if he seeks to rid himself of the obligation of care, and free himself from responsibility for his own negligence, express this intention in his contract, and that it shall not be left to inference, argument or construction, from general language.

There is an almost unbroken line of judicial expression, to the effect that general words will not operate to exempt a carrier from liability for his own negligence. In New Jersey Steam Navigation Co. v. Merchants' Bank, 6 How. 344, 12 L. Ed. 465, Nelson, J., referring to the contract in that case, said: "The language is general and broad, and might very well comprehend every description of risk incident to the shipment. But we think it would be going farther than the intent of the parties, upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for willful misconduct, gross negligence, or want of ordinary care." In Alexander v. Greene, 7 Hill, 533, where the carrier claimed exemption from liability for negligence, under a stipulation to tow plaintiff's boat, "at the risk" of the master and owners, it is said: "To maintain a proposition so extravagant as this would appear to be, the stipulations of the parties ought to be most clear and explicit, showing that they comprehended in their arrangement the case that actually occurred." In Wells v. Steam Navigation Co., 8 N. Y. 375, Judge Gardner says: "We held then, if a party vested with a temporary control of another's property, for a special purpose of this sort, would shield himself from a responsibility,

on account of the gross neglect of himself or his servants he must show his immunity on the face of his agreement, and that a stipulation so extraordinary, so contrary to general usage and the understanding of men of business, would not be implied from a general expression, to which effect might otherwise be given." Johnson, J., in Magnin v. Dinsmore, 56 N. Y. 168, says: "But the contract will not be deemed to except losses occasioned by the carrier's negligence, unless that be expressly stipulated." And in the Case of Mynard, which contains the latest expression of this court upon the subject, it is said: "The carrier should not be released from the consequences of his own wrongful acts, under general words or by implication." In some of the cases cited, reference is made to the circumstance that the contract of exemption then before the court might have effect, without applying it to the case of negligence, but, this is referred to as ground for excluding the inference of an intention that that subject was in the minds of the parties to the contract. But the cases do not, we think, rest upon that circumstance, but as we have said before, upon the broader and more practical and satisfactory ground, that where the carrier claims to have been exempted by a special acceptance from liability for his negligence, or the negligence of his servants, he must in the language of Gardner, J., "show his immunity on the face of his agreement."

We think the nonsuit was improperly granted at the Circuit, and that the judgment should be reversed and a new trial granted.

DANFORTH, FINCH, and TRACY, JJ., concur.

RAPALLO, MILLER, and EARL, JJ., dissent.

Judgment reversed.

GULF C. & S. F. RY. CO. v. McGOWN.

(Supreme Court of Texas, 1886. 65 Tex. 640.)

STAYTON, Associate Justice.[75] There was such evidence as to justify a verdict in favor of the plaintiff if he had been an ordinary, fare-paying passenger. The charge assumes that the same degree of care is incumbent upon a carrier of passengers in the case of one traveling on a free pass as in the case of a passenger paying full fare, and if this be not the law, the charge given was erroneous, and some of the charges asked and refused should have been given.

The appellee applied for and received a free pass from Galveston to Fort Worth, and to return from the latter to the former place, which on its face had the following words: "Good for one trip only, upon conditions endorsed hereon, when countersigned," etc. On the back of the pass was the following: "Not transferable. If presented by any other person than the individual named hereon, the conductor

[75] The statement of facts and parts of the opinion are omitted.

will take up this ticket and collect fare. Free passengers assume all risks of accidents to their persons and property, without claims for damages upon the corporation. Good for passage only when signed by the person to whom issued."

The appellee was traveling on this pass, which he presented to the conductor, who detached therefrom the coupon evidencing his right to travel from Galveston to Fort Worth, gave him a check and returned the pass to him, without requiring him to sign it. Under the evidence, the fact that he used the pass without signing it we deem a matter of no importance. Having received and used it to procure free passage, he must be held to have consented to its conditions as fully as though he had signed it. * * *

The question whether a railway company—a public carrier of passengers—can relieve itself by contract from liability, even to a free passenger, for an injury which results from the negligence of any of its employes or agents, of whatsoever grade, has not been decided in this state, but arises in this case. It seems to us, upon principle, that it must be held, that such a carrier cannot relieve itself, by contract, from responsibility for injury that results from negligence, such as will fix liability upon the carrier under the general rules applicable to the ordinary relation of carrier and passenger. That the liability of the carrier does not depend on the fact that compensation for the passage is paid to the carrier, is well settled. Railroad Co. v. Derby, 14 How. 486, 14 L. Ed. 502; Steamboat New World v. King, 16 How. 469, 14 L. Ed. 1019; Todd v. Railway Co., 85 Mass. (3 Allen) 20, 80 Am. Dec. 49; Prince v. Railway Co., 64 Tex. 153; Abell v. Railway Co., 21 A. & E. R. Cases, 503; Brownfield v. Railway Co., 21 A. & E. R. Cases, 88.

The relation of passenger and carrier is created by contract, express or implied, but it does not follow from this that the extent of liability or responsibility of the carrier is, in any respect, dependent on a contract. In reference to matters indifferent to the public, parties may contract as they please; but, not so in reference to matters in which the public has an interest. For the purpose of regulating such matters, rules have been established, by statute or the common law, whereby certain duties have been attached to given relations and employments. These duties attach as matter of law, and without regard to the will or wish of the party engaged in the employment, or of the person who transacts business with him, in the course thereof; and this is so, for the public good. Duties thus imposed are not the subject of contract. They exist without it, and cannot be dispensed with by it. The violation of such a duty is a tort. The law declares that it is the duty of a public carrier of passengers to use the highest degree of care, to insure their safety. Why was not this left to be settled by the contract of the carrier and passenger? Certainly for no other reason than that the employment itself was of such a nature as to make it a matter of public concern. None could be of greater public

concern, at the present day, than these employments by which men, women and children are transported by millions, by agencies of a most dangerous character, and with a speed heretofore unknown. As said in Railway Co. v. Derby: "This duty does not result alone from the consideration paid. It is imposed by the law, even where the service is gratuitous. The confidence induced by the undertaking of any service for another, is a sufficient legal consideration to create a duty in the performance of it." Railroad Co. v. Wier, 37 Mich. 115, 26 Am. Rep. 499.

It has been held, in many cases, that the payment of the consideration which the law permits the carrier to demand and to receive, is not necessary to the imposition of the duty of the carrier to use that degree of care necessary where full consideration is paid, and that a failure to use such care in reference to a passenger not paying such compensation, fixes upon the carrier a liability which he cannot avoid by contract.

In accordance with this view, it has been held, in many cases, that the duty thus imposed cannot be avoided by contract, in that class of cases in which persons travel on what are known as "drovers' passes." Railroad v. Lockwood, 17 Wall. 357, 21 L. Ed. 627; Railroad Co. v. Henderson, 51 Pa. 331; Railway Co. v. Selby, 47 Ind. 471, 17 Am. Rep. 719; Flinn v. Railroad Co., 1 Houst. (Del.) 469; Railroad Co. v. Curran, 19 Ohio St. 1, 2 Am. Rep. 362.

Any rule founded on the character or adequacy of the consideration on which the carrier's undertaking is assured, it seems to us, ignores the public character of the carrier's employment, as well as all duty resulting therefrom. * * *

The rule, its application and foundation, is thus clearly stated by an elementary writer: "We have already seen that an agreement that a carrier shall not be liable for negligence is void, as against the policy of the law. There is no reason why this principle should not apply to cases of free as well as paid carriage. If 'confidence,' as has just been stated, is a sufficient consideration, then no passage voluntarily tendered and accepted is gratuitous. But, independently of this, it is against public policy that a person, using the high and dangerous agency of steam, should, in any case, on which the human life depends, act with a diligence less than a good and capable expert should employ in wielding such an agency. If diligence be proportioned to remuneration, steam service would be graded in diligence according to the degree of pay—first-class diligence for first-class cars; second-class diligence for second-class cars; minimum diligence to those who pay but little, or do not pay at all. But the law knows no such gradations. When the work is undertaken, then, so far as safety is concerned, the same precautions must be taken for all who are permitted to take passage." Wharton on Negligence, 589–592, 641, and cases cited in notes.

This rule is wholesome, is demanded by the nature of the employment, and embraces a policy which no state having a due regard for the safety and lives of its people can abandon; for it discourages negligence, by holding the carrier to strict accountability, and imposes upon him no responsibility which he does not voluntarily assume when he engages in such employment. It is simple, and discards all fine discriminations in regard to degrees of negligence and grades of agents, in determining liability and right to recover actual damages.

The charge of the court below was correct, and the judgment must be affirmed.

Affirmed.[76]

48 L. Ed. 513

BOERING v. CHESAPEAKE RY. CO.

(Supreme Court of the United States, 1904. 193 U. S. 442, 24 S. Ct. 515, 48 L. Ed. 742.)

Mr. Justice BREWER delivered the opinion of the court.

This was an action brought in the Supreme Court of the District of Columbia to recover damages for personal injuries sustained by Mrs. Boering while riding in one of the coaches of the defendant, and caused, as alleged, by the negligence of the company. Her husband was joined with her as plaintiff, but no personal injury to him was alleged. The defence was that she was riding upon a free pass, which contained the following stipulation: "The person accepting and using this pass thereby assumes all risk of accident and damage to person and property, whether caused by negligence of the company's agents or otherwise." A trial before the court and a jury resulted in a verdict and judgment for the defendant, which was affirmed by the Court of Appeals of the District, 20 D. C. App. 500, and thereupon the case was brought here on error.

The contention of the plaintiffs is that the company was liable in any event for injuries caused by its negligence to one riding on its trains; and further, that if it were not liable for such negligence to one accepting a free pass containing the stipulation quoted, it was liable to Mrs. Boering, because it did not appear that she knew or assented to the stipulation. The trial court submitted to the jury the question whether she was, in fact, a free passenger, and as the verdict was in

[76] Accord: Huckstep v. St. Louis & H. R. Co., 166 Mo. App. 330, 148 S. W. 988 (1912); St. Louis, I. M. & S. Ry. Co. v. Pitcock, 82 Ark. 441, 101 S. W. 725, 118 Am. St. Rep. 84, 12 Ann. Cas. 582 (1907); Yazoo & M. V. R. Co. v. Grant, 86 Miss. 565, 38 So. 502, 109 Am. St. Rep. 723, 4 Ann. Cas. 556 (1905); Annas v. Milwaukee & N. R. Co., 67 Wis. 46, 30 N. W. 282, 58 Am. Rep. 848 (1886). For a further collection of cases, see notes, 37 L. R. A. (N. S.) 623, 4 Ann. Cas. 556, 12 Ann. Cas. 582, and Ann. Cas. 1915C, 623. See, also, 21 Yale Law J. 162, 28 Harv. Law Rev. 560, 12 Colum. Law Rev. 642, and 20 Colum. Law Rev. 216, for a discussion of the right of a carrier to stipulate in gratuitous passes against its own negligence.

favor of the defendant, that question of fact was settled in favor of the company. Under those circumstances the recent decision of this court in Northern Pacific Railway Company v. Adams, 192 U. S. 440, 24 S. Ct. 408, 48 L. Ed. 513, disposes of the first contention.[77]

With reference to the second contention, the testimony of the two plaintiffs showed that the husband had attended to securing transportation; that he obtained passes for himself and wife, and that they had traveled on these passes before; that she knew the difference between passes (she called them "cards") and tickets, for on that day her husband had purchased a ticket for a friend who was traveling with them, and she had seen him use both ticket and passes. They further testified that she had not had either pass in her possession, and that her attention had not been called to the stipulation. Now, it is insisted that the exemption from liability for negligence results only from a contract therefor; that there can be no contract without knowledge of the terms thereof and assent thereto, and that she had neither knowledge of the stipulation nor assented to its terms; that therefore there was no contract between her and the company exempting it from lia-

[77] In the case of Northern Pacific Ry. Co. v. Adams, 192 U. S. 440, 24 S. Ct. 408, 48 L. Ed. 513 (1904), the Supreme Court decided that a stipulation on a free pass exempting the carrier from liability for injuries caused by its negligence did not contravene the rule of policy announced in the Lockwood Case, and therefore was valid. Mr. Justice Brewer declared: "The railway company was not as to Adams a carrier for hire. It waived its rights as a common carrier to exact compensation. It offered him the privilege of riding in its coaches without charge if he would assume the risk of negligence. He was not in the power of the company and obliged to accept its terms. They stood on an equal footing. If he had desired to hold it to its common law obligations to him as a passenger, he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the privilege offered, and having accepted that privilege cannot repudiate the conditions. It was not a benevolent association, but doing a railroad business for profit; and free passengers are not so many as to induce negligence on its part. So far as the element of contract controls, it was a contract which neither party was bound to enter into, and yet one which each was at liberty to make, and no public policy was violated thereby." Accord: Charleston & Western Carolina Ry. Co. v. Thompson, 234 U. S. 576, 34 S. Ct. 964, 58 L. Ed. 1476 (1914); Atchison, T. & S. F. Ry. Co. v. Smith, 38 Okl. 157, 132 P. 494, Ann. Cas. 1915C, 620 (1913); Quimby v. Boston & M. R. Co., 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846 (1890); Muldoon v. Seattle City R. Co., 7 Wash. 528, 35 P. 422, 22 L. R. A. 794, 38 Am. St. Rep. 901 (1893); Payne v. Terre Haute & I. Ry. Co., 157 Ind. 616, 62 N. E. 472, 56 L. R. A. 472 (1902); Rogers v. Kennebec Steamboat Co., 86 Me. 261, 29 A. 1069, 25 L. R. A. 491 (1894); Griswold v. New York & N. E. R. Co., 53 Conn. 371, 4 A. 261, 55 Am. Rep. 115 (1885); Kinney v. Central R. Co. of New Jersey, 34 N. J. Law, 513, 3 Am. Rep. 265 (1869). However, many cases hold that the carrier is liable in spite of the stipulation against liability, if the negligence complained of is gross, wanton, or willful. See New York C. R. Co. v. Mohney, 252 U. S. 152, 40 S. Ct. 287, 64 L. Ed. 502, 9 A. L. R. 496 (1920); Missouri, K. & T. Ry. v. Zuber, 76 Okl. 146, 184 P. 452, 7 A. L. R. 840 (1919), and cases collected in notes, 37 L. R. A. (N. S.) 235, 7 A. L. R. 852, and 9 A. L. R. 501. As to whether stipulations exempting the carrier from liability for negligence are binding upon infants injured while riding on such a pass, see Pinnell v. St. Louis-San Francisco Ry. Co. (Mo.) 263 S. W. 182 (1924), and cases collected in note, 41 A. L. R. 1099.

bility for negligence. Counsel refer to several cases in which it has been held that stipulations in contracts for carriage of persons or things are not binding unless notice of those stipulations is brought home to such passenger or shipper. We do not propose in any manner to qualify or limit the decisions of this court in respect to those matters. They are not pertinent to this case. They apply when a contract for carriage and shipment is shown. When that appears it is fitting that any claim of limitation of the ordinary liabilities arising from such a contract should not be recognized unless both parties to the contract assent, and that assent is not to be presumed, but must be proved. Here there was no contract of carriage, and that fact was known to Mrs. Boering. She was simply given permission to ride in the coaches of the defendant. Accepting this privilege, she was bound to know the conditions thereof. She may not, through the intermediary of an agent, obtain a privilege—a mere license—and then plead that she did not know upon what conditions it was granted. A carrier is not bound, any more than any other owner of property who grants a privilege, to hunt the party to whom the privilege is given, and see that all the conditions attached to it are made known. The duty rests rather upon the one receiving the privilege to ascertain those conditions. In Quimby v. Boston & Maine Railroad, 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846, a case of one traveling on a free pass, and in which the question of the assent of the holder of the pass was presented, the court said (page 367):

"Having accepted the pass, he must have done so on the conditions fully expressed therein, whether he actually read them or not. Squire v. New York Central Railroad, 98 Mass. 239, 93 Am. Dec. 162; Hill v. Boston, Hoosac Tunnel & Western Railroad, 144 Mass. 284, 10 N. E. 836; Boston & Maine Railroad v. Chipman, 146 Mass. 107, 14 N. E. 940, 4 Am. St. Rep. 293."

So in Muldoon v. Seattle City Railway Company, 10 Wash. 311, 313, 38 P. 995, 45 Am. St. Rep. 787.

"We think it may be fairly held that a person receiving a ticket for free transportation is bound to see and know all of the conditions printed thereon which the carrier sees fit to lawfully impose. This is an entirely different case from that where a carrier attempts to impose conditions upon a passenger for hire, which must, if unusual, be brought to his notice. In these cases of free passage, the carrier has a right to impose any conditions it sees fit as to time, trains, baggage, connections, and, as we have held, damages for negligence; and the recipient of such favors ought at least to take the trouble to look on both sides of the paper before he attempts to use them."

See, also, Griswold v. New York, etc., Railroad Company, 53 Conn. 371; Illinois Central Railroad Company v. Read, 37 Ill. 484, 510, 87 Am. Dec. 260. As was well observed by Circuit Judge Putnam in Duncan v. Maine Central Railroad Company, 113 F. 508, 514, in words quoted with approval by the Court of Appeals in this case:

"The result we have reached conforms the law applicable to the present issue to that moral sense which justly holds those who accept gratuities and acts of hospitality to perform the conditions on which they are granted."

We see no error in the record, and the judgment of the Court of Appeals is affirmed.

GRAND TRUNK RY. CO. v. STEVENS.

(Supreme Court of the United States, 1877. 95 U. S. 655, 24 L. Ed. 535.)

This was an action on the case for negligence, brought against the Grand Trunk Railway of Canada, to recover damages for injuries received by Stevens whilst a passenger in its cars. The plaintiff, being owner of a patented car coupling, was negotiating with the defendant, at Portland, Me., for its adoption and use by the latter, and was requested by the defendant to go to Montreal to see the superintendent of its car department in relation to the matter, the defendant offering to pay his expenses. The plaintiff consented to do this, and, in pursuance of the arrangement, he was furnished with a pass to carry him in the defendant's cars. This pass was in the usual form of free passes, thus, "Pass Mr. Stevens from Portland to Montreal," and signed by the proper officer. On its back was the following printed indorsement:

"The person accepting this free ticket, in consideration thereof, assumes all risk of all accidents, and expressly agrees that the company shall not be liable, under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person, or for any loss or injury to the property, of the passenger using the ticket. If presented by any other person than the individual named therein, the conductor will take up this ticket and collect fare." * * *

Mr. Justice BRADLEY delivered the opinion of the court.[78]

It is evident that the court below regarded this case as one of carriage for hire, and not as one of gratuitous carriage, and that no sufficient evidence to go to the jury was adduced to show the contrary; and, hence, that under the ruling of this court in Railroad Company v. Lockwood, 17 Wall. 357, 21 L. Ed. 627, it was a case in which the defendant, as a common carrier of passengers, could not lawfully stipulate for exemption from liability for the negligence of its servants. In taking this view, we think the court was correct. The transportation of the plaintiff in the defendant's cars, though not paid for by him in money, was not a matter of charity nor of gratuity in any sense. It was by virtue of an agreement, in which the mutual interest of the parties was consulted. It was part of the consideration for which the plaintiff consented to take the journey to Montreal. His expenses in making that journey were to be paid by the defendant, and of these the expense of his transportation was a part. The giving him a free

[78] Parts of the statement of facts and opinion are omitted.

pass did not alter the nature of the transaction. The pass was a mere ticket, or voucher, to be shown to the conductors of the train, as evidence of his right to be transported therein. It was not evidence of any contract by which the plaintiff was to assume all the risk; and it would not have been valid if it had been. In this respect it was a stronger case than that of Lockwood's. There the pass was what is called a "drover's pass," and an agreement was actually signed, declaring that the acceptance of the pass was to be considered as a waiver of all claims for damages or injury received on the train. The court rightly refused, therefore, in the present case, to charge that the plaintiff was travelling upon the conditions indorsed on the pass, or that, if he travelled on that pass, the defendant was free from liability. And the court was equally right in refusing to charge, that, if the plaintiff was a free or gratuitous passenger, the defendant was not liable. The evidence did not sustain any such hypothesis. It was uncontradicted, so far as it referred to the arrangement by virtue of which the journey was undertaken. * * *

It is strongly urged, however, that the plaintiff, by accepting the free pass indorsed as it was, was estopped from showing that he was not to take his passage upon the terms therein expressed; or, at least, that his acceptance of the pass should be regarded as competent, if not conclusive, evidence that such a pass was in the contemplation of the parties when the arrangement for his going to Montreal was made. But we have already shown that the carrying of the plaintiff from Portland to Montreal was not a mere gratuity. To call it such would be repugnant to the essential character of the whole transaction. There was a consideration for it, both good and valuable. It necessarily follows, therefore, that it was a carrying for hire. Being such, it was not competent for the defendant, as a common carrier, to stipulate for the immunity expressed on the back of the pass. This is a sufficient answer to the argument propounded. The defendant being, by the very nature of the transaction, a common carrier for hire, cannot set up, as against the plaintiff, who was a passenger for hire, any such estoppel or agreement as that which is insisted on.

Since, therefore, from our view of the case, it is not necessary to determine what would have been the rights of the parties if the plaintiff had been a free or gratuitous passenger, we rest our decision upon Railroad Company v. Lockwood, supra. We have no doubt of the correctness of the conclusion, reached in that case. We do not mean to imply, however, that we should have come to a different conclusion, had the plaintiff been a free passenger instead of a passenger for hire. We are aware that respectable tribunals have asserted the right to stipulate for exemption in such a case; and it is often asked, with apparent confidence, "May not men make their own contracts, or, in other words, may not a man do what he will with his own?" The question, at first sight, seems a simple one. But there is a question lying behind that: "Can a man call that absolutely his own, which he holds as a great public trust, by the public grant, and for the public use as well

as his own profit?" The business of the common carrier, in this country at least, is emphatically a branch of the public service; and the conditions on which that public service shall be performed by private enterprise are not yet entirely settled. We deem it the safest plan not to anticipate questions until they fairly arise and become necessary for our decision.

Judgment affirmed.[79]

ANDERSON v. ERIE R. CO.

(Court of Appeals of New York, 1918. 223 N. Y. 277, 119 N. E. 557.)

McLAUGHLIN, J.[80] Plaintiff's intestate, a clergyman, obtained from defendant, a written order that at any time during the year 1913 its agents would sell to him, for his personal use, a clerical ticket subject to the conditions on the back thereof. On the 10th of November, 1913, he presented this order to and purchased from defendant's agent at Elmira, N. Y., a ticket over defendant's road from that place to Leroy, N. Y., for which he paid $1.20, the regular fare being $2.35. The condition on the back of the ticket was: "In consideration of this ticket being sold at a reduced rate, a person accepting and using it expressly agrees to and does thereby assume all risk of accidents and damage to person and property, whether caused by negligence of the company or that of its agents or employees or otherwise. And as a condition precedent to the issuing and use thereof, each person represents that he or she is legally entitled to use such reduced rate ticket under all laws governing the same, and agrees that he or she will not use this ticket in violation of any law. This ticket is not transferable." The intestate having agreed to the condition, as evidenced by his signature thereto, the ticket was delivered to him and while en route the car in which he was riding was derailed and he was killed. This action was brought to recover the damages alleged to have been sustained by reason of his death. Plaintiff had a verdict for a substantial sum, upon which judgment was entered. An appeal was taken to the Appellate Division, where the judgment was reversed and a new trial ordered. Plaintiff gave the usual stipulation and appeals to this court.

[79] As to the distinction between a free passenger and a passenger for hire, compare the following cases: Powell v. Union Pac. R. Co., 255 Mo. 422, 164 S. W. 628 (1914), where an attorney was given a pass in exchange for his promise not to take any case against the railroad; Ft. Wayne & Wabash Valley Traction Co. v. Justus (Ind. App.) 108 N. E. 754 (1915), where a pass was issued to a director of another railroad in exchange for the issuance of a pass by the latter road to an officer of the former; Griswold v. New York & N. E. R. Co., 53 Conn. 371, 4 A. 261, 55 Am. Rep. 115 (1885), where a pass was issued to an employee of another, who kept a restaurant at one of the railroad's stations; Pinnell v. St. Louis-San Francisco Ry. Co. (Mo.) 263 S. W. 182, 41 A. L. R. 1092 (1924), where a pass was issued to a minor child of one of the railroad's employees. See, also, Norfolk Southern R. Co. v. Chatman, 244 U. S. 276, 37 S. Ct. 499, 61 L. Ed. 1131, L. R. A. 1917F, 1128 (1917), and McNeill v. Durham & C. R. Co., 135 N. C. 682, 47 S. E. 765, 67 L. R. A. 227 (1904).

[80] Parts of the opinion are omitted.

The sole question presented by the appeal is whether the release from liability for negligence given by plaintiff's intestate to defendant, in consideration of the reduced rate at which the ticket was sold to him, prevents a recovery. Had the intestate, at the time of the accident, been traveling on a pass there could be but one answer to the question. A recovery could not be had. This court settled that question over half a century ago. Wells v. N. Y. C. R. R. Co., 24 N. Y. 181. * * *

Does an agreement to sell a ticket at a reduced rate of fare, in consideration of exemption from liability in case of negligence, change the rule? I do not think it does. No good reason can be suggested why it should. If a railroad company and a passenger be permitted to make such contract at all, then they are the sole judges of the amount of consideration which will compensate the one for being relieved from liability and the other for assuming the risk, whether it be the whole fare or anything less than that. * * *

The intestate agreed if the defendant would sell him a ticket at the reduced rate at which it was sold, he would assume all risks of accident due to the negligence of the defendant's agents and servants. In fairness, it seems to me, such agreement should be enforced. The intestate was an intelligent man. He deliberately and voluntarily entered into the agreement. It was printed on the back of the ticket, and as evidence that he had full knowledge and appreciated the effect of the agreement is his signature thereto. The ticket and agreement thereon were received in evidence at the trial without objection. No suggestion was then made that it was necessary for defendant to show that the ticket, including the agreement, was in accordance with the schedules filed with the public service commission. Section 28 of the Public Service Commissions Law provides for the filing of such tariffs and section 33 prohibits transportation until they are filed. The presumption is, therefore, that these statutory regulations have been fully complied with. If not, the burden was upon the one claiming illegality to show it. Ocorr & Rugg Co. v. City of Little Falls, 77 App. Div. 592, 79 N. Y. S. 251, affirmed 178 N. Y. 622, 70 N. E. 1104. But the law presumes that every person does his duty and this presumption extends to a railroad corporation in the use of tickets delivered to passengers. Cincinnati, N. O. & Tex. Pac. Ry. Co. v. Rankin, 241 U. S. 319, 36 S. Ct. 555, 60 L. Ed. 1022, L. R. A. 1917A, 265.

I am of the opinion plaintiff was not entitled to recover and, therefore, defendant is entitled to judgment on the stipulation, with costs in all courts.

HISCOCK, C. J., and COLLIN and CUDDEBACK, JJ., concur.

CHASE, HOGAN, and CRANE, JJ., dissent.

Order affirmed, etc.[81]

81 Section 38, New York Public Service Commissions Law (N. Y. Consol. Laws, c. 48), has rendered invalid such contracts with reference to the transportation of property, but does not affect the liability of a carrier of

GRAVES v. LAKE SHORE & M. S. R. CO.

(Supreme Judicial Court of Massachusetts, 1884. 137 Mass. 33, 50 Am. Rep. 282.)

MORTON, C. J. The defendant, as a common carrier, received at Peoria, Illinois, seventy-five barrels of high wines, and agreed to deliver them to the plaintiffs at Boston, in this Commonwealth. The bill of lading contained the stipulation that the goods were "shipped at an agreed valuation of $20 per bbl., owner's risk of leakage." It also contained the agreement, that, "in the event of the loss of any property for which responsibility attaches under this bill of lading to the carriers, the value or cost of the same at the time and point of shipment is to govern the settlement, except the value of the articles has been agreed upon with the shipper, or is determined by the classification upon which the rates are based."

The defendant had no knowledge of the value of the goods except that furnished by the statement of the shippers, and the charge for transportation was based upon this statement and valuation. The goods were destroyed during the transit by a collision of two trains, occasioned by the negligence of the servants of the defendant. The only question presented is whether the plaintiffs can recover any more than the agreed valuation of the goods.

The question whether a carrier can, by a special contract, exempt himself from liability for a loss arising from the negligence of himself or his servants, is one which has been much discussed, and upon which the adjudications are conflicting. If we adopt the general rule, that a carrier cannot thus exempt himself from responsibility, we are of opinion that it does not cover the case before us, which must be governed by other considerations. The defendant has not attempted to exempt itself from liability for the negligence of its servants. It has made no contract for that purpose, but admits its responsibility; its claim is, that the plaintiffs, having represented and agreed that the goods are of a specified value, and having thus obtained the benefit of a diminished rate of transportation, are now estopped to claim, in contradiction of their representation and agreement, that the goods are of a greater value.

It is the right of the carrier to require good faith on the part of those persons who deliver goods to be carried, or enter into contracts with him. The care to be exercised in transporting property, and the reasonable compensation for its carriage, depend largely on its nature and value, and such persons are bound to use no fraud or deception which would mislead him as to the extent of the duties or the risks which he assumes. It is just and reasonable that a carrier should base

passengers. Is there any justification for making a distinction, in this regard, between the transportation of property and the transportation of persons?

his rate of compensation, to some extent, upon the value of the goods carried; this measures his risks, and is an important element in fixing his compensation. If a person voluntarily represents and agrees that the goods delivered to a carrier are of a certain value, and the carrier is thereby induced to grant him a reduced rate of compensation for the carriage, such person ought to be barred by his representation and agreement. Otherwise, he imposes upon the carrier the obligations of a contract different from that into which he has entered. Dunlap v. International Steamboat Co., 98 Mass. 371; Judson v. Western Railroad, 6 Allen, 486, 83 Am. Dec. 646.

The plaintiffs admit that their valuation of the goods would be conclusive against them in case of a loss from any other cause than the negligence of the carrier or its servants; but contend that the contract does not fairly import a stipulation of exemption from responsibility for such negligence. We cannot see the justice of this distinction. Looking at the matter practically, everybody knows that the charges of a carrier must be fixed with reference to all the risks of the carriage, including the risk of loss from the negligence of servants. In the course of time, such negligence is inevitable, and the business of a carrier could not be carried on unless he includes this risk in fixing his rates of compensation. When the parties in this case made their contract, it is fair to assume that both had in mind all the usual risks of the carriage. It savors of refinement to suppose that they understood that the valuation of the goods was to be deemed to be fixed if a loss occurred from some causes, but not fixed if it occurred from the negligence of the servants of the carrier. Such does not seem to us to be the fair construction of the contract.

The plaintiffs voluntarily entered into the contract with the defendant; no advantage was taken of them; they deliberately represented the value of the goods to be $20 per barrel. The compensation for carriage was fixed upon this value; the defendant is injured and the plaintiffs are benefited by this valuation, if it can now be denied. We are of opinion that the plaintiffs are estopped to show that it was of greater value than that represented. The plaintiffs cannot recover a larger sum without violating their own agreement. Although one of the indirect effects of such a contract is to limit the extent of the responsibility of the carrier for the negligence of his servants, this was not the purpose of the contract. We cannot see that any considerations of a sound public policy require that such contracts should be held invalid, or that a person, who in such contract fixes a value upon his goods which he entrusts to the carrier, should not be bound by his valuation. McCance v. London & North Western Railway, 7 H. & N. 437; s. c., 3 H. & C. 343; Railroad v. Fraloff, 100 U. S. 24, 25 L. Ed. 531; Muser v. Holland, 17 Blatchf. C. C. 412, 1 F. 382; Hart v. Pennsylvania Railroad, 2 McCrary, 333, 7 F. 630; Magnin v. Dinsmore, 70 N. Y. 410, 26 Am. Rep. 608.

We are therefore of opinion, upon the facts of this case, that it was not competent for the plaintiffs to show that the value of the goods lost was greater than $20 per barrel.[82]

Judgment affirmed.

MOULTON et al. v. ST. PAUL, M. & M. RY. CO.

(Supreme Court of Minnesota, 1883. 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781.)

Appeal by defendant from an order of the district court for Ramsey county, refusing a new trial, after a trial before Brill, J., and a jury, resulting in a verdict for $400 in favor of plaintiffs.

DICKINSON, J.[83] The plaintiffs shipped two car-loads of horses at St. Paul, over defendant's line of road, to points in Dakota. Two of the horses died by reason of prolonged exposure to cold weather, as is claimed, caused by defendant's negligent detention of the train during transportation. The action is for the recovery of the value of these two horses, which appears to have been $200 each. For the purposes of this appeal, we are to consider the negligence of the defendant as established, and are to determine whether the defendant is liable for its negligence, and the measure or extent of its liability under the contract made by the parties.

The contract under which the property was shipped, and which was executed by both plaintiffs and defendant, contained the provisions that in consideration that the defendant would transport the property at the rate of $75 per car-load, "the same being a rate given, subject to the conditions of this contract," the plaintiffs released the defendant from the liability of a common carrier, and from any liability for any delay in shipping the stock after its delivery to the defendant, and agreed that the liability of the defendant should be only that of a private carrier for hire. The plaintiffs contracted to assume all risk of damage which might be sustained by reason of any delay in transportation, and all risk of damage from any other cause, not resulting from the wilful negligence of the agents of the defendant. It was further

[82] Accord: Galveston Hotel Co. v. Goggan (Tex. Civ. App.) 253 S. W. 694 (1923); Noone v. Southern Express Co., 79 Fla. 25, 83 So. 607 (1920); Coupland v. Housatonic R. Co., 61 Conn. 531, 23 A. 870, 15 L. R. A. 534 (1892); Duntley v. Boston & M. R. R., 66 N. H. 263, 20 A. 327, 9 L. R. A. 449, 49 Am. St. Rep. 610 (1890), semble. Contra: American Ry. Express Co. v. Bailey, 154 Ga. 96, 113 S. E. 551 (1922), semble. But, according to many cases, where the carrier knows the value of the article shipped, or such value is apparent, the shipper's right to recover is not limited by the amount stipulated in the contract. St. Louis & S. F. Ry. Co. v. Mounts, 44 Okl. 359, 144 P. 1036 (1914); Southern Express Co. v. Crook, 44 Ala. 468, 4 Am. Rep. 140 (1870); Orndorff v. Adams Express Co., 3 Bush (66 Ky.) 194, 96 Am. Dec. 207 (1868). For an excellent discussion of the estoppel theory, see Biklé, Agreed Valuation as Affecting the Liability of a Common Carrier for Negligence, 21 Harv. Law Rev. 32.

[83] Part of the opinion is omitted.

agreed that, in case of total loss, the damage should in no case exceed the sum of $100 per head, and, in case of partial loss, damage should be measured in the same proportion. A printed "regulation" of the defendant, attached to the contract, provided that the defendant would not assume any liability over $100 per head on horses and valuable live stock, except by special agreement. By the contract of the parties the owner of the horses attended and cared for them upon the passage, without extra charge for his own transportation. * * *

The recovery in this case rests alone upon the neglect of the defendant to transport the horses to their destination within a reasonable time, whereby, from exhaustion and exposure to cold, they died. The law has been determined in this state, and in most of the United States, as well as in the federal supreme court, to be that a common carrier of goods cannot by contract relieve himself from liability for his own negligence. Christenson v. Am. Exp. Co., 15 Minn. 270 (Gil. 208), 2 Am. Rep. 122; Shriver v. Sioux City & St. P. R. Co., 24 Minn. 506, 31 Am. Rep. 353; Railroad Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627; Bank of Kentucky v. Adams Exp. Co., 93 U. S. 174, 23 L. Ed. 872. Nor is there any reason why a different rule should prevail in respect to the transportation of live stock, or of property under the care of the owner. The rule itself rests upon considerations of public policy, and upon the fact that to allow the carrier to absolve himself from the duty of exercising care and fidelity is inconsistent with the very nature of his undertaking. These reasons apply with undiminished force where the property is live stock, or is under the care of the owner, who has not the direction or control of the agencies and the operation of the transportation. To whatever extent such facts might modify or affect the liability of the carrier for accidents, or for injuries not the result of his own negligence, they would not qualify his responsibility for his own neglect of duty. The agreement discharging the defendant from the liability of a common carrier cannot avail to divest the carrier of his real character, nor indirectly relieve him from responsibilities from which he cannot directly by contract free himself. Christenson v. Am. Exp. Co., supra; Bank of Kentucky v. Adams Exp. Co., supra.

Our conclusion, therefore, is that the defendant was responsible in damages for its negligence, notwithstanding the contract.

The same reasons which forbid that a common carrier should, even by express contract, be absolved from liability for his own negligence, stand also in the way of any arbitrary preadjustment of the measure of damages, where the carrier is *partially* relieved from such liability. It would indeed be absurd to say that the requirement of the law as to such responsibility of the carrier is absolute, and cannot be laid aside, even by the agreement of the parties, but that one-half or three-fourths of this burden, which the law compels the carrier to bear, may be laid aside, by means of a contract limiting the recovery of damages to one-half or one-fourth of the known value of the property.

This would be mere evasion, which would not be tolerated. Yet there is no reason why the contracting parties may not in good faith agree upon the value of the property presented for transportation, or fairly liquidate the damages recoverable in accordance with the supposed value. Such an agreement would not be an abrogation of the requirements of the law, but only the application of the law as it is by the parties themselves to the circumstances of the particular case. But that the requirements of the law be not evaded, and its purposes frustrated, contracts of this kind should be closely scrutinized.

Upon the face of the contract under consideration, it is apparent that it was not the purpose of the parties to liquidate the damages recoverable, with reference to the value of the property consigned to the carrier. Its provisions are somewhat contradictory, and not easily reconciled. The general regulation attached to the contract, to the effect that the company "will not assume any liability over one hundred dollars per head on horses and valuable live stock except by special agreement," is plainly opposed to the law as established, so far as regards the negligence of the carrier. As a regulation it is, therefore, of no effect. The law declares that the carrier shall be liable to the extent of the value of the property, although there be no special agreement. We do not question the right of a carrier to require the disclosure, by the consignor, of the value of the property presented for transportation, where its value is not apparent and well known. This is reasonable, both to the end that proper care may be taken of the property while it is in the hands of the carrier, and because the proper charges for transportation may often depend largely upon value. We see nothing, however, in this contract which can be regarded as having been intended as calling for such a disclosure on the part of the plaintiffs, or as estopping them from claiming a recovery, upon the ground of the carrier's negligence, of the actual value of the horses. In terms, the contract purports to relieve the defendant from liability, even for its own negligence, and, at the same time, if a recovery shall be had notwithstanding this agreement, then the amount of such recovery is limited to the sum of $100 per head. These stipulations cannot naturally be applied to a case involving as the cause of action the negligence of the carrier, without making them, in effect, to be an agreement in the first place for absolute exemption from liability (except for wilful negligence); and if, notwithstanding the agreed exemption, a recovery should be awarded, it shall not exceed the sum named; that is to say (as applied to a case of negligence), it is, in effect, an agreement for absolute exemption, and, that failing to be sustained, then for a partial exemption, from the liability which the law imposes in such cases, and which cannot be laid aside by the mere consent of parties. Such a contract cannot be sustained.[84]

Order affirmed.

[84] Accord: Hughes v. Pennsylvania R. Co., 202 Pa. 222, 51 A. 990, 63 L. R. A. 513, 97 Am. St. Rep. 713 (1902); Kansas City, St. J. & C. B. R. Co.

HART v. PENNSYLVANIA R. CO.

(Supreme Court of the United States, 1884. 112 U. S. 331, 5 S. Ct. 151, 28 L. Ed. 717.)

Lawrence Hart brought this suit in a state court in Missouri, against the Pennsylvania Railroad Company, to recover damages from it, as a common carrier, for the breach of a contract to transport, from Jersey City to St. Louis, five horses and other property. The petition alleges that, by the negligence of the defendant, one of the horses was killed and the others were injured, and the other property was destroyed, and claims damages to the amount of $19,800. After an answer and a reply, the plaintiff removed the suit into the Circuit Court of the United States for the Eastern District of Missouri, where it was tried by a jury.

It appeared that the property was transported under a bill of lading issued by the defendant to the plaintiff, and signed by him, and reading as follows:

* * * * * * * * * *

"First. To pay freight thereon to said company at the rate of ninety-four (94) cents per one hundred pounds (company's weight), and all back freight and charges paid by them, on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation:

"If horses or mules, not exceeding two hundred dollars each.

"If cattle or cows, not exceeding seventy-five dollars each.

"If fat hogs or fat calves, not exceeding fifteen dollars each.

v. Simpson, 30 Kan. 645, 2 P. 821, 46 Am. Rep. 104 (1883); Abrams v. Milwaukee, Lake Shore & Western R. Co., 87 Wis. 485, 58 N. W. 780, 41 Am. St. Rep. 55 (1894); Southern Pac. Co. v. Haug, 43 Nev. 102, 182 P. 92 (1919); Everett v. Norfolk & S. R. R. Co., 138 N. C. 68, 50 S. E. 557, 1 L. R. A. (N. S.) 985 (1905); Chicago & N. W. Ry. Co. v. Chapman, 133 Ill. 96, 24 N. E. 417, 8 L. R. A. 508, 23 Am. St. Rep. 587 (1890); Central of Georgia Ry. Co. v. Murphey, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720 (1901). For a further collection of cases, see notes, 14 L. R. A. 433, and 88 Am. St. Rep. 107. The ratio decidendi of these cases is that the stipulated liability did not represent a bona fide attempt to liquidate the damages, since there was no actual evaluation of the specific goods shipped, but merely an arbitrary limitation of the carrier's liability to an amount bearing no relation to the actual value of the goods. However, in Alair v. Northern Pacific R. R. Co., 53 Minn. 160, 54 N. W. 1072, 19 L. R. A. 764, 39 Am. St. Rep. 588 (1893), a stipulation as to limited liability in the bill of lading was held valid because the amount stated approximated to some degree the actual value of the goods shipped, although there was no attempt made to evaluate the specific articles. In accord with the principal case, see Western Union Tel. Co. v. Compton, 114 Ark. 193, 169 S. W. 946 (1914); Rhyne v. Western Union Telegraph Co., 164 N. C. 394, 80 S. E. 152 (1913), holding invalid a stipulation restricting to an arbitrary sum the liability of the telegraph company for damages due to its negligence. For more cases on this point, see footnotes to New York Cent. R. Co. v. Lockwood, supra, p. 845, and Hart v. Pennsylvania Railroad Co., post, p. 870.

"If sheep, lambs, stock hogs, or stock calves, not exceeding five dollars each.

"If a chartered car, on the stock and contents in same, twelve hundred dollars for the car-load." * * *

At the trial the plaintiff put in evidence the bill of lading, and gave testimony to prove the alleged negligence and how the loss and injury occurred. He then offered to show that the actual value of the horse killed was $15,000; that the other horses were worth from $3,000 to $3,500 each; and that they were rendered comparatively worthless in consequence of their injuries. The defendant objected to this testimony, on the ground that it was not competent for the plaintiff to prove any damage or loss in excess of that set out in the bill of lading. The court sustained the objection and the plaintiff excepted. It appeared, on the trial, that the horses were race-horses, and that they and the other property were all in one car.

It was admitted by the defendant that the damages sustained by the plaintiff were equal to the full amount expressed in the bill of lading. The court charged the jury as follows: "It is competent for a shipper, by entering into a written contract, to stipulate the value of his property, and to limit the amount of his recovery in case it is lost. This is the plain agreement, that the recovery shall not exceed the sum of two hundred dollars each for the horses, or twelve hundred dollars for a car-load. It is admitted here, by counsel for the defendant, under this charge, that the plaintiff is entitled to recover a verdict for twelve hundred dollars, and, also, under the charge of the court, the plaintiff agrees that that is all. It is simply your duty to find a verdict for that amount." The plaintiff excepted to this charge. The jury found a verdict of $1,200 for the plaintiff (see 2 McCrary, 333, 7 F. 630); and after a judgment accordingly the plaintiff brought this writ of error.

The errors assigned are, that the court erred in refusing to permit the plaintiff to show the actual damages he had sustained and in so charging the jury as to restrict their verdict to $1,200.

Mr. Justice BLATCHFORD delivered the opinion of the court.[85] He stated the facts in the foregoing language, and continued:

It is contended for the plaintiff that the bill of lading does not purport to limit the liability of the defendant to the amounts stated in it, in the event of loss through the negligence of the defendant. But we are of opinion that the contract is not susceptible of that construction. The defendant receives the property for transportation on the terms and conditions expressed, which the plaintiff accepts "as just and reasonable." The first paragraph of the contract is that the plaintiff is to pay the rate of freight expressed, "on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: If horses or mules, not exceeding two hundred dollars

[85] Parts of the statement of facts and opinion are omitted.

each. * * * If a chartered car, on the stock and contents in same, twelve hundred dollars for the car load." Then follow in the first paragraph, these words: "But no carrier shall be liable for the acts of the animals themselves, or to each other, such as biting, kicking, goring or smothering, nor for loss or damage arising from condition of the animals themselves, which risks, being beyond the control of the company, are hereby assumed by the owner, and the carrier released therefrom." This statement of the fact that the risks from the acts and condition of the horses are risks beyond the control of the defendant, and are, therefore, assumed by the plaintiff, shows, if more were needed than the other language of the contract, that the risks and liability assumed by the defendant in the remainder of the same paragraph are those not beyond, but within, the control of the defendant, and, therefore, apply to loss through the negligence of the defendant.

It must be presumed from the terms of the bill of lading, and without any evidence on the subject, and especially in the absence of any evidence to the contrary, that, as the rate of freight expressed is stated to be on the condition that the defendant assumes a liability to the extent of the agreed valuation named, the rate of freight is graduated by the valuation. Especially is this so, as the bill of lading is what its heading states it to be, "a limited liability live-stock contract," and is confined to live-stock. Although the horses, being race-horses, may, aside from the bill of lading, have been of greater real value than that specified in it, whatever passed between the parties before the bill of lading was signed was merged in the valuation it fixed; and it is not asserted that the plaintiff named any value, greater or less, otherwise than as he assented to the value named in the bill of lading, by signing it. The presumption is conclusive that, if the liability had been assumed on a valuation as great as that now alleged, a higher rate of freight would have been charged. The rate of freight is indissolubly bound up with the valuation. If the rate of freight named was the only one offered by the defendant, it was because it was a rate measured by the valuation expressed. If the valuation was fixed at that expressed, when the real value was larger, it was because the rate of freight named was measured by the low valuation. The plaintiff cannot claim a higher valuation, on the agreed rate of freight.

It is further contended by the plaintiff, that the defendant was forbidden, by public policy, to fix a limit for its liability for a loss by negligence, at an amount less than the actual loss by such negligence. As a minor proposition, a distinction is sought to be drawn between a case where a shipper, on requirement, states the value of the property, and a rate of freight is fixed accordingly, and the present case. It is said, that, while in the former case the shipper may be confined to the value he so fixed, in the event of a loss by negligence, the same rule does not apply to a case where the valuation inserted in the contract is not a valuation previously named by the shipper. But we see no sound reason for this distinction. The valuation named was the "agreed

valuation," the one on which the minds of the parties met, however it came to be fixed, and the rate of freight was based on that valuation, and was fixed on condition that such was the valuation, and that the liability should go to that extent and no further.

We are, therefore, brought back to the main question. It is the law of this court, that a common carrier may, by special contract, limit his common-law liability; but that he cannot stipulate for exemption from the consequences of his own negligence or that of his servants. New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 12 L. Ed. 465; York Co. v. Central R. R. Co., 3 Wall. 107, 18 L. Ed. 170; Railroad Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627; Express Co. v. Caldwell, 21 Wall. 264, 22 L. Ed. 556; Railroad Co. v. Pratt, 22 Wall. 123, 22 L. Ed. 827; Bank of Kentucky v. Adams Express Co., 93 U. S. 174, 23 L. Ed. 872; Railway Co. v. Stevens, 95 U. S. 655, 24 L. Ed. 535. * * *

To the views announced in these cases we adhere. But there is not in them any adjudication on the particular question now before us. It may, however, be disposed of on principles which are well established and which do not conflict with any of the rulings of this court. As a general rule, and in the absence of fraud or imposition, a common carrier is answerable for the loss of a package of goods though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them. If the shipper is guilty of fraud or imposition, by misrepresenting the nature or value of the articles, he destroys his claim to indemnity, because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assumed, and what he has done has tended to lessen the vigilance the carrier would otherwise have bestowed. 2 Kent's Comm. 603, and cases cited; Relf v. Rapp, 3 Watts & S. (Pa.) 21, 37 Am. Dec. 528; Dunlap v. International Steamboat Co., 98 Mass. 371; Railroad Co. v. Fraloff, 100 U. S. 24, 25 L. Ed. 531. This qualification of the liability of the carrier is reasonable, and is as important as the rule which it qualifies. There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract.

The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practised on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss.

This principle is not a new one. In Gibbon v. Paynton, 4 Burrow, 2298, the sum of £100 was hidden in some hay in an old mail-bag and sent by a coach and lost. The plaintiff knew of a notice by the proprietor that he would not be answerable for money unless he knew what it was, but did not apprise the proprietor that there was money in the bag. The defence was upheld, Lord Mansfield saying: "A common carrier, in respect of the premium he is to receive runs the risque of the goods, and must make good the loss, though it happen without any fault in him, the reward making him answerable for their safe delivery. His warranty and insurance is in respect of the reward he is to receive, and the reward ought to be proportionable to the risque. If he makes a greater warranty and insurance, he will take greater care, use more caution, and be at the expense of more guards or other methods of security; and, therefore, he ought, in reason and justice, to have a greater reward." To the same effect is Batson v. Donovan, 4 B. & A. 21.

The subject-matter of a contract may be valued, or the damages in case of a breach may be liquidated in advance. In the present case, the plaintiff accepted the valuation as "just and reasonable." The bill of lading did not contain a valuation of all animals at a fixed sum for each, but a graduated valuation according to the nature of the animal. It does not appear that an unreasonable price would have been charged for a higher valuation.

The decisions in this country are at variance. The rule which we regard as the proper one in the case at bar is supported in Newburger v. Howard, 6 Phila. (Pa.) 174; Squire v. New York Central R. R. Co., 98 Mass. 239, 93 Am. Dec. 162; Hopkins v. Westcott, 6 Blatchford, 64, Fed. Cas. No. 6,692; Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575; Oppenheimer v. United States Express Co., 69 Ill. 62, 18 Am. Rep. 596; Magnin v. Dinsmore, 56 N. Y. 168, and 62 N. Y. 35, 20 Am. Rep. 442, and 70 N. Y. 410, 26 Am. Rep. 608; Earnest v.

Express Co., 1 Woods, 573, Fed. Cas. No. 4,248; Elkins v. Empire Transportation Co., 81* Pa. 315; South & North Ala. R. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578; Same v. Same, 56 Ala. 368; Muser v. Holland, 17 Blatchford, 412, 1 F. 382; Harvey v. Terre Haute R. R. Co., 74 Mo. 538; and Graves v. Lake Shore Ry. Co., 137 Mass. 33, 50 Am. Rep. 282. The contrary rule is sustained in Southern Express Co. v. Moon, 39 Miss. 822; The City of Norwich, 4 Ben. 271, Fed. Cas. No. 2,761; United States Express Co. v. Backman, 28 Ohio St. 144; Black v. Goodrich Transportation Co., 55 Wis. 319, 13 N. W. 244, 42 Am. Rep. 713; Chicago, St. Louis & N. O. R. R. Co. v. Abels, 60 Miss. 1017; Kansas City, etc., Railroad Co. v. Simpson, 30 Kan. 645, 2 P. 821, 46 Am. Rep. 104; and Moulton v. St. Paul, etc., R. R. Co., 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781. We have given consideration to the views taken in these latter cases, but are unable to concur in their conclusions. Applying to the case in hand the proper test to be applied to every limitation of the common-law liability of a carrier—its just and reasonable character—we have reached the result indicated. In Great Britain, a statute directs this test to be applied by the courts. The same rule is the proper one to be applied in this country, in the absence of any statute. * * *

The plaintiff did not, in the course of the trial, or by any request to instruct the jury, or by any exception to the charge, raise the point that he did not fully understand the terms of the bill of lading, or that he was induced to sign it by any fraud or under any misapprehension. On the contrary, he offered and read in evidence the bill of lading, as evidence of the contract on which he sued.

The distinct ground of our decision in the case at bar is that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. Squire v. New York Central R. R. Co., 98 Mass. 239, 245, 93 Am. Dec. 162, and cases there cited.

There was no error in excluding the evidence offered, or in the charge to the jury, and the judgment of the Circuit Court is affirmed.[86]

[86] Accord: Donlon Bros. v. Southern Pac. Co., 151 Cal. 763, 91 P. 603, 11 L. R. A. (N. S.) 811, 12 Ann. Cas. 1118 (1907); Denver & R. G. Ry. Co. v. Teufel, 64 Colo. 515, 172 P. 1060 (1918); Duntley v. Boston & M. R. R., 66 N. H. 263, 20 A. 327, 9 L. R. A. 449, 49 Am. St. Rep. 610 (1890); South & North Ala. R. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 78 (1875); St. Louis, I. M. & S. Ry. Co. v. Weakly, 50 Ark. 397, 8 S. W. 134, 7 Am. St. Rep. 104 (1887). See discussion by Biklé, Agreed Valuation as Affecting the Liability of Common Carriers for Negligence, 21 Harv. Law Rev. 32. For

PENNSYLVANIA R. CO. v. HUGHES.

(Supreme Court of the United States, 1903. 191 U. S. 477, 24 S. Ct. 132, 48 L. Ed. 268.)

Statement by Mr. Justice DAY:

The defendants in error brought suit in the court of common pleas of Philadelphia against the Pennsylvania Railroad Company, to recover for injuries to a horse shipped by them from Albany in the state of New York to Cynwyd, in the state of Pennsylvania. The shipment was under of bill of lading of the New York Central & Hudson River Railroad Company, bearing date of August 10, 1900. It recited the receipt of the horse "for transportation from ——— to destination, if on the said carrier's line of railroad, otherwise to the place where said live stock is to be received by the connecting carriers for transportation to or toward destination, and that the same has been received by said carrier for itself and on behalf of connecting carriers, for transportation, subject to the official tariffs, classifications and rules of the said company, and upon the following terms and conditions, which are admitted and accepted by the said shipper as just and reasonable, viz.: That said shipper, or the consignee, is to pay freight thereon to the said carrier at the rate of ——— per ———, which is the lower published tariff rate, upon the express condition that the carrier assumes liability on the said live stock to the extent only of the following agreed valuation, upon which valuation is based the rate charged for the transportation of the said animals, and beyond which valuation neither the said carrier nor any connecting carrier shall be liable in any event, whether the loss or damage occur

an exhaustive collection of cases, see notes, 23 Am. St. Rep. 593, and 1 L. R. A. (N. S.) 985. Where a stipulation limits the carrier's liability for total loss, but no provision is made as to partial loss, the cases are divided as to the amount the shipper may recover. According to the majority view, the shipper may recover the actual damage caused not exceeding the amount agreed upon as compensation for a total loss. Candee v. Delaware, L. & W. Ry. Co., 94 N. J. Law, 144, 109 A. 202 (1920); Central of Georgia Ry. Co. v. Broda, 190 Ala. 266, 67 So. 437 (1914). According to the minority view, the shipper may recover only a proportionate part of the stipulated amount. Goodman v. Missouri, K. & T. Ry. Co., 71 Mo. App. 460 (1897). See Mallison & Co. v. Barrett, 215 App. Div. 524, 213 N. Y. S. 652 (1926) where it was held that the shipper, having placed a single valuation on five bales of silk as a whole, without separately valuing any particular bale, was estopped from recovering a greater proportion of the actual value of a single lost bale than the declared value of the entire shipment bears to its actual value. In accord with the principal case, see Primrose v. Western Union Telegraph Co., 154 U. S. 1, 14 S. Ct. 1098, 38 L. Ed. 883 (1894), in which the Supreme Court upheld a stipulation limiting to a fixed amount the liability of a telegraph company for mistakes, delays, or nondelivery of a telegram caused by its negligence. The state courts, as in the carrier cases, have disagreed as to the validity of such stipulations. For a collection of cases, see 11 L. R. A. (N. S.) 561; 30 L. R. A. (N. S.) 409; L. R. A. 1915B, 685. As to the limitation of the carrier's liability by means of a time limit for presenting claims, see 65 Univ. of Pa. Law Rev. 282.

through the negligence of the said carrier or connecting carriers, or their employees or otherwise. If horses or mules—not exceeding $100 each."

The through rate of freight was not filled out in the blanks in the shipping receipt or the bill of lading, but was collected by the agent of the Pennsylvania Railroad Company at Cynwyd, and it appears was the reduced tariff rate usually charged on such shipments where the limited liability clause above recited is inserted. The shipper signed the bill of lading, which contained the following stipulations:

"Thomas Grady does hereby acknowledge that he had the option of shipping the above-described live stock at a higher rate of freight according to the official tariffs, classifications, and the rules of the said carrier and connecting carriers, and thereby receiving the security of the liability of the said carrier and connecting railroad and transportation companies, as common carriers of the said live stock, upon their respective roads and lines, but has voluntarily decided to ship the same under this contract at the reduced rate of freight above first mentioned."

The agreement further provided:

"No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee. The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation."

Upon the trial the jury returned a verdict in favor of the plaintiff for $10,000, and judgment was rendered accordingly. The horse was transported in safety to the end of the line of the receiving carrier, and delivered to the defendant company, and injured while the car in which he was shipped was standing on the track of the Pennsylvania Railroad Company in the city of Philadelphia, it being run into by heavily laden cars.

Upon appeal to the supreme court of Pennsylvania, the judgment was affirmed. 202 Pa. 222, 51 Atl. 990.

Mr. Justice DAY delivered the opinion of the court.

The right to review the judgment of the supreme court of Pennsylvania herein depends upon the proper assertion of a right or privilege under the federal Constitution or statutes which was denied to the plaintiff in error by the adverse holding of the state court.

Upon the trial in the common pleas court, it was contended that the special contract above recited limited the recovery of the plaintiff to the sum of $100. The court refused to so charge, but holding that the policy and law of Pennsylvania, as declared by her courts of last resort, did not permit such limitations on the liability of common

carriers, left to the jury to determine the value of the horse, and the question of the negligence of the defendant.

In view of being carried to the supreme court of Pennsylvania, two errors were assigned to the refusal of the court to charge:

"1. That it was lawful in the state of New York for the carrier to limit its liability by a special contract for an injury resulting from its negligence; that said contract having been for a through consignment from Albany to Cynwyd, a place within this state, said contract must be considered in its entirety, and is incapable of divisibility; that said contract having stipulated for an agreed valuation of the stock shipped, the parties must be governed by its terms throughout the entire route, as said contract must be interpreted and enforced here by the law of the place where it was made, and within which state it was partly performed; and that consequently the plaintiff is not entitled to recover in excess of the valuation agreed upon by the parties at the time of the shipment.

"2. That the plaintiff is not entitled to recover in excess of $100."

Neither of these assignments of error presents a federal question in such sense as to give this court jurisdiction to review the judgment of the state court under section 709 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 575). Nothing is better settled in federal jurisprudence than that the jurisdiction of this court in such cases depends upon the assertion of a right, title, privilege, or immunity under the federal Constitution or laws set up and denied in the state courts. Beals v. Cone, 188 U. S. 184, 47 L. Ed. 435, 23 S. Ct. 275.

The first error assigned in the common pleas court raised the question as to the law of the contract. It does not assert that any federal right was invaded or denied. It seems to have been conceded at the trial that the law of the state of New York, where the contract was made, permitted the making of a contract limiting the liability of the carrier to the agreed valuation in consideration of the lower freight rate for carriage, the shipper having the opportunity to have the larger liability for the value of the goods if the higher rate of freight for carriage was paid. This rule also prevails in the courts of the United States (Hart v. Pennsylvania R. Co., 112 U. S. 331, 28 L. Ed. 717, 5 S. Ct. 151), wherein it was held that a contract fairly made and signed by the shipper, agreeing on a valuation of the property carried, with a rate of freight based on such valuation, on the condition that the carrier assume liability only to the extent of such agreed valuation in case of loss by the negligence of the carrier, will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier is responsible and the freight received, and of protecting the carrier against extravagant valuations.

But this is not a question of federal law wherein the decision of the highest federal tribunal is of conclusive authority. In Grogan v. Adams Exp. Co., 114 Pa. 523, 60 Am. Rep. 360, 7 A. 134, the

supreme court of Pennsylvania expressly declined to follow the rule laid down in Hart v. Pennsylvania R. Co. adhering to its own declared doctrine denying the right of a common carrier to thus limit its liability for injuries resulting from negligence. The cases are numerous and conflicting, different rules prevailing in different states. The federal courts in cases of which they have jurisdiction will doubtless continue to follow the rule of the Hart Case, but the highest court of Pennsylvania may administer the common law according to its understanding and interpretation of it, being only amenable to review in the federal Supreme Court where some right, title, immunity, or privilege, the creation of the federal power, has been asserted and denied. Bethell v. Demaret, 10 Wall. 537, 19 L. Ed. 1007; Delmas v. Merchants' Mut. Ins. Co., 14 Wall. 666, 20 L. Ed. 759; New York L. Ins. Co. v. Hendren, 92 U. S. 287, 23 L. Ed. 709; United States v. Thompson, 93 U. S. 586, 23 L. Ed. 982.[87]

In the supreme court of Pennsylvania a further assignment of error was made as follows:

"III. The learned court below erred in entering judgment in conflict with the Act of Congress of February 4, 1887, entitled 'An Act to Regulate Commerce.' Section 1 of said act clearly provides that where the transportation is from one state to another, under a through bill of lading, its provisions shall be carried out, unless it be in conflict with a statute of the state in which it may be performed, or in conflict with the policy of the United States as laid down in the federal courts, and that, as the contract was valid in the place where made, and, as there is no statute in Pennsylvania prohibitory of an agreed valuation to establish a rate, and as it is consistent with the policy of the United States as declared by the federal courts, the judgment should have been for the valuation mentioned in the contract."

Of this assignment of error, Mr. Justice Potter, delivering the opinion of the supreme court of Pennsylvania, said:

"The third assignment of error suggests that the entry of judgment is in conflict with the Interstate Commerce Act of Congress. This seems to be an afterthought, as there is no indication in the record that this question was raised or considered in the court below. It is not apparent how the act can have any application to this case. It contains nothing bearing upon the validity of a contract limiting the liability of a railroad for loss or injury caused by negligence. The object of the act seems to me to be to secure continuous carriage and uniform rates, and to compel the furnishing of equal facilities. We cannot see that the entry of judgment in this case interferes in any way with the legitimate exercise of interstate commerce."

Upon the authority of Missouri, K. & T. R. Co. v. Elliott, 184

[87] On the question of what law governs contracts of interstate carriage in the absence of federal regulation, see note, 13 Colum. Law Rev. 637.

U. S. 533, 46 L. Ed. 674, 22 S. Ct. 446, it may be admitted that the question of the decision of the state court being in contravention of the legislation of Congress to regulate interstate commerce was sufficiently made, and the adverse decision to the party claiming the benefit of that act gives rise to the right of review here. In refusing to limit the recovery to the valuation agreed upon, did the state court deny to the company a right or privilege secured by the interstate commerce law? It may be assumed that under the broad power conferred upon Congress over interstate commerce as defined in repeated decisions of this court, it would be lawful for that body to make provision as to contracts for interstate carriage, permitting the carrier to limit its liability to a particular sum in consideration of lower freight rates for transportation. But upon examination of the terms of the law relied upon we fail to find any such provision therein. The sections of the interstate commerce law relied upon by the learned counsel for plaintiff in error (24 Stat. at L. 379, c. 104, U. S. Comp. Stat. 1901, p. 3154) provide for equal facilities to shippers for the interchange of traffic; for nondiscrimination in freight rates; for keeping schedules of rates open to public inspection; for posting the same in public places, with certain particulars as to charges, rules, and regulations; for the publication of joint tariff rates for continuous transportation over one or more lines, to be made public when directed by the Interstate Commerce Commission; against advances in joint tariff rates except after ten days' notice to the commission; against reduction of joint tariff rates except after three days' like notice; making it unlawful for any party to a joint tariff to receive or demand a greater or less compensation for the transportation of property between points as to which a joint tariff is made different than is specified in the schedule filed with the commission; giving remedies for the enforcement of the foregoing provisions, and providing penalties for their violation; making it unlawful to prevent continuous carriage, and providing that no break of bulk, stoppage or interruption by the carrier, unless made in good faith for some necessary purpose, without intention to evade the act, shall prevent the carriage of freights from being treated as one continuous carriage from the place of shipment to the place of destination.

While under these provisions it may be said that Congress has made it obligatory to provide proper facilities for interstate carriage of freight, and has prevented carriers from obstructing continuous shipments on interstate lines, we look in vain for any regulation of the matter here in controversy. There is no sanction of agreements of this character limiting liability to stipulated valuations, and, until Congress shall legislate upon it, is there any valid objection to the state enforcing its own regulations upon the subject, although it may to this extent indirectly affect interstate commerce contracts of carriage?

It is well settled that the state may make valid enactments in the exercise of its legislative power to promote the welfare and convenience of its citizens, although in their operation they may have an effect upon interstate traffic.

In Missouri, K. & T. R. Co. v. Haber, 169 U. S. 614–635, 42 L. Ed. 878, 885, 18 S. Ct. 488, 496, after reviewing previous cases in this court, Mr. Justice Harlan, delivering the opinion of the court, says:

"These cases all proceed upon the ground that the regulation of the enjoyment of the relative rights and the performance of the duties of all persons within the jurisdiction of a state belong primarily to such state under its reserved power to provide for the safety of all persons and property within its limits; and that even if the subject of such regulations be one that may be taken under the exclusive control of Congress, and be reached by national legislation, any action taken by the state upon that subject does not directly interfere with rights secured by the Constitution of the United States or by some valid act of Congress, must be respected until Congress intervenes."

In the absence of Congressional legislation upon the subject, an act of the legislature of Alabama, to require locomotive engineers to be examined and licensed by a board to be appointed by the governor for that purpose, was sustained in Smith v. Alabama, 124 U. S. 465, 31 L. Ed. 508, 1 Inters. Com. Rep. 804, 8 S. Ct. 564.

An enumeration of the instances in which this court has sustained the validity of local laws intended to promote the safety and comfort of passengers, employees, persons crossing railroad tracks, and adjacent property owners, is given in the opinion by Mr. Justice Brown, in Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514–516, 44 L. Ed. 868, 20 S. Ct. 722.

The case of Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. Ed. 688, 18 S. Ct. 289, is, in our opinion, virtually decisive of the question made upon this branch of the case. In that case cattle were loaded at Rock Valley, Iowa, to be shipped to Chicago. The contract, as here, was for interstate transportation. An injury happened to the drover in charge of the cattle in Iowa, due to the negligence of the transporting company. The shipper had signed a contract providing: "That the company shall in no event be liable to the owner or person in charge of said stock for any injury to his person in any amount not exceeding the sum of $500.00." The company averred and offered to prove that, in view of this limited liability, it had agreed to transport the cattle at a reduced rate. The statute of Iowa provided: "No contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation been made or entered into." Iowa Code of 1879, § 1308.

The trial court charged that the limitation contained in the contract was void, and a verdict of $1,000.00 damages was returned. A judgment on the verdict was affirmed in the supreme court of Iowa. In delivering the opinion of this court, Mr. Justice Gray, said:

"A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable, according to the law of the state, for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another state, the right of action for the consequent damage is given by the local law. It is equally within the power of the state to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, the state has the power to redress and punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits. * * * The statute now in question, so far as it concerns liability for injuries happening within the state of Iowa—which is the only matter presented for decision in this case—clearly comes within the same principles. It is in no just sense a regulation of commerce. It does not undertake to impose any tax upon the company, or to restrict the persons or things to be carried, or to regulate the rate of tolls, fares, or freight. Its whole object and effect are to make it more sure that railroad companies shall perform the duty, resting upon them by virtue of their employment as common carriers, to use the utmost care and diligence in the transportation of passengers and goods."

It is true that this language was used of a statute of Iowa enacting a rule of obligation for common carriers in that state. But the principle recognized is that, in the absence of congressional legislation upon the subject, a state may require a common carrier, although in the execution of a contract for interstate carriage, to use great care and diligence in the carrying of passengers and transportation of goods, and to be liable for the whole loss resulting from negligence in the discharge of its duties.

We can see no difference in the application of the principle based upon the manner in which the state requires this degree of care and responsibility, whether enacted into a statute or resulting from the

Shipment moving in interstate commerce, agreed valuation is binding.

rules of law enforced in the state courts. The state has a right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence, a contract to the contrary notwithstanding. This requirement in the case just cited is held not to be an unlawful attempt to regulate interstate commerce, in the absence of congressional action providing a different measure of liability when contracts such as the one now before us are made in relation to interstate carriage. Its pertinence to the case under consideration renders further discussion unnecessary.

The judgment of the Supreme Court of Pennsylvania is affirmed.[88]

ADAMS EXPRESS CO. v. CRONINGER.

(Supreme Court of the United States, 1913. 226 U. S. 491, 33 S. Ct. 148, 57 L. Ed. 314, 44 L. R. A. [N. S.] 257.)

This was an action in the Circuit Court of Kenton County, Kentucky, against the Express Company to recover the full market value of a small package containing a diamond ring which was delivered by the plaintiff below to the Express Company at its office in Cincinnati, Ohio, consigned to J. W. Clendenning at Augusta, Georgia. The package was never delivered.

The Express Company made defense by answer. The plaintiff demurred to the answer as not containing a defense, which demurrer was sustained. The company declined to further plead, whereupon the Circuit Court gave judgment for the sum of $137.52, being the full value of the ring and interest. A writ of error was sued out from this court to the Circuit Court of Kenton County, that being the highest court of the state in which a decision could be had.

The answer and accompanying exhibit were in substance as follows:

That the defendant was an express company engaged in interstate commerce within the provisions of the Act of Congress of June 29, 1906; that in obedience to that act it had duly filed with the Interstate Commerce Commission schedules showing its rates and charges from Cincinnati to Augusta, Georgia, which schedules showed that its rates and charges, when the value of the property to be carried was in excess of fifty dollars, were graduated reasonably, according to the value, and that the lawful rate upon the package of the plaintiff from Cincinnati to Augusta was twenty-five cents if the value was fifty dollars or less, and was fifty-five cents if its value was one hundred and twenty-five dollars.

[88] See Cooke, The Powers of Congress and of the States Respectively to Regulate the Conduct and Liability of Carriers, 10 Colum. Law Rev. 35; Prentice, The Origin of the Right to Engage in Interstate Commerce, 17 Harv. Law Rev. 20, pp. 30–40.

It is averred that the plaintiff knew that the charges upon the package shipped were based upon the value of the shipment, and that it (the defendant) required that the value should be declared by the shipper, and that if he did not disclose and declare the value when he delivered the shipment to it at Cincinnati for transportation to Augusta, the rate charged would be based upon a valuation of fifty dollars. It is then alleged that the package so delivered was sealed and that defendant did not know the contents or value, and that if it had it would not have received it for carriage for less than the lawful published rate of fifty-five cents. The receipt or bill of lading issued shows no value, but contains a stipulation in these words:

"In consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding fifty dollars unless a greater value is declared, the shipper agrees that the value of said property is not more than fifty dollars, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than fifty dollars if no value is stated herein."

Mr. Justice LURTON, after making the foregoing statement, delivered the opinion of the court.[89]

The answer relies upon the Act of Congress of June 29, 1906, being an act to amend the Interstate Commerce Act of 1887 (Comp. St. § 8563, et seq.), as the only regulation applicable to an interstate shipment; and avers that the limitation of value, declared in its bill of lading, was valid and obligatory under that act. This defense was denied. This constitutes the Federal question and gives this court jurisdiction.

Under the law of Kentucky this contract, limiting the plaintiff's recovery to the agreed or declared value, was invalid, and the shipper was entitled to recover the actual value, "unless," as said in Adams Express Company v. Walker, 119 Ky. 121, 129, 83 S. W. 106, 67 L. R. A. 412, and affirmed in Southern Express Company v. Fox and Logan, 131 Ky. 257, 115 S. W. 184, 117 S. W. 270, 133 Am. St. Rep. 241, "sufficient facts are shown, independently of the special contract, to avoid the contract for fraud or to create an estoppel at common law."

The question upon which the case must turn, is, whether the operation and effect of the contract for an interstate shipment, as shown by the receipt or bill of lading, is governed by the local law of the state, or by the acts of Congress regulating interstate commerce.

That the constitutional power of Congress to regulate commerce among the States and with foreign nations comprehends power to regulate contracts between the shipper and the carrier of an interstate shipment by defining the liability of the carrier for loss, delay,

89 Parts of the opinion are omitted.

injury or damage to such property, needs neither argument nor citation of authority.

But it is equally well settled that until Congress has legislated upon the subject, the liability of such a carrier, exercising its calling within a particular state, although engaged in the business of interstate commerce, for loss or damage to such property, may be regulated by the law of the state. Such regulations would fall within that large class of regulations which it is competent for a state to make in the absence of legislation by Congress, growing out of the territorial jurisdiction of the state over such carriers and its duty and power to safeguard the general public against acts of misfeasance and nonfeasance committed within its limits, although interstate commerce may be indirectly affected. Smith v. Alabama, 124 U. S. 465, 8 S. Ct. 564, 31 L. Ed. 508; New York, etc., Railroad v. New York, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853; Chicago, Milwaukee & St. P. Ry. v. Solan, 169 U. S. 133, 137, 18 S. Ct. 289, 42 L. Ed. 688; Richmond, etc., Ry. v. Patterson Co., 169 U. S. 311, 18 Sup. Ct. 335, 42 L. Ed. 759; Cleveland, etc., Ry. v. Illinois, 177 U. S. 514, 20 S. Ct. 722, 44 L. Ed. 868; Pennsylvania Railroad v. Hughes, 191 U. S. 477, 24 S. Ct. 132, 48 L. Ed. 268. * * *

In view of the decisions of this court in the two cases last referred to, we shall assume that this case is governed by them, unless the subsequent legislation of Congress is such as to indicate a purpose to bring contracts for interstate shipments under one uniform rule of law not subject to the varying policies and legislation of particular States.

The original Interstate Commerce Act of February 4, 1887, 24 Stat. 379, c. 104, was extensively amended by the Act of June 29, 1906, 34 Stat. 584, c. 3591. We may pass by many of the changes and amendments made by the latter act as not decisive, and come at once to the far more important amendment made in section 20, an amendment bearing directly upon the carrier's liability or obligation under interstate contracts of shipment, and generally referred to as the Carmack Amendment. For convenience of reference, it is set out in the margin.[90] * * *

[90] That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

That the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whose line the loss, damage

The significant and dominating features of that amendment are these:

First. It affirmatively requires the initial carrier to issue "a receipt or bill of lading therefor," when it receives "property for transportation from a point in one state to a point in another."

Second. Such initial carrier is made "liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it."

Third. It is also made liable for any loss, damage, or injury to such property caused by "any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass."

Fourth. It affirmatively declares that "no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed."

Prior to that amendment the rule of carrier's liability, for an interstate shipment of property, as enforced in both federal and state courts, was either that of the general common law as declared by this court and enforced in the federal courts throughout the United States, Hart v. Pennsylvania Railroad, 112 U. S. 331, 5 S. Ct. 151, 28 L. Ed. 719; or that determined by the supposed public policy of a particular state, Pennsylvania Railroad v. Hughes, 191 U. S. 477, 24 S. Ct. 132, 48 L. Ed. 268; or that prescribed by statute law of a particular state, Chicago, etc., Railroad v. Solan, 169 U. S. 133, 18 S. Ct. 289, 42 L. Ed. 688.

Neither uniformity of obligation nor of liability was possible until Congress should deal with the subject. * * *

That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist. Northern Pacific Ry. v. State of Washington, 222 U. S. 370, 32 S. Ct. 160, 56 L. Ed. 237; Southern Railway v. Reid, 222 U. S. 424, 32 S. Ct. 140, 56 L. Ed. 257; Mondou v. Railroad, 223 U. S. 1, 32 S. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44.

or injury shall have been sustained, the amount of such loss, damage or injury, as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.

U. S. Comp. St. §§ 8604a, 8604aa.

To hold that the liability therein declared may be increased or diminished by local regulation or local views of public policy will either make the provision less than supreme or indicate that Congress has not shown a purpose to take possession of the subject. The first would be unthinkable and the latter would be to revert to the uncertainties and diversities of rulings which led to the amendment. The duty to issue a bill of lading and the liability thereby assumed are covered in full, and though there is no reference to the effect upon state regulation, it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject.

What is the liability imposed upon the carrier? It is a liability to any holder of the bill of lading which the primary carrier is required to issue "for any loss, damage or injury to such property caused by it," or by any connecting carrier to whom the goods are delivered. The suggestion that an absolute liability exists for every loss, damage or injury, from any and every cause, would be to make such a carrier an absolute insurer and liable for unavoidable loss or damage though due to uncontrollable forces. That this was the intent of Congress is not conceivable. To give such emphasis to the words, "any loss or damage," would be to ignore the qualifying words, "caused by it." The liability thus imposed is limited to "any loss, injury or damage caused by it or a succeeding carrier to whom the property may be delivered," and plainly implies a liability for some default in its common law duty as a common carrier.

But it has been argued that the non-exclusive character of this regulation is manifested by the proviso of the section, and that state legislation upon the same subject is not superseded, and that the holder of any such bill of lading may resort to any right of action against such a carrier conferred by existing state law. This view is untenable. It would result in the nullification of the regulation of a national subject and operate to maintain the confusion of the diverse regulation which it was the purpose of Congress to put an end to.

What this court said of § 22 of this act of 1906 in the case of Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, is applicable to this contention. It was claimed that that section continued in force all rights and remedies under the common law or other statutes. But this court said of that contention what must be said of the proviso in section 20, that it was "evidently only intended to continue in existence such other rights or remedies for the redress of some specific wrong or injury, whether given by the Interstate Commerce Act, or by state statute, or common law, not inconsistent with the rules and regulations prescribed by the provisions of this act." Again, it was said, of the same clause, in the same case, that it could "not in reason be construed as continuing in a shipper a common law right

the existence of which would be inconsistent with the provisions of the act. In other words, the act cannot be said to destroy itself."

To construe this proviso as preserving to the holder of any such bill of lading any right or remedy which he may have had under existing federal law at the time of his action, gives to it a more rational interpretation than one which would preserve rights and remedies under existing state laws, for the latter view would cause the proviso to destroy the act itself. One illustration would be a right to a remedy against a succeeding carrier, in preference to proceeding against the primary carrier, for a loss or damage incurred upon the line of the former. The liability of such succeeding carrier in the route would be that imposed by this statute, and for which the first carrier might have been made liable.

We come now to the question of the validity of the provision in the receipt or bill of lading limiting liability to the agreed value of fifty dollars, as shown therein. This limiting clause is in these words:

"In consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding fifty dollars unless a greater value is declared, the shipper agrees that the value of said property is not more than fifty dollars, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than fifty dollars if no value is stated herein."

The answer states that the schedules which the express company had filed with the Interstate Commerce Commission showed rates based upon valuations; and that the lawful and established rate for such a shipment as that made by the plaintiff from Cincinnati to Augusta, having a value not in excess of fifty dollars, was twenty-five cents, while for the same package if its value had been declared to be one hundred and twenty-five dollars, the amount for which the plaintiff sues as the actual value, the lawful charge according to the rate filed and published would have been fifty-five cents. It is further averred that the package was sealed, and its contents and actual value unknown to the defendant's agent.

That no inquiry was made as to the actual value is not vital to the fairness of the agreement in this case. The receipt which was accepted showed that the charge made was based upon a valuation of fifty dollars unless a greater value should be stated therein. The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Commission. That presumption is strengthened by the fact that across the top of this bill of lading there was this statement in bold type, "This company's charge is based upon the value of the property, which must be declared by the shipper."

That a common carrier cannot exempt himself from liability for his own negligence or that of his servants is elementary. York Mfg.

Co. v. Illinois Central Railroad, 3 Wall. 107, 18 L. Ed. 170; Railroad Company v. Lockwood, 17 Wall. 357, 21 L. Ed. 627; Bank of Kentucky v. Adams Express Company, 93 U. S. 174, 23 L. Ed. 872; Hart v. Pennsylvania Railroad, 112 U. S. 331, 338, 5 S. Ct. 151, 28 L. Ed. 717. The rule of the common law did not limit his liability to loss and damage due to his own negligence, or that of his servants. That rule went beyond this and he was liable for any loss or damage which resulted from human agency, or any cause not the act of God or the public enemy. But the rigor of this liability might be modified through any fair, reasonable and just agreement with the shipper which did not include exemption against the negligence of the carrier or his servants. The inherent right to receive a compensation commensurate with the risk involved the right to protect himself from fraud and imposition by reasonable rules and regulations, and the right to agree upon a rate proportionate to the value of the property transported.

It has therefore become an established rule of the common law as declared by this court in many cases that such a carrier may by a fair, open, just and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage to an agreed value made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk. York Mfg. Co. v. Railroad, 3 Wall. 107, 18 L. Ed. 170; Railroad v. Lockwood, 17 Wall. 357, 21 L. Ed. 627; Hart v. Pennsylvania Railroad, cited above; Phœnix Ins. Co. v. Erie & W. Trans. Co., 117 U. S. 312, 322, 6 S. Ct. 750, 29 L. Ed. 873; Steam Co. v. Phœnix Ins. Co., 129 U. S. 397, 442, 9 S. Ct. 469, 32 L. Ed. 788; New York, L. E. & W. Ry. v. Estill, 147 U. S. 591, 619, 13 S. Ct. 444, 37 L. Ed. 292; Primrose v. W. U. Tel. Co., 154 U. S. 1, 15, 14 S. Ct. 1098, 38 L. Ed. 883; Chicago, etc., Ry. v. Solan, 169 U. S. 133, 135, 18 S. Ct. 289, 42 L. Ed. 688; Calderon v. Atlas Steamship Company, 170 U. S. 272, 278, 18 S. Ct. 588, 42 L. Ed. 1033; Pennsylvania Railroad v. Hughes, 191 U. S. 477, 485, 24 S. Ct. 132, 48 L. Ed. 268.

That such a carrier might fix his charges somewhat in proportion to the value of the property is quite as reasonable and just as a rate measured by the character of the shipment. The principle is that the charge should bear some reasonable relation to the responsibility, and that the care to be exercised shall be in some degree measured by the bulk, weight, character and value of the property carried.

Neither is it conformable to plain principles of justice that a shipper may understate the value of his property for the purpose of reducing the rate, and then recover a larger value in case of loss. Nor does a limitation based upon an agreed value for the purpose of adjusting the rate conflict with any sound principle of public policy. The reason for the legality of such agreements is well stated in Hart v. Pennsylvania Railroad, cited above. * * *

The statutory liability, aside from responsibility for the default of a connecting carrier in the route, is not beyond the liability imposed by the common law as that body of law applicable to carriers has been interpreted by this court as well as many courts of the states. Greenwald v. Barrett, 199 N. Y. 170, 175, 92 N. E. 218, 35 L. R. A. (N. S.) 971; Bernard v. Adams Express Co., 205 Mass. 254, 259, 91 N. E. 325, 28 L. R. A. (N. S.) 293, 18 Ann. Cas. 351. The exemption forbidden is, as stated in the case last cited, "a statutory declaration that a contract of exemption from liability for negligence is against public policy and void." This is no more than this court, as well as other courts administering the same general common law, have many times declared. In the same case, just such a stipulation as that here involved was upheld, the court saying (page 259):

"But such a contract as we are considering in this case is not an exemption from liability for negligence in the management of property, within the meaning of the statute. It is a contract as to what the property is, in reference to its value. The purpose of it is not to change the nature of the undertaking of the common carrier, or limit his obligation in the care and management of that which is entrusted to him. It is to describe and define the subject matter of the contract, so far as the parties care to define it, for the purpose of showing of what value that is which comes into the carrier's possession, and for which he must account in the performance of his duty as a carrier. It is not in any proper sense a contract exempting him from liability for the loss, damage or injury to the property, as the shipper describes it in stating its value for the purpose of determining for what the carrier shall be accountable upon his undertaking, and what price the shipper shall pay for the service and for the risk of loss which the carrier assumes."

In Greenwald v. Barrett, cited above, the same conclusion was reached as to the nature of the liability imposed and the purport of the exemption forbidden, the court, among other things, saying:

"The language of the enactment does not disclose any intent to abrogate the right of common carriers to regulate their charges for carriage by the value of the goods or to agree with the shipper upon a valuation of the property carried. It has been the uniform practice of transportation companies in this country to make their charges dependent upon the value of the property carried and the propriety of this practice and the legality of contracts signed by the shipper agreeing upon a valuation of the property were distinctly upheld by the Supreme Court of the United States in Hart v. Penn. R. R. Co., 112 U. S. 331, 341, 5 S. Ct. 151, 28 L. Ed. 717."

To the same effect are the cases of Travis v. Wells, Fargo Co., 79 N. J. Law, 83, 74 A. 444; Fielder v. Adams Express Co., 69 W. Va. 138, 71 S. E. 99; Larsen v. Oregon Short Line, 38 Utah, 130, 110 P. 983. See also, Atkinson v. New York Transfer Co., 76 N. J. Law, 608, 71 A. 278, as to the general rule.

That a carrier rate may be graduated by value and that a stipulation limiting recovery to an agreed value made to adjust the rate is recognized by the Interstate Commerce Commission, see 13 Interst. Com. Com'n R. 550.

We therefore reach the conclusion that the provision of the act forbidding exemptions from liability imposed by the act is not violated by the contract here in question.

The demurrer to the answer of the defendant below should have been overruled.

For this reason the judgment is reversed, with direction to overrule the demurrer, and for such further proceedings as are not inconsistent with this opinion.

SOUTHERN EXPRESS CO. v. BYERS.

(Supreme Court of the United States, 1916. 240 U. S. 612, 36 S. Ct. 410, 60 L. Ed. 825, L. R. A. 1917A, 197.)

Mr. Justice McREYNOLDS delivered the opinion of the court.[91]

Claiming damages solely on account of mental anguish occasioned by failure promptly to deliver a casket and grave clothes intended for his wife's burial and accepted by plaintiff in error with knowledge of the facts at Asheville, North Carolina, for transportation to Hickory Grove, South Carolina, Byers recovered a judgment against it for $250, and this was affirmed by the Supreme Court of North Carolina. 165 N. C. 542, 81 S. E. 741.

In defense the Express Company averred: That while engaged in interstate commerce it received the described articles at Asheville and transported them to Hickory Grove; that, as required by Act of Congress approved June 29, 1906, and amendments (U. S. Comp. St. § 8563, et seq.), it had filed a schedule of rates with the Interstate Commerce Commission; that at the time of shipment it issued a bill of lading limiting liability to $50; that it had paid the shipper the full amount expended by him in purchasing the articles; that no present liability exists, and especially under the laws of the United States it is not responsible for such damages as those specified.

There was put in evidence a duly executed receipt for $64.17, "being in full payment for one coffin delivered to Southern Express Company, at Asheville, N. C., on April 1st, 1912, by John Byers, to be shipped to Sarah Moore, Hickory Grove, South Carolina," and Byers testified that "the Southern Express Company paid him for all the money he had paid out on the casket and other things contained in the shipment, but did not pay him anything for damages." The bill of lading was also introduced. It specified no value and undertook to restrict the carrier's liability to $50. * * *

[91] Parts of the opinion are omitted.

Having been requested in apt time, the trial court refused to charge the jury as follows: "As the shipment which is alleged to have been delayed was a shipment in interstate commerce, and as the damage claimed by the plaintiff is damage for mental suffering only on account of the delay of the delivery of said shipment, the court instructs the jury that under the evidence in this case the plaintiff is not entitled to recover any such damage; the jury is therefore directed to render a verdict for the defendant." This instruction should have been given.

The action is based upon a claim for mental suffering only—nothing else was set up and the proof discloses no other injury for which compensation had not been made. In such circumstances as those presented here, the long recognized common law rule permitted no recovery; the decisions to this effect "rest upon the elementary principle that mere mental pain and anxiety are too vague for legal redress where no injury is done to person, property, health or reputation." Cooley on Torts (3d Ed.) p. 94. The lower federal courts, almost without exception, have adhered to this doctrine, and in so doing we think they were clearly right upon principle and also in accord with the great weight of authority. * * *

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

And it is so ordered.[92] Mr. Justice McKenna and Mr. Justice Holmes concur in the result.

GEORGE N. PIERCE CO. v. WELLS, FARGO & CO.

(Supreme Court of the United States, 1915. 236 U. S. 278, 35 S. Ct. 351, 59 L. Ed. 576.)

Mr. Justice Day delivered the opinion of the court.[93]

This action was begun in the Circuit Court of the United States for the Western District of New York, to recover $20,000 for the loss of certain automobiles shipped for the petitioner, hereinafter called the Automobile Company, by the respondent, hereinafter called the Express Company. The automobiles were shipped under circumstances to be detailed later, and the recovery of their value was sought for a breach of the contract to carry safely; failure to deliver

[92] See, in accord, Mobile & O. R. Co. v. Flannagan (Miss.) 105 So. 749 (1925), where a recovery was denied for "mental worry" caused by delay in transporting the plaintiff's baggage. The court declared: "It will be observed that the transportation of the suit case was in interstate commerce; that is, from Corinth, Miss., to Ramer, Tenn. Therefore the federal law relative thereto must be applied in the case, both as to the question of whether damages are recoverable for 'mental worry' alone and whether the principal may be held for punitive damages for the willful act of an agent, where the principal does not participate therein nor authorize or ratify such act."

[93] Parts of the opinion are omitted.

according to the contract; for negligence; and for breach of the duty imposed upon the initial carrier by section 20 of the Act to Regulate Commerce, the Carmack Amendment. Act of June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. §§ 8604a, 8604aa). The automobiles were shipped and receipt was issued in the form usually used by the express companies and containing the clause: "Nor in any event shall said company be held liable beyond the sum of fifty dollars, at not exceeding which sum the said property is hereby valued unless a different value is hereinabove stated." * * *

In May, 1907, the Automobile Company requested the Express Company to furnish an express car for the shipment of a carload of automobiles to San Francisco. Negotiations followed between the officers of the two companies and an understanding was reached. An express car was furnished and put as requested by the Automobile Company upon a side track where it could be by that company conveniently loaded. Four automobiles were then moved by their own power to the place of loading and together with an extra automobile body and other automobile parts were loaded in the car by the shipper. When the car was loaded, triplicate receipts on the form usually used by the Express Company were made out and handed to the agent of the Automobile Company, who read them, observed the absence of declaration of value and the limitation of $50.00, and said they were satisfactory. Before the shipment moved, the agent of the Express Company again called the attention of the agent of the shipper to the absence of declared valuation, inquired whether such declaration had been intentionally omitted and whether the property was insured, and was told that the omission was intentional and that the property was insured. Indeed it was shown beyond dispute that the failure to declare an additional value was the result of a change in the method of shipping its goods which had been shortly before put in practice by the Automobile Company, and that in this particular case the additional value was not declared because the shipment had been ordered from San Francisco, and the primary rate, that is the one shown by the tariff on weight or volume based upon the primary value, had been designated from San Francisco as the rate under which the goods should be carried. The car moved toward its destination but never reached there because while in transit on the rails of the Santa Fé Railway in the state of Missouri it was destroyed by fire.

This suit was then brought by the Automobile Company against the Express Company and the Santa Fé Railway to recover $20,000.00, the alleged value of the automobiles. The suit as to the Santa Fé Railway was dismissed for want of service and the case was tried only against the Express Company. As the case went to the jury, there was no denial of some liability on the part of the Express Company, the issue being whether its responsibility was limited to the sum of $50.00, the value of the automobiles as stated in the shipping receipt, which was in accordance with the published and filed tariff,

or embraced the actual value of the things shipped. The trial court sustained the limitation in the receipt and directed a verdict for the $50.00 only, and after the affirmance by the Circuit Court of Appeals of the Second Circuit of the judgment of the trial court entered on such instructed verdict (189 Fed. Rep. 561), the writ of certiorari which brings the case before us was granted.

The case as made therefore presents the question whether one who has deliberately and purposely, without imposition or fraud, accepted a contract of shipment limiting the amount of recovery to $50.00, which is the sum named in the filed tariffs as the amount of recovery in the absence of declaration of a greater value on the part of the shipper, who is given the privilege of paying an increased rate and having the liability for the full value of the goods, is entitled in case of loss to recover the full value of the property.

That contracts for limited liability, when fairly made, do not contravene the settled principles of the common law preventing the carrier from contracting against its liability for loss by negligence (Railroad Company v. Lockwood, 17 Wall. 357, 375, 21 L. Ed. 627) was settled by this court in what is known as the Hart Case. (Hart v. Pennsylvania R. R., 112 U. S. 331, 5 S. Ct. 151, 28 L. Ed. 717). In that case a recovery limited to $1,200 for 6 horses, one shown to be worth $15,000 and the others from $3,000 to $3,500 each, was sustained upon the principle that the contract did not relieve against the carrier's negligence, but limited the amount that might be recovered for such negligence, and it was there held that such contracts when fairly made did not contravene public policy. That case has been frequently followed since and its doctrine applied in construing limited liability contracts in connection with the Carmack Amendment to the Interstate Commerce Act, in a series of cases beginning with the Adams Express Co. v. Croninger, 226 U. S. 491, 33 S. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257. See in this connection Wells, Fargo & Co. v. Neiman-Marcus Co., 227 U. S. 469, 33 S. Ct. 267, 57 L. Ed. 600; Kansas Southern Railway v. Carl, 227 U. S. 639, 33 S. Ct. 391, 57 L. Ed. 683; M., K. & T. Ry. v. Harriman, 227 U. S. 657, 33 S. Ct. 397, 57 L. Ed. 690; Chicago, Rock Island & Pacific v. Cramer, 232 U. S. 490, 34 S. Ct. 383, 58 L. Ed. 697; Boston & Maine R. R. v. Hooker, 233 U. S. 97, 34 S. Ct. 526, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593; A., T. & S. F. Ry. v. Robinson, 233 U. S. 173, 34 S. Ct. 556, 58 L. Ed. 901.

The facts detailed show that there was nothing unfair in the contract. It was made between competent parties, dealing at arms' length, and for the purpose, so far as the shipper was concerned, of securing the lower rate, it deliberately took upon itself the risk of lessened recovery in case of loss for the sake of the lower rate.

Since the Act to Regulate Commerce and its amendments have gone into effect, cases of this character must be decided in view of the provisions of the Commerce Act and its requirement that the carrier shall

file its tariffs and rates which shall be open to inspection and shall prescribe rates applicable to all shippers alike, thus to effect one of the main purposes of the law often declared by this court, to require like treatment of all shippers and the charging of uniform rates equally applicable to all under like circumstances. As this court said in one of the earlier cases, considering the limited liability contracts in connection with the provisions of the Interstate Commerce Act (Kansas Southern Railway v. Carl, 227 U. S. 639, 652, 33 S. Ct. 391, 57 L. Ed. 683):

"The valuation declared or agreed upon as evidenced by the contract of shipment upon which the published tariff rate is applied, must be conclusive in an action to recover for loss or damage a greater sum. * * * To permit such a declared valuation to be overthrown by evidence aliunde the contract, for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess of the maximum valuation thus fixed, would both encourage and reward undervaluations and bring about preferences and discriminations forbidden by the law. Such a result would neither be just nor conducive to sound morals or wise policies. The valuation the shipper declares determines the legal rate where there are two rates based upon valuation. He must take notice of the rate applicable, and actual want of knowledge is no excuse."

But it is said, and this fact was the basis of the dissenting opinion in the Circuit Court of Appeals, that there was no valuation at all in this case, and that the disproportion between the actual value of the automobiles shipped,—about $15,000,—and $50 demonstrates this fact, and it is insisted that what was done was merely an arbitrary and unreasonable limitation in the guise of valuation. This argument overlooks the fact that the legality of the contract does not depend upon a valuation which shall have a relation to the actual worth of the property.[94] None such was attempted in the Neiman-Marcus Case, the Croninger Case, or the Hooker Case. But the contract embodied in the receipt was sustained in the Express Company Cases, because of

[94] Compare this statement with the following statement of the court in Kansas City Southern Ry. v. Carl, 227 U. S. 639, 33 S. Ct. 391, 57 L. Ed. 683 (1913): "An agreement to release such a carrier for part of a loss due to negligence is no more valid than one whereby there is complete exemption. Neither is such a contract any more valid because it rests upon a consideration than if it was without consideration. A declared value by the shipper for the purpose of determining the applicable rate, when the rates are based upon valuation, is not an exemption from any part of its statutory or common-law liability." Taking the two statements together, it would seem to follow that where the goods shipped are worth $50,000, a stipulation limiting the carrier's liability to "nine-tenths of the damages caused by its negligence" would be invalid (although in case of a total loss the carrier would be assuming $45,000 of the risk), whereas a stipulation limiting the carrier's liability to "an agreed value of $50" (which in fact is only one-thousandth part of the damage in case of a total loss) is valid, although the loss is caused by the negligence of the carrier. Is there any justification for such a distinction?

the acceptance of the same by the parties as the basis of shipment, and by force of the statute as to the filed tariff and the requirement of the shipper to take notice of its terms and to be bound thereby. In each of those cases the filed tariff showed an opportunity to the shipper to have a recovery in a greater value than was declared, thus making it optional with the shipper to ship at the lower rate and not to avail himself of the right to greater recovery upon paying the higher rate named in the tariff. As the cases cited have held, so long as the tariff rate remains operative, the alternative rates based on value are deemed to be in force and controlling of the rights of the parties. Great Northern Ry. v. O'Connor, 232 U. S. 508, 34 S. Ct. 380, 58 L. Ed. 703; Boston & Maine R. R. v. Hooker, 233 U. S. 97, 121, 34 S. Ct. 526, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593. * * *

The suggestion that there is a wrong to other shippers, who value their goods at their real worth, is answered by the fact that this tariff was open to all under the same circumstances, and while it remained in force, any shipper who wished to take the risk of a recovery for very much less than the value of his goods might have the benefit of the shipment at the reduced rate. The contention that the carrier should have been held to account for the value of what was left of the automobiles after the wreck and fire does not seem to be presented by the pleadings and was not involved in the disposition of the case ultimately made upon the contract of shipment. We find no error in the court's withholding that issue from the jury in the condition of the record.

Finding no error in the judgment of the Circuit Court of Appeals, it is affirmed.

Mr. Justice PITNEY dissenting.

BOSTON & M. R. R. v. PIPER.

(Supreme Court of the United States, 1918. 246 U. S. 439, 38 S. Ct. 354, 62 L. Ed. 820, Ann. Cas. 1918E, 469.)

Mr. Justice DAY delivered the opinion of the Court.

This suit was brought by Piper against the Boston & Maine Railroad to recover damages for loss occasioned by delay in delivering cattle as a result of the company's negligence. The plaintiff recovered damages and the judgment was affirmed by the Supreme Court of Vermont, 90 Vt. 176, 97 A. 508.

The plaintiff shipped the cattle upon paying the reduced rate for shipment thereof under the Uniform Live Stock Agreement containing, among other things, the following:

"The same has been received by said carrier for itself and on behalf of connecting carriers for transportation subject to official tariffs, classifications and rules of the said company and upon the following

terms and conditions which are admitted and accepted by the said shipper as just and reasonable. * * * That in the event of any unusual delay or detention of said live stock caused by the negligence of said carrier or its employés or its connecting carriers or their employés or otherwise the said shipper agrees to accept as full compensation for all loss or damage sustained thereby the amount actually expended by said shipper in the purchase of food and water for said stock while so detained. * * * And E. G. Piper does hereby acknowledge that he had the option of shipping the above-described live stock at a higher rate of freight according to the official tariffs, classifications and rules of the said carrier and connecting carriers and thereby receiving the security of the liability of the said carrier and connecting railroad and transportation companies as common carriers of the said live stock upon their respective roads and lines, but has voluntarily decided to ship same under this contract at the reduced rate of freight above first mentioned."

The tariffs in effect at the time the shipment moved provided for a rate of $42 when the Uniform Live Stock Agreement was signed and that "live stock will be taken at the reduced rates fixed in the tariff only when a uniform live stock contract is executed by the station agent and the consignor, and when the release on the back of said contract is executed by man or men who are to accompany said live stock. If consignor refuses to execute a uniform live stock contract, the live stock will be charged ten (10) per cent. higher than the reduced rates specified herein provided, that in no case shall such higher charge be less than one (1) per cent. per one hundred pounds."

The company's tariffs were duly filed with the Interstate Commerce Commission and contained a copy of the Uniform Live Stock Contract as above set forth.

Interstate shipments of the character here in controversy made upon bills of lading, and under tariffs filed with the Interstate Commerce Commission, have been the subject of frequent consideration in this court. The binding character of the stipulations of the bill of lading and of the rates as fixed in the filed tariffs, have been recognized and enforced. St. Louis, Iron Mountain & Southern Ry. Co. v. Starbird, Adm'r, 243 U. S. 592, 37 S. Ct. 462, 61 L. Ed. 917, and previous cases in this court therein cited.

The Carmack Amendment (Comp. St. 1916, §§ 8604a, 8604aa), requires the initial carrier to issue a bill of lading, and carriers are obliged to carry the articles shipped at the rates fixed in the published tariffs. Many decisions of this court have held that the carrier may offer to the shipper and the shipper may be bound by a contract which limits recovery to a valuation declared by the shipper in consideration of the reduced rate for the carriage of the freight. This rule was stated in an early case arising after the passage of the Carmack Amendment. Adams Express Co. v. Croninger, 226 U. S. 491, 509, 510, 33 S. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, and has been frequently reiterated since.

In the cases in which the recovery for the lesser valuation has been affirmed, the shipper was offered an opportunity to recover a greater sum than the declared value upon paying a higher rate to the carrier. The shipper was offered alternative recoveries based upon different valuations upon the payment of different rates, and was held bound by the one chosen. Such contracts of shipment this court has held not to be in contravention of the settled principles of the common law preventing a carrier from contracting against liability for losses resulting from its own negligence, and are lawful limitations upon the amount of recovery binding upon the shipper upon principles of estoppel. Hart v. Pennsylvania R. Co., 112 U. S. 331, 5 S. Ct. 151, 28 L. Ed. 717, followed and approved since the passage of the Carmack Amendment in Adams Express Co. v. Croninger, 226 U. S. 491, 33 S. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, supra, and see Wells Fargo & Co. v. Neiman-Marcus Co., 227 U. S. 469, 33 S. Ct. 267, 57 L. Ed. 600; Kansas Southern R. Co. v. Carl, 227 U. S. 657, 33 S. Ct. 391, 57 L. Ed. 683; Chicago, R. I. & Pacific R. Co. v. Cramer, 232 U. S. 490, 34 S. Ct. 383, 58 L. Ed. 697; Boston & Maine R. Co. v. Hooker, 233 U. S. 97, 34 S. Ct. 526, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593; Atchison, Topeka & Santa Fé R. Co. v. Robinson, 233 U. S. 173, 34 S. Ct. 556, 58 L. Ed. 901. Furthermore it has been held that a low valuation will not prevent the application of the rule making the agreement binding upon the shipper. Pierce Co. v. Wells Fargo & Co., 236 U. S. 278, 285, 35 S. Ct. 351, 59 L. Ed. 576.

While the rule of the lesser recovery based upon lesser rates, when the shipper has been given the option of higher recovery upon paying a higher rate has been held binding upon the shipper so long as the published tariff remains in force, this court has not held a bill of lading containing a limitation against liability for loss caused by the carrier's negligence, such as is here involved, to be conclusive of the shipper's right to recover. In the previous decisions of this court upon the subject it has been said that the limited valuation for which a recovery may be had does not permit the carrier to defeat recovery because of losses arising from its own negligence, but serves to fix the amount of recovery upon an agreed valuation made in consideration of the lower rate stipulated to be paid for the service.

In the bill of lading, now under consideration, there is an express agreement limiting liability from unusual delay and detention, caused by the carrier's negligence, to the amount actually expended by the shipper in the purchase of food and water for his stock while so detained. This stipulation contravenes the principle that the carrier may not exonerate itself from losses negligently caused by it, and is not within the principle of limiting liability to an agreed valuation which has been made the basis of a reduced freight rate. Such stipulations as are here involved are not legal limitations upon the amount of recovery, but are in effect attempts to limit the carrier's liability for

negligence by a contract which leaves practically no recovery for damages resulting from such negligence. While this provision was in the bill of lading, the form of which was filed with the railroad company's tariffs with the Interstate Commerce Commission, it gains nothing from that fact. The legal conditions and limitations in the carrier's bill of lading duly filed with the Commission are binding until changed by that body (Kansas Southern Ry. v. Carl, 227 U. S. 639, 654, 33 S. Ct. 391, 57 L. Ed. 683); but not so of conditions and limitations which are, as is this one, illegal, and consequently void.

We find no error in the judgment of the Supreme Court of Vermont, and the same is

Affirmed.[95]

CAU v. TEXAS & P. RY. CO.

(Supreme Court of the United States, 1904. 194 U. S. 427, 24 S. Ct. 663, 48 L. Ed. 1053.)

[This is an action to recover the value of cotton delivered by plaintiff to defendant, to be transported over its railroad from Texarkana, Texas, to New Orleans. The cotton was destroyed by fire while in the custody of defendant. The main question presented by the record is the effect of a provision in the bills of lading delivered by defendant to plaintiff, exempting it from liability for damages caused by fire.

[The shipper testified that when he applied to defendant for a rate to New Orleans on the cotton he was told that there was only one rate, 60 cents per 100 pounds. The shipper testified that he knew that all the railroads had the same rate and knew that it was against the law for them to give any other rate, and that he shipped the cotton at the rate stated to him, taking bills of lading without knowledge of the exemption from liability for damages caused by fire. The shipper also testified that nothing was said about shipping at another rate and upon different terms.

[The case was tried to a jury, which, under the instructions of

95 Compare the decision in the principal case with the decision of the Supreme Court in Primrose v. Western Union Tel. Co., 154 U. S. 1, 14 S. Ct. 1098, 38 L. Ed. 883 (1894), in which the following stipulation was held valid: "It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery or for nondelivery of any unrepeated message, whether happening by the negligence of its servants or otherwise, beyond the amount received for sending the same; not for mistakes or delays in the transmission or delivery or for nondelivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured."

the court, rendered a verdict for defendant, upon which judgment was entered dismissing the suit with costs.][96]

Plaintiff requested instructions of the court which embodied the following propositions:

1. A carrier cannot limit his common law liability without consent of the shipper for consideration given.

2. The mere contract of shipment is not such a consideration.

3. The condition usually, though not necessarily, is a reduced rate, but in such case both rates must be offered shipper and be reasonable, and the shipper given a genuine freedom of choice in making his selection, and if the evidence satisfied the jury, "there was no fair alternative or choice offered to plaintiff by defendant as between two rates, under one of which defendant would be liable for the loss of said cotton by fire, and under the other of which he would not be so liable," the fire clause was not binding upon plaintiff, and the jury might "deal with such bill of lading as though it did not contain such clause or stipulation."

Mr. Justice McKENNA, after stating the case, delivered the opinion of the court.

It is well settled that the carrier may limit his common law liability. York Co. v. Central Railroad, 3 Wall. 107, 18 L. Ed. 170. But it is urged that the contract must be upon a consideration other than the mere transportation of the property, and an "option and opportunity must be given to the shipper to select under which, the common law or limited liability, he will ship his goods."

If this means that a carrier must take no advantage of the shipper or practice no deceit upon him, we agree. If it means that the alternative must be actually presented to the shipper by the carrier, we cannot agree. From the standpoint of the law the relation between carrier and shipper is simple. Primarily the carrier's responsibility is that expressed in the common law, and the shipper may insist upon the responsibility. But he may consent to a limitation of it, and this is the "option and opportunity" which is offered to him. What other can be necessary? There can be no limitation of liability without the assent of the shipper, New Jersey Steam Navigation Co. v. Merchants' Bank, 6 How. 344, 12 L. Ed. 465, and there can be no stipulation for any exemption by a carrier which is not just and reasonable in the eye of the law. Railroad Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627; Bank of Kentucky v. Adams Express Co., 93 U. S. 174, 23 L. Ed. 872.

Inside of that limitation, the carrier may modify his responsibility by special contract with a shipper. A bill of lading limiting liability constitutes such a contract, and knowledge of the contents by the shipper will be presumed.[97]

[96] The statement of facts has been abbreviated and partly rewritten by the authors and part of the opinion is omitted.

[97] According to the prevailing view this so-called presumption is conclusive, which means that the shipper is bound although he did not know of the stipula-

(2) It is again urged that there was no independent consideration for the exemption expressed in the bill of lading. This point was

tion. Kirkland v. Dinsmore, 62 N. Y. 171, 20 Am. Rep. 475 (1875); Grace v. Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131 (1868); St. Louis, Kansas City & Northern Ry. Co. v. Cleary, 77 Mo. 634, 46 Am. Rep. 13 (1883); Christenson v. American Express Co., 15 Minn. 270 (Gil. 208), 2 Am. Rep. 122 (1870); Pacific Express Co. v. Foley, 46 Kan. 457, 26 P. 665, 12 L. R. A. 799, 26 Am. St. Rep. 107 (1891); Adams Express Co. v. Carnahan, 29 Ind. App. 606, 63 N. E. 245, 64 N. E. 647, 94 Am. St. Rep. 279 (1902). For a further collection of cases, see 88 Am. St. Rep. 80. And this is so, even though the shipper or his agent cannot read. Jones v. Cincinnati S. & M. R. Co., 89 Ala. 376, 8 So. 61 (1889); Kolb v. Taylor, 102 Misc. Rep. 220, 168 N. Y. S. 685 (1918). But compare Madan v. Sherard, 73 N. Y. 329, 29 Am. Rep. 153 (1878), where the court refused to apply this rule to a case where the plaintiff accepted a small baggage check in ignorance of a limitation of liability printed thereon. See, also, Barter v. Barrett, 186 App. Div. 715, 174 N. Y. S. 779 (1919); Lichterman v. Barrett, 95 Misc. Rep. 594, 159 N. Y. S. 929 (1916); Indianapolis & C. R. Co. v. Cox, 29 Ind. 360, 95 Am. Dec. 640 (1868). With reference to passenger tickets, see and compare Fonseca v. Cunard Steamship Co., 153 Mass. 553, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. Rep. 660 (1891); Steers v. Liverpool, N. Y. & P. Steamship Co., 57 N. Y. 1, 15 Am. Rep. 453 (1874); Wood v. Cunard S. S. Co., 192 F. 293, 112 C. C. A. 551, 41 L. R. A. (N. S.) 371 (1911); Rawson v. Pennsylvania R. Co., 48 N. Y. 212, 8 Am. Rep. 543 (1872); Chollette v. Omaha & R. V. R. Co., 26 Neb. 159, 41 N. W. 1106, 4 L. R. A. 135 (1889), and cases collected in 23 L. R. A. 746. Some cases hold that the presumption of assent resulting from the acceptance of a bill of lading is rebuttable. Mosier v. American Ry. Express Co., 211 Mich. 19, 178 N. W. 81 (1920). Moreover, in several jurisdictions it has been held that the mere acceptance of a bill of lading or receipt creates no presumption of assent to stipulations limiting the carrier's liability. Chicago & N. W. Ry. Co. v. Calumet Stock Farm, 194 Ill. 9, 61 N. E. 1095, 88 Am. St. Rep. 68 (1901); Southern Express Co. v. Hanaw, 134 Ga. 445, 67 S. E. 944, 137 Am. St. Rep. 227 (1910); Benson v. Oregon Short Line R. Co., 35 Utah, 241, 99 P. 1072, 136 Am. St. Rep. 1052, 19 Ann. Cas. 803 (1909); Higgins v. United States Express Co., 83 N. J. Law, 398, 85 A. 450 (1912). But assent may be implied in fact. See Merchants' Dispatch Transportation Co. v. Joesting, 89 Ill. 152, 154 (1878); Benson v. Oregon Short Line R. Co., supra. The shipper's signature is not necessary. See Boscowitz v. Adams Express Co., 93 Ill. 523, 530, 34 Am. Rep. 191 (1879). Concerning the effect of acceptance of a bill of lading after shipment, or after a loss has occurred, see McGregor v. Oregon R. & N. Co., 50 Or. 527, 93 P. 465, 14 L. R. A. (N. S.) 668 (1908); Wilde v. Merchants' Transportation Co., 47 Iowa, 247, 29 Am. Rep. 479 (1877); Strohn v. Detroit & M. Ry. Co., 21 Wis. 554, 94 Am. Dec. 564 (1867).

According to most decisions, the sender of a telegram is bound by lawful stipulations limiting the company's liability, which are printed on the back of the blank on which the message is written. Kiley v. Western Union Telegraph Co., 109 N. Y. 231, 16 N. E. 75 (1888); Boyce v. Western Union Telegraph Co., 119 Va. 14, 89 S. E. 106 (1916); Woodall v. Western Union Tel. Co., 210 Ala. 265, 97 So. 830 (1923); Cole v. Western Union Tel. Co., 33 Minn. 227, 22 N. W. 385 (1885); Redpath v. Western Union Tel. Co., 112 Mass. 71 (1873); Coit v. Western Union Tel. Co., 130 Cal. 657, 63 P. 83, 53 L. R. A. 678, 80 Am. St. Rep. 153 (1900); Primrose v. Western Union Tel. Co., 154 U. S. 1, 14 S. Ct. 1098, 38 L. Ed. 883 (1893). And this was held to be so even where the blank used was that of a company other than the one employed to send the message. Young v. Western Union Telegraph Co., 65 S. C. 93, 43 S. E. 448 (1902); Western Union Tel. Co. v. Waxelbaum, 113 Ga. 1017, 39 S. E. 443, 56 L. R. A. 741 (1901); Jacob v. Western Union Tel. Co., 135 Mich. 600, 98 N. W. 402 (1904). But in Ullmann & Co. v. Western Union Tel. Co., 60 Ill. 421, 14 Am. Rep. 38 (1871), it was held that the sender of a telegram is not bound by stipulations on the blank, unless the jury finds that he knew of them and assented thereto.

made in York Co. v. Central Railroad, supra. In response it was said: "The second position is answered by the fact, that there is no evidence that a consideration was not given for the stipulation. The company, probably, had rates of charges proportioned to the risks they assumed from the nature of the goods carried, and the exception of losses by fire must necessarily have affected the compensation demanded. Be this as it may, the consideration expressed was sufficient to support the entire contract made."

In other words, the consideration expressed in the bill of lading was sufficient to support its stipulations. This effect is not averted by showing that the defendant had only one rate. It was the rate also of all other roads, and presumably it was adopted and offered to shippers in view of the limitation of the common law liability of the roads.[98] * * *

Judgment affirmed.

AMERICAN RY. EXPRESS CO. v. DANIEL.

(Supreme Court of the United States, 1925. 269 U. S. 40, 46 S. Ct. 15, 70 L. Ed. ——.)

Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit against the petitioning Express Company for the value of a parcel that was received by the company for carriage but was not delivered. The company admitted liability for fifty dollars but alleged that it could not be held for more, because the receipt that it gave fixed that sum as the value of the goods and a higher value would have required the payment of a higher rate. Under the ruling of the court a verdict was found against the petitioner for a hundred dollars, interest and costs, subject to questions of law reserved, and judgment on the verdict was affirmed by the Supreme Court of the state, without opinion, by an evenly divided court.

The goods were delivered by an agent and after conversation between him and the agent of the Express Company the latter put fifty dollars into the receipt as the value, neither party having any clear knowledge, and the receipt later was handed to and bound the sender of the goods. Great Northern Ry. Co. v. O'Connor, 232 U. S. 508, 514, 34 S. Ct. 380, 58 L. Ed. 703. The rate for carriage of property valued at more than fifty dollars was higher than that charged. The schedules filed with the Interstate Commerce Commission were offered, to show the rates, but were excluded, and the judgment was affirmed seemingly on the ground that the sending agent was not shown to have known that a lower valuation secured a lower rate,

[98] In the following cases it was held that a stipulation limiting the carrier's common-law liability was not effectual unless supported by a consideration. Enid Oil & Pipe Line Co., v. Champlin (Okl.) 240 P. 649 (1925); Adams Express Co. v. Harris, 120 Ind. 73, 21 N. E. 340, 7 L. R. A. 214, 16 Am. St. Rep. 315 (1889); McFadden v. Missouri Pac. Ry. Co., 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721 (1887).

and that the carrier knew that the agent was ignorant of the true value of the goods. No argument is made for the respondent and it is plain that the judgment cannot be sustained. The carrier's knowledge of the agent's ignorance of the value was immaterial. It acted in good faith. The carrier's schedules should have been admitted and bound both parties. Kansas City Southern Ry. Co. v. Carl, 227 U. S. 639, 652, 653, 33 S. Ct. 391, 57 L. Ed. 683; Southern Express Co. v. Byers, 240 U. S. 612, 614, 36 S. Ct. 410, 60 L. Ed. 825; American Railway Express Co. v. Lindenburg, 260 U. S. 584, 43 S. Ct. 206, 67 L. Ed. 414. The sender is bound to know the relation established by them between values and rates. Galveston, Harrisburg & San Antonio Ry. Co. v. Woodbury, 254 U. S. 357, 360, 41 S. Ct. 114, 65 L. Ed. 301; Western Union Telegraph Co. v. Esteve Brothers & Co., 256 U. S. 566, 41 S. Ct. 584, 65 L. Ed. 1094.

Judgment reversed.[99]

UNION PAC. R. CO. v. BURKE.

(Supreme Court of the United States, 1921. 255 U. S. 317, 41 S. Ct. 283, 65 L. Ed. 656.)

Mr. Justice CLARKE delivered the opinion of the Court.

On March 10, 1915, S. Ontra & Bro. delivered to the Pacific Mail Steamship Company at Yokohama, Japan, 56 cases of "drawn work goods and renaissance," consigned to their own order at New York, and received a bill of lading for ocean transportation to San Francisco and thence by the Southern Pacific Company and its connections, by rail, to destination. The property was delivered to the Southern Pacific Company and without new billing was carried to a junction with the line of the petitioner, the Union Pacific Railroad Company, and while in its custody was totally destroyed in a collision. The respondent, successor in interest to the consignor, claimed in this suit the right to recover the fair invoice value of the goods, $17,449.01, and the petitioner conceded his right to recover, but only to the amount of the agreed valuation of $100 per package, $5,600, to which it contended he was limited by the bill of lading. All of the facts are stipulated or proved by undisputed evidence.

The Appellate Division, First Department, New York Supreme Court, rendered judgment in favor of respondent for $5,600, with interest and costs, but on appeal to the Court of Appeals of that state the judgment of the Appellate Division was reversed, and an order was entered that a judgment should be rendered by the Supreme Court in favor of respondent for $17,449.01, with interest and costs. The case is brought here on certiorari.

On the face of the bill of lading received at Yokohama was the notation: "Weight 26,404 lbs.; ocean weight rate, 50c; freight

[99] Concerning the effect of filing a limitation of liability clause with the Interstate Commerce Commission, see note, 27 Harv. Law Rev. 737.

$132.02. Rail, minimum carload weight 30,000 lbs., weight rate $1.25. Freight $375.00." (Thus the ocean and rail rates are separately stated, and the latter is $1.25 per 100 pounds minimum carload.)

On the back of the bill of lading were printed 31 conditions, the thirteenth of which contained the provision that "it is expressly agreed that the goods named in this bill of lading are hereby valued at not exceeding $100 per package, * * * and the liability of the companies therefor in case of the total loss of all or any of the said goods from any cause shall not exceed $100 per package."

The petitioner was an interstate common carrier by rail at the time of the shipment involved, and as such had filed with the Interstate Commerce Commission schedules of rates and regulations under which the property was moving at the time it was destroyed. By these schedules the carrier was bound, and to them it was limited, in contracting for traffic. Southern Railway v. Prescott, 240 U. S. 632, 638, 36 S. Ct. 469, 60 L. Ed. 836. The statute expressly provided that it should not charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than such as was specified in such schedules. 34 Stat. 587, § 6 (Comp. St. §§ 8569, 8597).

In these schedules was included a rule, designated as rule 9A, which reads: "Unless otherwise provided, when property is transported subject to the provisions of the Western Classification, the acceptance and use are required, respectively, of the 'uniform bill of lading,' 'straight' or 'order' as shown on pages 87 to 90, inclusive."

For the purposes of this case, only, it is admitted, and accepted by this court, that this rule 9A permitted and required that the property should be treated as moving east of San Francisco under the uniform bill of lading, although, in fact, no other than the Yokohama bill of lading was issued. This uniform bill of lading contained, among other conditions, the following:

"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation whether or not such loss or damage occurs from negligence."

Upon the facts thus stated the petitioner contends that the agreed valuation of $100 per package or case in the Yokohama bill of lading is necessarily imported into the uniform bill of lading, becomes the valuation "agreed upon" within the terms and conditions quoted from that bill, and limits the respondent's recovery to that amount, $5,600, regardless of the value of the property and of the fact that it was lost by the carrier's negligence.

To this contention it is replied by the respondent: That it is admitted

by the petitioner that its filed and published schedules contained but one rate applicable to the shipment as it was carried east of San Francisco; that that rate, $1.25 per 100 pounds minimum carload, was charged in the Yokohama bill of lading; and that, since no choice of rates was given, or could be given, to the shipper, any agreement, in form a valuation of the property, made for the purpose of limiting the carrier's liability to less than the real value thereof, in case of loss by negligence, was void and without effect.

In many cases, from the decision in Hart v. Pennsylvania Railroad Co., 112 U. S. 331, 5 S. Ct. 151, 28 L. Ed. 717, decided in 1884, to Boston & Maine Railroad v. Piper, 246 U. S. 439, 38 S. Ct. 354, 62 L. Ed. 820, Ann. Cas. 1918E, 469, decided in 1917, it has been declared to be the settled federal law that, if a common carrier gives to a shipper the choice of two rates, the lower of them conditioned upon his agreeing to a stipulated valuation of his property in case of loss, even by the carrier's negligence, if the shipper makes such a choice understandingly and freely, and names his valuation, he cannot thereafter recover more than the value which he thus places upon his property.

As a matter of legal distinction, estoppel is made the basis of this ruling—that, having accepted the benefit of the lower rate, in common honesty the shipper may not repudiate the conditions on which it was obtained—but the rule and the effect of it are clearly established.

The petitioner admits all this, but contends that it has never been held by this court that such choice of rates was essential to the validity of valuation agreements, and, arguing that they should be sustained unless shown to have been fraudulently or oppressively obtained, it affirms the validity of the agreement in the Yokohama bill of lading, and cites as a decisive authority Reid v. American Express Co., 241 U. S. 544, 36 S. Ct. 712, 60 L. Ed. 1156.

With this contention we cannot agree.

This court has consistently held the law to be that it is against public policy to permit a common carrier to limit its common-law liability by contracting for exemption from the consequences of its own negligence or that of its servants (112 U. S. 331, 338, 5 S. Ct. 151, 28 L. Ed. 717, and 246 U. S. 439, 444, 38 S. Ct. 354, 62 L. Ed. 820, Ann. Cas. 1918E, 469, supra), and valuation agreements have been sustained only on principles of estoppel and in carefully restricted cases where choice of rates was given—where "the rate was tied to the release." Thus in the Hart Case, 112 U. S. 343, 5 S. Ct. 157, 28 L. Ed. 717, it is said:

"The distinct ground of our decision in the case at bar is that, where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the

carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

And in the Piper Case it is said (246 U. S. 444, 38 S. Ct. 355, 62 L. Ed. 820, Ann. Cas. 1918E, 469):

"In the previous decisions of this court upon that subject it has been said that the limited valuation for which a recovery may be had does not permit the carrier to defeat recovery because of losses arising from its own negligence, but serves to fix the amount of recovery upon an agreed valuation made in consideration of the lower rate stipulated to be paid for the service."

The Reid Case, supra, does not conflict with these decisions, for in that case the bill of lading containing the undervaluation, which was there sustained, expressly recited that the freight was adjusted on the basis of the agreed value, and that the carrier's liability should not exceed that sum "unless a value in excess thereof be specially declared, and stated herein, and extra freight as may be agreed on be paid." The bill of lading was for ocean carriage only, London to New York, to which, of course, the Interstate Commerce Act was not applicable (36 Stat. 544, § 1 [Comp. St. § 8563]; Armour Packing Co. v. United States, 209 U. S. 56, 78, 28 S. Ct. 428, 52 L. Ed. 681; Cosmopolitan Shipping Co. v. Hamburg-American Packet Co. et al., 13 Interst. Com. Com'n R. 266) and the carrier, therefore, was in a position to tender to, and, by the quoted provision of the bill, did tender to, the shipper the choice of paying a higher rate and being subject to less restricted recovery in case of loss. The case was plainly within the scope of the prior decisions of this court upon the subject.

Thus this valuation rule, where choice is given to and accepted by a shipper, is, in effect, an exception to the common-law rule of liability of common carriers, and the latter rule remains in full effect as to all cases not falling within the scope of such exception. Having but one applicable published rate east of San Francisco, the petitioner did not give, and could not lawfully have given, the shipper a choice of rates, and therefore the stipulation of value in the Yokohama bill of lading, even if treated as imported into the uniform bill of lading, cannot bring the case within the valuation exception, and the carrier's liability must be determined by the rules of the common law. To allow the contention of the petitioner would permit carriers to contract for partial exemption from the results of their own negligence without giving to shippers any compensating privilege. Obviously such agreements could be made only with the ignorant, the unwary, or with persons deliberately deceived. It results that the judgment of the Supreme Court of the state of New York, entered upon the order of the Court of Appeals of that state, must be

Affirmed.[1]

[1] Compare the decision in this case with the subsequent decision in Western Union Telegraph Co. v. Esteve Bros. & Co., post, p. 927.

AMERICAN RY. EXPRESS CO. v. LEVEE.

(Supreme Court of the United States, 1923. 263 U. S. 19, 44 S. Ct. 11, 68 L. Ed. 140.)

Mr. Justice HOLMES[2] delivered the opinion of the Court.

This is a suit brought by the respondent in a court of Louisiana to recover the actual value of a trunk and its contents, weighing one hundred pounds or less, delivered to the petitioner for carriage from Madisonville, Texas, to Thibodaux, Louisiana, but not delivered by the latter. The plaintiff's petition set forth the receipt given by the Company, which was in the usual form approved by the Interstate Commerce Commission, and by which, "in consideration of the rate charged for carrying said property, which is dependent upon the value thereof and is based upon an agreed valuation of not exceeding fifty dollars for any shipment of 100 pounds or less * * * the shipper agrees that the company shall not be liable in any event for more than fifty dollars for any shipment of 100 pounds or less," with other language to the same effect. At the trial the defendant relied upon this limitation of its liability. But the Court following article 2754 of the Revised Civil Code of Louisiana held that the burden was on the carrier to "prove that [the] loss or damage had been occasioned by accidental and uncontrollable events," and gave the plaintiff judgment for $863.75 and interest. The Court of Appeal took the same view and said that failure to make that proof was equivalent to an admission of converting the property to its own use. The defendant applied to the Supreme Court of the State for a writ of certiorari, but the writ was "refused for the reason that the judgment is correct." * * *

Coming to the merits, the limitation of liability was valid, whatever may be the law of the State in cases within its control. Adams Express Co. v. Croninger, 226 U. S. 491, 33 S. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; Union Pacific R. R. Co. v. Burke, 255 U. S. 313, 317, 321, 41 S. Ct. 283, 65 L. Ed. 656; American Ry. Express Co. v. Lindenburg, 260 U. S. 584, 43 S. Ct. 206, 67 L. Ed. 414. The effect of the stipulation could not have been escaped by suing in trover and laying the failure to deliver as a conversion if that had been done. Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co., 241 U. S. 190, 197, 36 S. Ct. 541, 60 L. Ed. 948. No more can it be escaped by a state law or decision that a failure to deliver shall establish a conversion unless explained. The law of the United States cannot be evaded by the forms of local practice. Rogers v. Alabama, 192 U. S. 226, 230, 24 S. Ct. 257, 48 L. Ed. 417. Under the law of the United States governing interstate commerce the stipulation constituted a defense to liability beyond fifty dollars, unless the plaintiff should prove some facts that took the case out of the protection of the

[2] Part of the opinion is omitted.

contract. It had that scope in whatever Court it came up. The local rule applied as to the burden of proof narrowed the protection that the defendant had secured, and therefore contravened the law. See Central Vermont Ry. Co. v. White, 238 U. S. 507, 512, 35 S. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252; Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Rankin, 241 U. S. 319, 328, 36 S. Ct. 555, 60 L. Ed. 1022, L. R. A. 1917A, 265; E. Borneman & Co. v. New Orleans M. & C. R. Co., 145 La. 150, 81 So. 882. We think it unnecessary to follow the arguments addressed to us into further detail.

Judgment reversed.

D'UTASSY v. BARRETT.

(Court of Appeals of New York, 1916. 219 N. Y. 420, 114 N. E. 786, 5 A. L. R. 979.)

Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 19, 1916, which affirmed an order of Special Term overruling a demurrer to the amended answer. * * *

POUND, J.[3] The complaint alleges that the defendant received certain packages from plaintiff's assignors for interstate shipment and agreed to carry the same to the consignees thereof, but that said "Adams Express Company, its agents, servants and employees," stole said packages and their contents and have unlawfully disposed of said property and have converted the same to their own use, to plaintiff's damage upwards of $2,000. The answer sets up as a partial defense that it was agreed between the shipper and defendant that the value of each shipment was not more than $50 and that the defendant should not be liable for more than $50 thereon; that the shipper concealed the true value of the property; that charges were fixed and filed with the interstate commerce commission as required by the Interstate Commerce Act of Congress of February 4, 1887, and the acts amendatory thereof including the Carmack amendment (U. S. Comp. St. § 8563 et seq.); that a higher charge would have been made if the true value had been given; that greater care would also have been taken to prevent the loss or theft of the property "as well through the acts or omissions of the agents or employees of said express company as through the acts or omissions of other persons."

To this affirmative partial defense the plaintiff demurs on the ground of the legal insufficiency thereof. The effect of the pleadings is that the defendant admits that "its agents, servants and employees" stole, unlawfully disposed of and converted the packages to their own use and alleges that the value was stipulated as well in case the property

[3] Part of the statement of facts is omitted.

was so stolen or converted by the employees of the defendant as in case the loss or theft was due to the acts of third parties, and, therefore, claims that if the evidence discloses that the property was so stolen and converted by an agent, servant or employee of the defendant, the liability of the defendant should be limited to $50 on each shipment. Proof of actual conversion by the defendant itself would, under this partial defense, establish full liability, for it is not pleaded that the value is agreed upon as against such an act. As the defendant may act only through agents whose acts in the scope of their employment are attributed to it, the question narrowly presented is whether the agreed valuation applies to an action for the conversion of the goods by an employee for his own benefit and amounts to a partial defense.

Agreements of limited liability are upheld where the loss is due to ordinary negligence or to the wrongful act of another (Boyle v. Bush Terminal R. R. Co., 210 N. Y. 389, 392, 104 N. E. 933; Boston & Maine R. R. v. Hooker, 233 U. S. 97, 34 S. Ct. 526, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593); but the law remains that the carrier may not claim a limitation of liability to a certain amount for its affirmative wrongdoing (Magnin v. Dinsmore, 62 N. Y. 35, 20 Am. Rep. 442), when the plaintiff makes proof thereof (Wamsley v. Atlas S. S. Co., 168 N. Y. 533, 61 N. E. 896, 85 Am. St. Rep. 699). This distinction between a limitation of liability for conversion and for negligence is clearly shown in the cases.

The distinction must be borne in mind between a limitation of liability and an agreed valuation in case of liability. When it is urged that the limitation of value should not be applied to any case of theft by the carrier's employees, for the reason that the company is liable for such acts as if the company had been the thief (Adams Express Co. v. B. & W. Co., 35 App. D. C. 208, 31 L. R. A. [N. S.] 309), the argument loses sight of this distinction. When the agent acts within the scope of his employment in taking possession of the shipment "in legal effect it was the same as if the defendant, personified, had taken it" (Vann, J., in Hasbrouck v. N. Y. C. & H. R. R. R. Co., 202 N. Y. 363, 373, 95 N. E. 808, 35 L. R. A. [N. S.] 537, Ann. Cas. 1912D, 1150), but the liability may exist and the valuation of the shipment in case of liability may be agreed upon when the rates for transportation are based on the valuation of the goods intrusted to the carrier.

The reason for the rule sustaining the declared and agreed valuation is to prevent fraudulent practices by shippers in obtaining a lower rate by undervaluation. Kansas City Southern Ry. Co. v. Carl, 227 U. S. 639, 652, 33 S. Ct. 391, 57 L. Ed. 683; Pierce Co. v. Wells, Fargo & Co., 236 U. S. 278, 35 S. Ct. 351, 59 L. Ed. 576. While the rule should not be extended to permit a carrier to realize a profit by converting valuable shipments, such conversions are so unusual as to be almost negligible. It would be unjust and contrary to the policy of the law to permit the agreed valuation to be overthrown for the pur-

pose of enabling the shipper to obtain a recovery in excess thereof in a suit for loss or damage on any theory of trover or conversion for loss of goods by wrongful deliveries or acts of employees for their own benefit, based, not on the wrongful misconduct of the carrier as such, but on the act of the employee. Rosenthal v. Weir, 170 N. Y. 148, 154, 63 N. E. 65, 57 L. R. A. 527. The liability of carriers of goods at common law was that of insurers, and proper care and diligence were insufficient to avoid such liability. The duty was to carry the goods and deliver them to the consignee. A breach of that duty imposed liability. The innocent mistakes of the servant in delivering the goods no less than his willful misconduct in breach of the trust reposed in him constituted a conversion by the carrier. Price v. Oswego & Syracuse R. Co., 50 N. Y. 213, 10 Am. Rep. 475. But the contract in suit does not evade the liability; it merely fixes the valuation of the goods when liability is established. In an action for damages against the carrier, the shipper is bound by the terms of the contract, and it is of the highest importance that competent parties be held to the terms of their valid contracts. "The transactions in question related to interstate commerce; consequent rights and liabilities depend upon Acts of Congress, agreement between the parties and common law principles accepted and enforced in Federal Courts." Southern Express Co. v. Byers, 240 U. S. 612, 614, 36 S. Ct. 410, 60 L. Ed. 825, L. R. A. 1917A, 197; N. Y. C. & H. R. R. R. Co. v. Beaham, 242 U. S. 148, 151, 37 S. Ct. 43, 61 L. Ed. 210. It has been held in cases involving negligence or the acts of third parties that where alternate rates fairly based upon valuation are offered, liability may be limited by special contract (Cincinnati, N. O. & Tex. Pac. Ry. Co. v. Rankin, 241 U. S. 319, 36 S. Ct. 555, 60 L. Ed. 1022, L. R. A. 1917A, 265); that where a valuation has been agreed upon between the shipper and the carrier such value shall be the maximum amount for which any carrier may be held liable, whether or not the loss or damage occurs from negligence (Cleveland, C., C. & St. Louis Ry. Co. v. Dettlebach, 239 U. S. 588, 593, 36 S. Ct. 177, 60 L. Ed. 453); that having obtained a rate based on the declared value the shipper is concluded and there is no room for parol evidence to show otherwise (Mo., K. & T. Ry. Co. v. Harriman, 227 U. S. 657, 670, 33 S. Ct. 397, 57 L. Ed. 690); that so long as the tariff based on value remained operative it was binding upon the shipper and carrier alike and was to be enforced by the courts in fixing the rights and liabilities of the parties (Great Northern Ry. Co. v. O'Connor, 232 U. S. 508, 515, 34 S. Ct. 380, 58 L. Ed. 703; Atchison, T. & S. F. Ry. Co. v. Robinson, 233 U. S. 173, 180, 34 S. Ct. 556, 58 L. Ed. 901); that the question is not one of form but of actuality (Southern Ry. Co. v. Prescott, 240 U. S. 632, 639, 36 S. Ct. 469, 60 L. Ed. 836), and that the effect of the stipulation cannot be escaped by the mere form of the action, the scope and effect of which is an action for damages against the carrier (Georgia, F. & A. Ry. Co. v. Blish M. Co., 241 U. S. 190, 197,

36 S. Ct. 541, 60 L. Ed. 948). The contention of appellant that the agreed value does not conclude the shipper as against the acts of employees outside the scope of their employment cannot be sustained without ignoring the terms of the contract, disregarding the intent of the parties and of the acts of Congress regulating interstate transportation and holding the carrier to a different responsibility than that which it assumed.

The order should be affirmed with costs, and the questions should be answered in the affirmative.

WILLARD BARTLETT, C. J., and CHASE, COLLIN, CUDDEBACK, HOGAN, and CARDOZO, JJ., concur.

Order affirmed.[4]

HEUMAN v. M. H. POWERS CO.

(Court of Appeals of New York, 1919. 226 N. Y. 205, 123 N. E. 373.)

The action was begun in the City Court against the defendant, a common carrier, to recover the value of certain jewelry which was lost while in possession of the defendant.

The plaintiff employed the defendant to move her household goods from one apartment to another in the city of New York. Included in the furniture to be moved was a cabinet with a small safe inside, containing, among other things, some articles of jewelry.

When the defendant was employed, the plaintiff's husband, with his wife's authority, signed a memorandum showing when and where the moving was to be done, and the defendant's charges therefor, which were $49, and containing also the following clause: "The responsibility of the company is limited to $50 for any article, together with the contents thereof."

The property was to be moved on Saturday, and late in the afternoon a van load of furniture, including the cabinet safe, arrived at the apartment to which the goods were to be taken.

The plaintiff's husband and the defendant's representative arranged that this van load of goods should be taken to the defendant's warehouse, and should be delivered to the plaintiff on the following Monday morning. When the goods were delivered on Monday it was found that the cabinet safe had been broken open, and certain articles of jewelry belonging to the plaintiff had been taken.

It turned out that while the goods were in the custody of the defendant over Sunday, three of the defendant's employés broke open the safe and took the jewelry.

In the City Court the plaintiff recovered a judgment against the defendant of $1,000 and costs, which was affirmed at the Appellate Term, but was reversed in the Appellate Division.

[4] Compare Adams Express Co. v. Berry & Whitmore Co., 35 App. D. C. 208, 31 L. R. A. (N. S.) 309 (1910).

CUDDEBACK, J. The action is for a breach by the defendant of the contract of carriage.

It will be observed that the memorandum signed by the plaintiff's husband contains no stipulation as to the value of the property intrusted to the defendant, but simply a clause limiting the responsibility of the defendant for any article or the contents thereof to $50. Therefore those cases which involve a stipulation between the shipper and the carrier as to the value of the goods carried to measure the extent of the carrier's liability in case of loss do not apply. D'Utassy v. Barrett, 219 N. Y. 420, 114 N. E. 786.

Whatever else may be said of the manner in which the defendant performed its contract, it certainly violated the common-law obligation of a carrier to safely carry and deliver the plaintiff's goods. The question is whether the clause quoted from the memorandum signed by the plaintiff's husband is sufficient to limit the responsibility of the defendant for the loss of the jewelry to $50. The simple and complete answer to that question is that the clause referred to, when read in the light of the decisions construing such clauses, does not even purport to limit the defendant's responsibility for the violation of duty shown in this case.

The rule is that where a common carrier desires by special contract to exonerate itself from the effect of its own acts or omissions, or those of its employés, the special contract must openly and plainly express that intention so that it cannot be in the slightest degree misunderstood. Mynard v. Syracuse, B. & N. Y. R. R. Co., 71 N. Y. 180, 27 Am. Rep. 28; Spinetti v. Atlas S. S. Co., 80 N. Y. 71, 36 Am. Rep. 579; Gardiner v. N. Y. C. & H. R. R. R. Co., 201 N. Y. 387, 94 N. E. 876, 34 L. R. A. (N. S.) 826, Ann. Cas. 1912B, 281.

The clause in the memorandum is: "The responsibility of the company is limited to $50 for any article, together with the contents thereof." Plainly this clause refers to the defendant's responsibility as a carrier, and does not include the misfeasance or nonfeasance of the carrier itself or of its employés. The plaintiff had no reason to understand she was releasing them from responsibility for their own depredations. While couched in the words selected by the defendant, the clause does not, under the circumstances of this case, limit the defendant's responsibility at all.

The defendant also contends that it was relieved from its liability as a common carrier by the failure of the plaintiff to disclose the fact that there was a safe in the cabinet containing valuable articles. The answer to that argument is that the failure to make such disclosure did not relieve the defendant from liability for its own acts or those of its servants, which amounted to a misfeasance. Magnin v. Dinsmore, 62 N. Y. 35, 20 Am. Rep. 442; Id., 70 N. Y. 410, 26 Am. Rep. 608.

I recommend that the order of the Appellate Division be reversed,

and that the judgment of the Appellate Term be reinstated, with costs in this court and in the Appellate Division.

HISCOCK, C. J., and COLLIN, HOGAN, and CRANE, JJ., concur.

CHASE, J., not voting.

McLAUGHLIN, J., not sitting.

Order reversed, etc.

CHICAGO, M. & ST. P. RY. CO. v. McCAULL-DINSMORE CO.

(Supreme Court of the United States, 1920. 253 U. S. 97, 40 S. Ct. 504, 64 L. Ed. 801.)

Mr. Justice HOLMES delivered the opinion of the Court.[5]

This is an action for the loss of grain belonging to the plaintiff and delivered on November 17, 1915, to the defendant, the petitioner, in Montana, for transportation to Omaha, Nebraska. The grain was shipped under the uniform bill of lading, part of the tariffs filed with the Interstate Commerce Commission, by which it was provided that "the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including freight charges, if paid." The petitioner has paid $1,200.48, being the amount of the loss so computed, but the value of the grain at the place of destination at the time when it should have been delivered, with interest, less freight charges, was $1,422.11. The plaintiff claimed the difference between the two sums on the ground that the Cummins Amendment to the Interstate Commerce Act made the above stipulation void. The District Court gave judgment for the plaintiff, 252 F. 664, and the judgment was affirmed by the Circuit Court of Appeals. 260 F. 835.

The Cummins Amendment Act of March 4, 1915, c. 176, 38 Stat. 1196 (Comp. St. § 8604a), provides that the carriers affected by the Act shall issue a bill of lading and shall be liable to the lawful holder of it "for any loss, damage, or injury to such property * * * and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier * * * from the liability hereby imposed" and further that the carrier "shall be liable * * * for the full actual loss, damage, or injury * * * notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void." Before the passage of this amendment the Interstate Commerce Commission had upheld the clause in the bill of lading as in no way limiting the car-

[5] The dissenting opinion of Chief Justice White is omitted.

riers' liability to less than the value of the goods, but merely offering the most convenient way of finding the value. Shaffer v. Chicago, Rock Island & Pacific Ry. Co., 21 I. C. C. 8, 12. In a subsequent report upon the amendment it considered that the clause was still valid and not forbidden by the law. 33 I. C. C. 682, 693. The argument for the petitioner suggests that courts are bound by the Commission's determination that the rule is a reasonable one. But the question is of the meaning of a statute and upon that, of course, the courts must decide for themselves.

We appreciate the convenience of the stipulation in the bill of lading and the arguments urged in its favor. We understand that it does not necessarily prevent a recovery of the full actual loss, and that if the price of wheat had gone down the carrier might have had to pay more under this contract than by the common law rule. But the question is how the contract operates upon this case. In this case it does prevent a recovery of the full actual loss, if it is enforced. The rule of the common law is not an arbitrary fiat but an embodiment of the plain fact that the actual loss caused by breach of a contract is the loss of what the contractee would have had if the contract had been performed, less the proper deductions, which have been made and are not in question here. It seems to us, therefore, that the decision below was right, and as, in our opinion, the conclusion is required by the statute, neither the convenience of the clause, nor any argument based upon the history of the statute or upon the policy of the later Act of August 9, 1916, c. 301, 39 Stat. 441 (Comp. St. §§ 8592, 8604a) can prevail against what we understand to be the meaning of the words. Those words seem not only to indicate a broad general purpose but to apply specifically to this very case.

Judgment affirmed.[6]

AMERICAN RY. EXPRESS CO. v. LINDENBURG.

(Supreme Court of the United States, 1923. 260 U. S. 584, 43 S. Ct. 206, 67 L. Ed. 414.)

Mr. Justice SUTHERLAND delivered the opinion of the Court.

On July 22, 1918, at Indianapolis, Ind., respondent caused to be delivered to petitioner two trunks weighing 200 pounds and 100 pounds, respectively, and a package weighing 10 pounds, for transportation to him at Charleston, W. Va. A receipt was given for the property, which recited that its terms and conditions were agreed to by the shipper. The receipt, among other things, stipulated that in no event "shall this company be held liable or responsible, nor shall any demand be made upon it beyond the sum of fifty dollars upon any shipment of

[6] For a discussion of the first Cummins Amendment, see Daish, Liability of Common Carriers under the Act to Regulate Commerce, 25 Yale Law J. 341. See, also, note in 36 Harv. Law Rev. 746.

100 pounds or less, and for not exceeding 50 cents per pound upon any shipment weighing more than 100 pounds, and the liability of the express company is limited to the value above stated unless the just and true value is declared at time of shipment, and the declared value in excess of the value above specified is paid for, or agreed to be paid for, under this company's schedule of charges for excess value."

This receipt was produced at the trial and put in evidence by the respondent in support of his action. At the time of the shipment the value of the property was neither stated by the respondent nor demanded by the petitioner. The charges paid were on the basis of the limited liability set forth in the receipt. One of the trunks when delivered at destination was in bad order, some of the goods therein being damaged and others destroyed. Respondent alleged damages in the sum of $1,500. Petitioner answered, admitting liability for $110, under the terms of the receipt. The trial court gave judgment for $916.15, which the state appellate court affirmed. 88 W. Va. 439, 106 S. E. 884. The case is here on certiorari.

The case is governed by the provisions of the Cummins Amendment, Act of March 4, 1915, c. 176, 38 Stat. 1196, as amended by the Act of August 9, 1916, c. 301, 39 Stat. 441 (Comp. St. § 8604a). The amendment requires every common carrier receiving property for interstate transportation to issue a receipt or bill of lading, and makes it liable for the full, actual loss, damage or injury to such property caused by it or any connecting carrier participating in the transportation on a through bill of lading, notwithstanding any limitation of liability of the amount of recovery or representation or agreement as to value. Any such attempted limitation is declared to be unlawful and void. Then follows a proviso, which appears in full in the margin,[7] and the question for determination is whether, under the facts, the case is within its terms.

[7] "Provided, however, that the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this act to regulate commerce, as amended; and any tariff schedule which may be filed with the Commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared or agreed upon; and the Commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation."

The Interstate Commerce Commission on April 2, 1917, in a proceeding wherein the Adams Express Company and a number of other express companies (but not including this petitioner) were parties, made an order in conformity with this proviso, authorizing the express companies to maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property. The basic rate to be established was upon a valuation not exceeding $50 for any shipment of 100 pounds or less, or not exceeding 50 cents per pound for any shipment in excess of 100 pounds, the rates to be progressively increased with increased valuations. The express companies were further authorized, after notice, to amend the terms and conditions of the uniform express receipt in accordance with a form prescribed.

The new form, so prescribed, contained a provision to the effect that "in consideration of the rate charged for carrying the property, which rate is dependent upon the value thereof and is based upon an agreed valuation of not exceeding $50 for a shipment of 100 pounds or less, and not exceeding 50 cents per pound for any shipment in excess of 100 pounds," the shipper agrees, unless a greater value be declared at the time of shipment, that the company shall not be liable in any event for more than these amounts. At the time of the shipment, the evidence shows there was in effect a tariff of petitioner governing transportation between Indianapolis and Charleston, duly published and filed with the Interstate Commerce Commission, setting forth the form of receipt prescribed by the Commission, and that the charges made were in accordance with this tariff. The receipt issued by petitioner, it will be seen, limits the liability of the petitioner, not in the precise words of, but substantially in accordance with, the provision contained in the receipt authorized by the Commission; but it was upon an old form which had been used previous to the order of the Commission and contained some conditions which were contrary to and declared to be void by the Cummins Amendment (Comp. St. §§ 8592, 8604a). Neither the receipt nor any declaration or agreement was signed by respondent or by any one in his behalf.

The judgment of the state appellate court is made to rest upon the sole ground that petitioner did not take from the shipper a written declaration of value or a written agreement as to the value signed by him. Respondent here seeks to justify the judgment upon other grounds as well, and these we first consider.

In the first place, it is said that petitioner was never expressly authorized or required by the Interstate Commerce Commission to establish or maintain rates dependent upon declared or agreed values. It is true the order of the Commission, hereinbefore referred to, was made in a proceeding in which petitioner's name did not appear, but petitioner subsequently published and filed with the Commission a tariff, specifically referring to the order of the Commission in that proceeding and containing the form of receipt therein authorized, which tariff

was in effect at the time of the shipment, and had been in effect for more than a year prior thereto. The transportation charges were in conformity with the tariff, and the receipt issued, in so far as the limitation of liability is concerned, was in substantial accord with the authorized receipt. The petitioner appears to have proceeded upon the assumption that the publication and filing of the tariff were authorized by the Commission's order, and there is nothing in the record to indicate that the Commission did not so regard it. A copy of the tariff, certified by the secretary of the Commission, was put in evidence. If these facts do not warrant the logical inference of a grant of authority they do afford the basis for a legal presumption to that effect, for, if petitioner was not duly authorized by the Commission, its action in attempting to limit its liability was unlawful, and, as this court said in Cincinnati, New Orleans & Texas Pacific Railway Co. v. Rankin, 241 U. S. 319, 327, 36 S. Ct. 555, 558 (60 L. Ed. 1022, L. R. A. 1917A, 265):

"It cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law. Such a carrier must comply with strict requirements of the federal statutes or become subject to heavy penalties, and in respect of transactions in the ordinary course of business it is entitled to the presumption of right conduct."

It is a rule of general application that, "where an act is done which can be done legally only after the performance of some prior act, proof of the later carries with it a presumption of the due performance of the prior act." Knox County v. Ninth National Bank, 147 U. S. 91, 97, 13 S. Ct. 267, 37 L. Ed. 93. See also New York Central, etc., R. R. v. Beaham, 242 U. S. 148, 151, 37 S. Ct. 43, 61 L. Ed. 210; Young v. South Tredegar Iron Co., 85 Tenn. 189, 2 S. W. 202, 4 Am. St. Rep. 752; Insurance Co. v. Plummer, 70 Me. 540, 544.

In the absence of proof to the contrary, we therefore indulge the presumption that in basing its transportation charges upon the values recited in the receipt, the petitioner had due authority.

It is next contended that the receipt which was issued was unlawful and void because it contained conditions forbidden by the Cummins Amendment and prior statutes, the principal condition being a limitation of the carrier's liability to its own routes or lines. But it does not appear that the shipment in question came within the terms of any of these conditions or that the obligations of petitioner in respect of the matter were in any way affected thereby. Assuming their unlawful character, there is no difficulty in separating them from the condition limiting the liability by the declared valuation. We do not, therefore, deem it necessary to inquire in respect of the nature or extent of these alleged unlawful conditions, since, in any event, their presence would not have the effect of rendering unenforceable the severable, valid provision here relied upon. McCullough v. Virginia, 172 U. S. 102, 113, 19 S. Ct. 134, 43 L. Ed. 382; United States v. Bradley, 10 Pet. 343, 360,

9 L. Ed. 448; Chicago, etc., Co. v. Pullman Car Co., 139 U. S. 79, 91, 11 S. Ct. 490, 35 L. Ed. 97.

In Pickering v. Ilfracombe Railway Company, L. R. 3, C. P. C. 235, 250, the rule is stated by Willes, J., as follows: "The general rule is that where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but, where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good." See also Cincinnati Packet Co. v. Bay, 200 U. S. 179, 185, 26 S. Ct. 208, 50 L. Ed. 428.

We come now to the point on which the judgment of the state appellate court is grounded. That court held that the petitioner should have given the shipper "a receipt specifying the value fixed by himself, and evidenced by his signature. * * * A writing not signed by him, although specifying value, was not a declaration or agreement in writing by him." 88 W. Va. 439, 443, 444, 106 S. E. 884, 886.

Neither the statute nor the order of the Commission requires the signature of the shipper. The pertinent words of the statute are: "* * * Rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value. * * *"

It is not to be supposed that the Commission would attempt to add anything to the substantive requirements of the statute, and its order does not purport to do so; but the form of receipt which the express companies were authorized to adopt contains a recital to the effect that as evidence of the shipper's agreement to the printed conditions he "accepts and signs this receipt," and a blank space is provided for his signature. Naturally, such signature would be desirable as constituting the most satisfactory evidence of the shipper's agreement, but it is not made a prerequisite without which no agreement will result, and a subsequent report of the Commission on the subject of bills of lading is persuasive evidence that there was no such intention. Bills of lading, 52 Interst. Com. Com'n R. 681, where it is said: "It is sufficient if the shipper accepts the carrier's bill of lading without himself signing it. It becomes binding upon him by his acceptance, he being presumed to know and accept the conditions of the written bill of lading."

The respondent, by receiving and acting upon the receipt, although signed only by the petitioner, assented to its terms and the same thereby became the written agreement of the parties. McMillan v. Railroad Co., 16 Mich. 79, 93 Am. Dec. 208; The Henry B. Hyde (D. C.) 82 F. 681. In the absence of a statutory requirement, signing by the respondent was not essential. Missouri, Kansas & Texas Railway v. McCann, 174 U. S. 580, 590, 19 S. Ct. 755, 43 L. Ed. 1093; Inman & Co. v. Seaboard Air Line Ry. (C. C.) 159 F. 960, 966. His signature, to be sure, would have brought into existence additional evidence of the agreement but it was not necessary to give it effect. See Girard Life Insurance Co. v. Cooper, 162 U. S. 529, 543, 16 S. Ct. 879, 40 L. Ed. 1062. And his knowledge of its contents will be

presumed. Cau v. Texas & Pacific Railway Co., 194 U. S. 427, 431, 24 S. Ct. 663, 48 L. Ed. 1053; Kansas City Southern Railway Co. v. Carl, 227 U. S. 639, 652, 653, 656, 33 S. Ct. 391, 57 L. Ed. 683. "The receipt which was accepted showed that the charge made was based upon a valuation of $50 unless a greater value should be stated therein. The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Commission." Adams Express Co. v. Croninger, 226 U. S. 491, 508, 509, 510, 33 S. Ct. 148, 153 (57 L. Ed. 314, 44 L. R. A. [N. S.] 257). Having accepted the benefit of the lower rate dependent upon the specified valuation, the respondent is estopped from asserting a higher value. To allow him to do so would be to violate the plainest principles of fair dealing. Hart v. Pennsylvania Railroad Co., 112 U. S. 331, 340, 5 S. Ct. 151, 28 L. Ed. 717; Adams Express Co. v. Croninger, supra.

In Kansas City Southern Railway Co. v. Carl, supra, this court said: "To permit such a declared valuation to be overthrown by evidence aliunde the contract, for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess of the maximum valuation thus fixed, would both encourage and reward undervaluations and bring about preferences and discriminations forbidden by the law. Such a result would neither be just nor conducive to sound morals or wise policies."

The judgment of the state appellate court is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.[8]

BARRETT v. VAN PELT.

(Supreme Court of the United States, 1925. 268 U. S. 85, 45 S. Ct. 437, 69 L. Ed. 857.)

Mr. Justice BUTLER delivered the opinion of the court.

February 23, 1918, at Louisville, Ky., respondent's assignor delivered to the Adams Express Company a carload, consisting of 522 cases of fresh eggs for transportation to New York City, there to be delivered to Harold L. Brown Company. The shipment was so delivered March 4, 1918. This action was brought to recover damages for loss in market value due to delay in transportation. At the trial, respondent contended that the express company was bound to make delivery of the eggs within a reasonable time, which he claimed to be not more than 30 hours. It was shown that the price of eggs in New York declined between the time respondent claimed delivery to consignee should have been made and the time when it was made. The trial court directed a verdict in favor of respondent. A judg-

[8] See interesting synopsis of events leading to the passage of the first and second Cummins Amendments, by Biklé, 66 Univ. of Pa. Law Review, 166.

ment was entered thereon. Petitioner appealed. It was affirmed by the Appellate Division. 205 App. Div. 332, 199 N. Y. S. 509. Leave to appeal to the Court of Appeals of New York was denied. This court granted certiorari. 263 U. S. 697, 44 S. Ct. 134, 68 L. Ed. 508.

The case involves the construction of a provision of the Act of Congress of March 4, 1915, known as the First Cummins Amendment (38 Stat. 1196, 1197, c. 176), amending section 20 of the Act to Regulate Commerce of February 4, 1887, c. 104, 24 Stat. 386, as amended by section 7 of the Act of June 29, 1906, c. 3591, 34 Stat. 593, 595 (Comp. St. § 8604a). Chapter 176 requires any common carrier receiving property for transportation in interstate commerce to issue a receipt or bill of lading therefor, and makes it liable to the lawful holder thereof for any loss, damage or injury to such property, and contains certain provisos, the last two of which are:

"Provided further, that it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

At the time of the delivery of the property for transportation, the express company issued and delivered a receipt or bill of lading therefor, which contained the following:

"Received from Ky. Creameries the shipment hereinafter listed, subject to the classification and tariffs in effect on the date hereof, which shipment the company agrees to carry upon the terms and conditions of the uniform express receipt in effect on date of shipment."

Section 7 of the uniform receipt contains the following:

"Except where the loss, damage or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, as conditions precedent to recovery claims must be made in writing to the originating or delivering carrier within four months after delivery of the property or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed; and suits for loss, damage or delay shall be instituted only within two years and one day after delivery of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed." Official Express Classification No. 25, filed May 18, 1917, I. C. C. A-2130.

No claim was made or filed within four months after the delivery of the property to the consignee. We are required to decide whether the case is one where notice or filing of claim may be required as a condition precedent to recovery. If the first clause of the above-

quoted provision stood alone, the rule established would be clear. But the purpose of the second clause is to except some cases from the application of the general rule and to provide that as to them no notice of claim nor filing of claim shall be required. The language and structure of the second clause is so inapt and defective that it is difficult to give it a construction that is wholly satisfactory.[9] The Appellate Division held that the requirement of the receipt for the filing of claims within four months after delivery was prohibited by law, and was without force or effect. The court quoted from its opinion in Bell v. New York Central Railroad Co., 187 App. Div. 564, 566, 175 N. Y. S. 712, 713:

"It will be noted that both the Cummins Amendment and the bill of lading provision make a double classification of claims, to wit: (1) Those for loss due to delay or damage while being loaded or unloaded, or damaged in transit, which we will call transit claims; and (2) those for loss otherwise sustained, which we will call nontransit claims. The Cummins Amendment permitted the carrier to require as a condition precedent to recovery the filing of a nontransit claim within four months, and in such cases to require suit to be instituted within two years. In the case of transit claims it forbade the carrier to require the filing of a claim as a condition precedent to recovery but authorized a requirement, that suit be instituted within two years."

Respondent supports this construction. But we think it is not satisfactory. The language does not require such a classification. The court suggests no reason for such a division, and there seems to be no substantial considerations supporting it. Apparently, no effect is given the phrase, "by carelessness or negligence."

The petitioner contends that the word "delay" is to be read with "while being loaded or unloaded." This would make two classes of claims excepted from the general rule. One would include claims for loss due to delay or damage while being loaded or unloaded. The other would include those for damage in transit due to carelessness or negligence. But it is not apparent why claims for loss, damage or injury due to delay in transit should not be included in the same class as claims for damages due to delay while being loaded or unloaded. And no good reason is shown for the elimination of the element of carelessness or negligence from the definition of one class, while including it in the definition of the other.

[9] See Hailey v. Oregon Short Line R. Co. (D. C.) 253 F. 569 (1918); Gillette Safety Razor Co. v. Davis (C. C. A.) 278 F. 864 (1922); Conover v. Wabash Railway Co., 208 Ill. App. 105 (1917); Conover v. Baltimore & Ohio Southwestern R. Co., 212 Ill. App. 29 (1918); Bell v. New York Central Railroad Co., 187 App. Div. 564, 175 N. Y. S. 712 (1919); Henningsen Produce Co. v. American Ry. Express Co., 152 Minn. 209, 188 N. W. 272 (1922); St. Sing v. Express Co., 183 N. C. 405, 111 S. E. 710 (1922); Cunningham v. Missouri Pacific R. Co. (Mo. App.) 219 S. W. 1003 (1920); Lissberger v. Bush Terminal R. Co., 119 Misc. Rep. 691, 197 N. Y. S. 281 (1922); Allen v. Davis (S. C.) 118 S. E. 614 (1923).—[Footnote by the Court.]

It must be assumed that Congress intended to make the classification on a reasonable basis having regard to considerations deemed sufficient to justify exceptions to the rule. The element of carelessness or negligence is important. There are such differences between liability without fault and that resulting from negligence that Congress upon good reasons might permit carriers to require notice and filing of claim within the specified times where the carrier is without fault, and forbid such a requirement in the cases referred to where the loss results from the carrier's negligence. Notice and filing of claim warn the carrier that there may be need to make investigations which otherwise might not appear to be necessary; and if notice of claim is given and filing of claim is made within a reasonable time it serves to enable the carrier to take timely action to discover and preserve the evidence on which depends a determination of the merits of the demand.

As to claims for damages not due to negligence, in the absence of notice, there may be no reason for anticipating demand or to investigate to determine the fact or extent of liability. But as to damages resulting from carelessness or negligence, it reasonably may be thought that the carrier has such knowledge of the facts or has such reason to expect claim for compensation to be made against it that the carrier should not be permitted to exact such notice and filing of claim as a condition precedent to recovery. No other basis of classification seems as well supported in reason as the element of carelessness or negligence. And that basis is substantially sustained by the language of the clause. The elimination of the final "d" in "damaged" and the omission of the comma after "unloaded" would make the clause read as follows: "Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded or damage in transit by carelessness or negligence then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

The context does not permit the use of the word "damaged" or allow any meaning to be given to it. Its presence makes a grammatical defect and embarrasses interpretation. It seems obvious that the word "damage" was intended. That word is in harmony with the context as well as with the probable intention of Congress. The final "d" may be eliminated. The intention of the lawmaker constitutes the law. Stewart v. Kahn, 11 Wall. 493, 504, 20 L. Ed. 176. See Smythe v. Fiske, 23 Wall. 374, 380, 23 L. Ed. 47. Being satisfied of the legislative intention, the court will not be prevented from giving that intention effect by a too rigid adherence to the very word and letter of the statute. Oates v. National Bank, 100 U. S. 239, 244, 25 L. Ed. 580. Having found that the word "damage" was intended to be used, the court applies the rule that:

"A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter, and a thing

which is within the letter of a statute, is not within the statute, unless it is within the intention of the makers." People v. Utica Insurance Company, 15 Johns. (N. Y.) 358, 381, 8 Am. Dec. 243; Hawaii v. Mankichi, 190 U. S. 197, 212, 23 S. Ct. 787, 47 L. Ed. 1016.

The comma after the word "unloaded" is not entitled to have any weight as evidence of the legislative intention as against the considerations supporting the extension of the qualifying effect of the words "by carelessness or negligence" to all claims referred to in the second clause. "Punctuation is a minor, and not a controlling element in interpretation, and courts will disregard the punctuation of a statute, or re-punctuate it, if need be, to give effect to what otherwise appears to be its purpose and true meaning." Chicago, M. & St. P. Ry. Co. v. Voelker, 129 F. 522, 527, 65 C. C. A. 226, 70 L. R. A. 264.

We hold that the second clause must be read as above indicated, that carelessness or negligence is an element in each case of loss, damage or injury included therein, and that, in such cases, carriers are not permitted to require notice of claim or filing of claim as a condition precedent to recovery. See Hailey v. Oregon Short Line R. Co. (D. C.) 253 F. 569.

No notice of claim having been given and no claim having been filed as required by the uniform express receipt, it was incumbent upon the respondent to show loss, damage or injury due to delay by carelessness or negligence of the company. The carload of eggs was delivered to the company at Louisville, February 23, and was delivered by the company to the consignee at New York, March 4. It was shown that the car was taken out of Louisville, February 23, on a train of the Pennsylvania Railroad Company, and that it should have gone to Pittsburgh without transfer. There was no other evidence in respect of the intended or actual movement of the car. There was evidence tending to show that the ordinary time of a passenger train on the Pennsylvania Railroad between Louisville and New York was 25 or 26 hours. But there was no evidence that such shipments usually moved or that this shipment could have moved on any train making that time, or to show the time usually made by trains upon which such shipments were or could be moved. There was no evidence to show what was the customary or usual time for the transportation and delivery of such shipments. The trial judge held that such reasonable time was not more than 30 hours. We think the evidence was not sufficient to sustain that finding or to show what was a reasonable time for such transportation and delivery. It follows that there was nothing to give rise to any inference or presumption that failure to deliver at destination within 30 hours was due to negligence or to support a finding that there was any loss or damage due to delay caused by carelessness or negligence of the company. The evidence of market value of such eggs in New York City was as follows: February 25th, 53 cents per dozen; February 26th, 52 to 53 cents; March 1st, 36 cents; March 2d, 35.5 to 36 cents; March 4th, 36.5 cents.

The eggs in question were sold March 4th—some for 35 cents, some for 35.5, and the rest for 36.5 per dozen. There was no evidence of market value at any other time. The court directed a verdict in favor of respondent for $3,396.26, the difference between the amount for which the eggs were sold March 4th and their value calculated at 53 cents per dozen, the price prevailing February 25th, with interest. The date when the eggs should have been delivered to consignee and the market value at that time were essential to respondent's case. In the absence of either, the amount of the loss, if any, cannot be determined. The judgment given cannot be sustained.

Reversed and remanded, for further proceedings not inconsistent with this opinion.

DAVIS, Director General, v. JOHN L. ROPER LUMBER CO.

(Supreme Court of the United States, 1925. 269 U. S. 158, 46 S. Ct. 28, 70 L. Ed. ——.)

Mr. Justice BUTLER delivered the opinion of the court.

There is here for review a judgment of the Supreme Court of Appeals of Virginia which affirmed a judgment of the court of law and chancery against petitioner for $1,046.88. 138 Va. 377, 122 S. E. 113. June 24, 1918, at New Bern, N. C., respondent delivered to petitioner, then operating the Norfolk Southern Railroad, a carload of scrap iron for transportation over that line and connecting lines to Clarksburg, W. Va. Petitioner issued a bill of lading, consigning the shipment to the order of respondent, "notify George Yampolsky at Clarksburg." It contained a clause requiring surrender of the bill of lading properly indorsed before delivery of the property, and provided that "claims for loss, damage or delay must be made in writing to the carrier * * * within six months after delivery of the property, or in case of failure to make delivery, then within six months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable."

The shipment arrived at Clarksburg, July 15, 1918, and on that day was delivered to Yampolsky without surrender of the bill of lading and without the knowledge of the respondent, who at all times has been its lawful holder. No claim was made by respondent until March 5, 1920.

The Act of Congress of March 4, 1915 (known as the first Cummins Amendment), c. 176, 38 Stat. 1196, 1197 (Comp. St. § 8604a), amending section 20 of the Act to Regulate Commerce, requires a common carrier, receiving property for transportation in interstate commerce, to issue a receipt or bill of lading therefor, and makes it liable to the holder for any loss, damage, or injury to such property, and contains these provisos:

"Provided further, that it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter

period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

There is presented the question whether this case is one in which the right of recovery may be made to depend upon the making of claim as required by the bill of lading. The provisos in section 20 have been recently considered by this court in Barrett v. Van Pelt, 268 U. S. 85, 45 S. Ct. 437, 69 L. Ed. 857. It was there pointed out that the purpose of the second proviso is to take some cases out of the general rule declared by the first proviso. And, in view of the inapt language and defective structure of the second, it was held that the word "damaged" should be read "damage," and that the comma after "unloaded" should be eliminated. It was also held that "carelessness or negligence" is an element in each case of loss, damage, or injury there named. The judgment now before us was given prior to that decision. The state court held that the damage resulting to respondent from the misdelivery occurred while the shipment was "in transit," within the meaning of the proviso, and that therefore the provision of the bill of lading requiring claim to be made was invalid. It said that "in transit" means at any time after the property has been received by the initial carrier and before delivery in accordance with the contract of carriage.

But that view cannot be sustained. The loss was due solely to misdelivery; that is "a failure to make delivery" in accordance with the bill of lading. Georgia, Fla. & Ala. Ry. v. Blish Co., 241 U. S. 190, 195, 36 S. Ct. 541, 60 L. Ed. 948. As construed by this court, the second proviso embraces three classes: (1) Loss, damage, or injury due to delay; (2) damage while being loaded or unloaded; (3) damage in transit. Clearly, misdelivery is not in the first or second class. And, unless it is in the third class, the proviso does not apply. The context shows that the phrase "in transit" was not intended to have the broad meaning attributed to it by the state court. In the proviso, claims on account of damage "while being loaded or unloaded" are separate and distinct from those for "damage in transit." The creation of the former class would be wholly unnecessary and inappropriate, if the latter is to be taken to include both classes. Loading precedes, and unloading follows, transit. In the ordinary and usual meaning of the word, "transit" ends before delivery at destination. Misdelivery is not mentioned in the proviso; and the language used is inconsistent with and negatives any intention to include claims for damages on account of misdelivery in the class defined as "damage in transit."

Respondent contends that under section 10 of the Bill of Lading Act, c. 415 (39 Stat. 538, 540 [Comp. St. § 8604ee]), it was not necessary

to comply with the requirement of the bill of lading. The point is without merit. That section provides: "Where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to any one having a right of property or possession in the goods. * * *"

The rule of liability so declared is not inconsistent with the second proviso in section 20, which relates merely to the enforcement of liability. The provisions of both acts are to be read together, and applied in harmony with the bill of lading. More than nineteen months elapsed before respondent made any claim. There is nothing in the statutory provisions relied on by respondent to excuse its failure to make claim within the time specified in the shipping contract.

Judgment reversed, and cause remanded, for further proceedings not inconsistent with this opinion.

CHESAPEAKE & O. RY. CO. v. A. F. THOMPSON MFG. CO.

(Supreme Court of the United States, 1926. 46 S. Ct. 319, 70 L. Ed. —.)

Mr. Justice STONE delivered the opinion of the court.

The respondent, a corporation, brought suit in the circuit court of Cabell county, W. Va., to recover from petitioner, a common carrier, for damage to an interstate shipment of goods. The case was twice tried. See Thompson Manufacturing Co. v. Railroad, 115 S. E. 877, 93 W. Va. 3. The second trial before a jury resulted in a judgment for the respondent, which was affirmed by the Supreme Court of Appeals of West Virginia, 123 S. E. 421, 99 W. Va. 670. This court granted certiorari, 45 S. Ct. 352, 267 U. S. 588, 69 L. Ed. 801; Judicial Code, § 237 (Comp. St. § 1215).

Petitioner supplied respondent, at its request, with two box cars for the transportation of a quantity of sheet iron gas stoves in carload lots from Huntington, W. Va., to Kansas City, Mo. The stoves were shipped by respondent in good condition on interstate bills of lading purporting to exempt the carrier from liability unless claims for damage "be made in writing to the carrier within four months after delivery of the property." Upon arrival many of the stoves were found to be damaged by rust and unsalable. Respondent brought the present suit more than four months after the delivery of the stoves, setting up in its amended declaration that the damage was caused by the negligent conduct of the petitioner. At the trial the respondent made no attempt to show compliance with the requirement of the bill of lading for written notice of its claim to the carrier, and relied wholly on proof of the delivery of the stoves to the carrier in good condition and the delivery by the carrier at destination in a damaged condition, to establish its right to recover. Petitioner proved that the cars supplied were in weather-tight condition, that after the goods were loaded on the cars

they were sealed at the point of shipment, and that they arrived at destination in the same weather-tight condition, with seals unbroken.

The case turns on the meaning and application, in the circumstances, of the last proviso of the so-called Cummins Amendment. Act of March 4, 1915, 38 Stat. 1196, 1197, c. 176, amending the Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 379, as amended by section 7 of the Act of June 29, 1906, c. 3591, 34 Stat. 584, 593 (Comp. St. §§ 8592, 8604a). The last two provisos of the act, as construed in Barrett v. Van Pelt, 45 S. Ct. 437, 268 U. S. 85, 69 L. Ed. 857, read as follows:

"Provided further, that it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded or damage in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

If respondent does not bring the case within the terms of the final proviso, its failure to give written notice of claim will bar it from recovery. See Georgia, Florida & Alabama Ry. Co. v. Blish Co., 36 S. Ct. 541, 241 U. S. 190, 60 L. Ed. 948; Barrett v. Van Pelt, supra; Davis v. Roper Lumber Co., 46 S. Ct. 28, 269 U. S. 158, 70 L. Ed. ——.

It was argued by petitioner in the state court, as it argues here, that, as respondent offered no direct evidence that the damage to the goods in transit was caused by negligence of petitioner, respondent did not show compliance with the requirements of the Cummins Amendment for relieving the shipper from the necessity of filing its claim in writing with the carrier. On the other hand, it is argued by the respondent that every carrier receiving goods for carriage in good condition, and returning them in bad condition, is conclusively presumed to have been negligent, and is liable for the damage resulting from its negligence, unless the injury was caused by the act of God, the public enemy, or the act of the shipper or the nature of the goods themselves; that, as the evidence and the verdict of the jury established that the damage was not due to any of these causes, the carrier's negligence was to be conclusively presumed, and no notice of claim was necessary under the provisions of the Cummins Amendment.

It is sometimes said that the basis of the carrier's liability for loss of goods or for their damage in transit is "presumed negligence." Hall & Long v. Railroad Companies, 13 Wall. 367, 372, 20 L. Ed. 594. But the so-called presumption is not a true presumption, since it cannot be rebutted, and the statement itself is only another way of stating the rule of substantive law that a carrier is liable for a failure to transport safely goods intrusted to its care, unless the loss or damage was due to one of the specified causes. See Railroad Co. v. Reeves, 10 Wall. 176,

189, 19 L. Ed. 909; Railroad Co. v. Lockwood, 7 Wall. 357, 376, 21 L. Ed. 627; Bank of Kentucky v. Adams Express Co., 93 U. S. 174, 181, 23 L. Ed. 872.

We do not consider that the phrase "carelessness or negligence" of the carrier, as used in the Cummins Amendment in exempting shippers from giving written notice of a claim for damage, has any reference to the conclusive "presumption" to which we have referred. If such were the meaning of the statute, every case of carrier's liability for damage in transit would be a case of presumed negligence, and proof of written notice of claim for damage required by the bill of lading would always be dispensed with, and the plain purpose of the amendment would be defeated. We think that by the use of the words "carelessness or negligence," it was intended to relieve the shipper from the necessity of making written proof of claim when, and only when, the damage was due to the carrier's actual negligent conduct, and that by carelessness or negligence is meant not a rule of liability without fault, but negligence in fact. See Barrett v. Van Pelt, supra.

There is no language in the statute from which a purpose may be inferred to vary or limit the common-law rules governing proof of negligence as a fact in issue, and the shipper may follow these rules when he seeks to show that no notice of claim was necessary.

The respondent therefore had the burden of proving the carrier's negligence as one of the facts essential to recovery. When he introduced evidence to show delivery of the shipment to the carrier in good condition and its delivery to the consignee in bad condition, the petitioner became subject to the rule applicable to all bailees, that such evidence makes out a prima facie case of negligence. Miles v. International Hotel Co., 124 N. E. 599, 289 Ill. 320; Miller v. Miloslowsky, 133 N. W. 357, 153 Iowa, 135; Dinsmore v. Abbott, 36 A. 621, 89 Me. 373; Railroad Co. v. Hughes, 47 So. 662, 94 Miss. 242, 246, 22 L. R. A. (N. S.) 975; Hildebrand v. Carroll, 82 N. W. 145, 106 Wis. 324, 80 Am. St. Rep. 29. The effect of the respondent's evidence was, we think, to make a prima facie case for the jury. See Sweeney v. Erving, 33 S. Ct. 416, 228 U. S. 233, 57 L. Ed. 815, Ann. Cas. 1914D, 905; Hanes v. Shapiro, 84 S. E. 33, 168 N. C. 34, 35; Sims v. Roy, 42 App. D. C. 496, 499. But, even if this "prima facie case" be regarded as sufficient, in the absence of rebutting evidence, to entitle the plaintiff to a verdict (Buswell v. Fuller, 36 A. 1059, 89 Me. 600, 602, 603; Cogdell v. Railroad, 44 S. E. 618, 132 N. C. 852), the trial court erred here in deciding the issue of negligence in favor of the plaintiff as a matter of law. For the petitioner introduced evidence of the condition of the cars from the time of shipment to the time of arrival, which persuasively tended to exclude the possibility of negligence.

The trial court properly submitted to the jury the question whether the damage was due to an act of God or the public enemy or to the inherent condition of the stoves, since upon the answer to it depended the liability of the carrier provided the shipper was entitled, under the

Cummins Amendment, to maintain suit without giving the stipulated notice. But the court erroneously instructed the jury that if they found that the damage was not due to these causes, they might return a verdict for the respondent, thus, in effect, resolving the issue of negligence in favor of the respondent.

The judgment must therefore be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

POSTAL TELEGRAPH-CABLE CO. v. WARREN-GODWIN LUMBER CO.

(Supreme Court of the United States, 1919. 251 U. S. 27, 40 S. Ct. 69, 64 L. Ed. 118.)

Mr. Chief Justice WHITE delivered the opinion of the court.

In Primrose v. Western Union Telegraph Company, 154 U. S. 1, 14 S. Ct. 1098, 38 L. Ed. 883, the court passed upon the validity of a contract made by a telegraph company with the sender of a message by which, in case the message was missent, the liability of the company was limited to a refunding of the price paid for sending it, unless, as a means of guarding against mistake, the repeating of the message from the office to which it was directed to the office of origin was secured by the payment of an additional sum. It was held that such a contract was not one exempting the company from liability for its negligence, but was merely a reasonable condition appropriately adjusting the charge for the service rendered to the duty and responsibility exacted for its performance. Such a contract was therefore decided to be valid and the right to recover for error in transmitting a message which was sent subject to it was accordingly limited.

In Western Union Telegraph Company v. Showers, 112 Miss. 411, 73 So. 276, the Supreme Court of that state was called upon to consider the validity of a contract by a telegraph company limiting its responsibility for missending an unrepeated message essentially like the contract which was considered and upheld in the Primrose Case. The court decided that as the Act of Congress of June 18, 1910, c. 309, 36 Stat. 539, 545, had operated to exert the power of Congress over telegraph companies as to their interstate business and contracts, Congress had taken possesion of the field and thus excluded state legislation and hence such a contract was valid and enforcible in accordance with the rule laid down in the Primrose Case. In holding this, however, the court pointed out that but for the act of Congress a different rule would apply, as under the state law such a contract was invalid because it was a stipulation by a carrier limiting its liability for its negligence.

In Dickerson v. Western Union Telegraph Company, 114 Miss. 115, 74 So. 779, the validity of a like contract by a telegraph company

for the sending of an unrepeated message once again arose for consideration. In passing upon it the court declared that the ruling previously made in the Showers Case, as to the operation of the act of Congress of 1910, was erroneous. Coming therefore anew to reconsider that subject, it was held that the act of Congress of 1910 had not extended the power of Congress over the rates of telegraph companies for interstate business and the contracts made by them as to such subject, and hence the Showers Case, in so far as it held to the contrary, was overruled. Thus removing the contract from the operation of the national law and bringing it under the state law, the court held that the contract was void and not susceptible of being enforced because it was a mere contract exempting the telegraph company from the consequences of its negligence.

The case before us involving the extent of the liability of the Telegraph Company for an unrepeated interstate message governed by a contract like those considered in the previous cases, was decided by a state circuit court after the decision in the Showers Case and before the overruling of that case by the Dickerson Case. Presumably therefore the court, because of the Showers decision upheld the validity of the contract and accordingly limited the recovery. The appeal which took the case to the court below, however, was there heard after the decision in the Dickerson Case. In view of that situation the court below in disposing of the case expressly declared that the only issue which was open was the correctness of the ruling in the Dickerson Case, limiting the operation and effect of the act of Congress of June 18, 1910. Disposing of that issue, the ruling in the Dickerson Case was reiterated and the contract, although it concerned the transmission of an interstate message, was declared not affected by the act of Congress and to be solely controlled by the state law and to be therefore void. That subject, presents then, the only federal question, and indeed the only question in the case.

For the sake of brevity, we do not stop to review the cases which perturbed the mind of the court below in the Dickerson Case as to the correctness of its ruling in the Showers Case (Pennsylvania R. R. Co. v. Hughes, 191 U. S. 477, 24 S. Ct. 132, 48 L. Ed. 268; Western Union Telegraph Company v. Crovo, 220 U. S. 346, 31 S. Ct. 399, 55 L. Ed. 498; Adams Express Company v. Croninger, 226 U. S. 491, 33 S. Ct. 148, 57 L. Ed. 314, 44 L. R. A. [N. S.] 257; Western Union Telegraph Company v. Brown, 234 U. S. 542, 34 S. Ct. 955, 58 L. Ed. 1457), but content ourselves with saying that we are of opinion that the effect which was given to them was a mistaken one. We come at once therefore to state briefly the reasons why we conclude that the court below mistakenly limited the act of Congress of 1910 and why therefore its judgment was erroneous.

In the first place, as it is apparent on the face of the act of 1910 that it was intended to control telegraph companies by the act to regulate commerce, we think it clear that the act of 1910 was designed to and

did subject such companies as to their interstate business to the rule of equality and uniformity of rates which it was manifestly the dominant purpose of the act to regulate commerce to establish, a purpose which would be wholly destroyed if, as held by the court below, the validity of contracts made by telegraph companies as to their interstate commerce business continued to be subjected to the control of divergent and it may be conflicting local laws.

In the second place, as in terms the act empowered telegraph companies to establish reasonable rates, subject to the control which the act to regulate commerce exerted, it follows that the power thus given, limited of course by such control, carried with it the primary authority to provide a rate for unrepeated telegrams and the right to fix a reasonable limitation of responsibility where such rate was charged, since as pointed out in the Primrose Case the right to contract on such subject was embraced within the grant of the primary rate-making power.

In the third place, as the act expressly provided that the telegraph, telephone or cable messages to which it related may be "classified into day, night, repeated, unrepeated, letter, commercial, press, government and such other classes as are just and reasonable and different rates may be charged for the different classes of messages," it would seem unmistakably to draw under the federal control the very power which the construction given below to the act necessarily excluded from such control. Indeed, the conclusive force of this view is made additionally cogent when it is considered that as pointed out by the Interstate Commerce Commission (Clay County Produce Company v. Western Union Telegraph Company, 44 Interst. Com. R. 670), from the very inception of the telegraph business, or at least for a period of 40 years before 1910, the unrepeated message was one sent under a limited rate and subject to a limited responsibility of the character of the one here in contest.

But we need pursue the subject no further, since, if not technically authoritatively controlled, it is in reason persuasively settled by the decision of the Interstate Commerce Commission in dealing in the case above cited with the very question here under consideration as the result of the power conferred by the act of Congress of 1910; by the careful opinion of the Circuit Court of Appeals of the Eighth Circuit dealing with the same subject (Gardiner v. Western Union Telegraph Company, 231 F. 405, 145 C. C. A. 399); and by the numerous and conclusive opinions of state courts of last resort which in considering the act of 1910 from various points of view reached the conclusion that that act was an exertion by Congress of its authority to bring under federal control the interstate business of telegraph companies and therefore was an occupation of the field by Congress which excluded state action (Western Union Tel. Co. v. Bank of Spencer, 53 Okl. 398, 156 P. 1175; Haskell Implement Co. v. Postal Tel.-Cable Co., 114 Me. 277, 96 A. 219; Western Union Tel. Co. v. Bilisoly, 116 Va. 562, 82 S. E. 91; Bailey v. Western Union Tel. Co., 97 Kan. 619, 156

P. 716; Durre v. Western Tel. Co., 165 Wis. 190, 161 N. W. 755; Western Union Tel. Co. v. Schade, 137 Tenn. 214, 192 S. W. 924; Meadows v. Postal Tel.-Cable Co., 173 N. C. 240, 91 S. E. 1009; Norris v. Western Union Tel. Co., 174 N. C. 92, 93 S. E. 465; Bateman v. Western Union Tel. Co., 174 N. C. 97, 93 S. E. 467, L. R. A. 1918A, 803; Western Union Tel. Co. v. Lee, 174 Ky. 210, 192 S. W. 70, Ann. Cas. 1918C, 1026; Western Union Tel. Co. v. Foster, 224 Mass. 365, 113 N. E. 192; Western Union Tel. Co. v. Hawkins, 14 Ala. App. 295, 70 So. 12).

It is indeed true that several state courts of last resort have expressed conclusions concerning the act of Congress applied by the court below in this case. But we do not stop to review or refer to them as we are of opinion that the error in the reasoning upon which they proceed is pointed out by what we have said and by the authorities to which we have just referred.

It follows that the judgment below was erroneous, and it must be reversed, and the cause remanded for further proceedings, not inconsistent with this opinion.

And it is so ordered.[10]

Mr. Justice PITNEY dissents.

WESTERN UNION TELEGRAPH CO. v. ESTEVE BROS. & CO.

(Supreme Court of the United States, 1921. 256 U. S. 566, 41 S. Ct. 584, 65 L. Ed. 1094.)

Mr. Justice BRANDEIS delivered the opinion of the court.

In September, 1917, the Western Union Telegraph Company delivered to Esteve Bros. & Co., at New Orleans, La., an unrepeated cable message from the latter's main office at Barcelona, Spain, directing a sale for future delivery of 2,000 bales of cotton. The message actually sent had directed the sale of 200 bales. The error in transmission resulted in a loss to Esteve Bros. & Co. of $31,095. To recover compensation for this loss they sued the Western Union in a state court of Louisiana. The case was removed to the federal District Court, and there was tried by jury upon these additional stipulated facts:

The message was sent over lines of the Spanish Government Telegraph from Barcelona to Paris and thence over lines of the French government to Havre. There it was delivered to the Western Union, transmitted by its cable to New York City, and thence over its land lines to New Orleans. The error in transmission occurred on these land lines. The charge of $6.60, paid at Barcelona for transmitting

10 For a masterful argument against the conclusion reached in the principal case, see Bowman & Bull Co. v. Postal Telegraph-Cable Co., 290 Ill. 155, 165–168, 124 N. E. 851 (1919). See, also, 18 Colum. Law Rev. 612.

the message represented the sum of the local rates on the several connecting lines. The Western Union's share was $4.65, and of this $3.75 was apportioned to the cable system and 90 cents to the land lines. This Western Union rate was established by its tariff of telegraph and cable rates, in force since some time prior to June 18, 1910. Under the act of that date (chapter 309, 36 Stat. 544 [Comp. St. § 8563]), making telegraph and cable companies subject to the Act to Regulate Commerce, this tariff had been filed with the Interstate Commerce Commission in May, 1916, by its permission and pursuant to an appropriate resolution of the company. The tariff so filed embodied the long used classification of messages, rules and regulations, including the provision that the company "shall not be liable for mistakes * * * in transmission * * * of any unrepeated message, beyond the amount of that portion of the tolls which shall accrue to it." The plaintiffs did not in fact assent to this limitation of liability. They did not, in sending the message at Barcelona, use a blank containing the provisions so limiting liability. They did not have actual knowledge of the resolution of the company or of the filing of the tariffs with the Interstate Commerce Commission.

The plaintiffs contended at the trial that in view of the above facts they were entitled to a verdict for the full amount of their loss. The company contended that, since the message had not been repeated, the verdict should be limited to $4.65, the amount received by it as tolls. A verdict was directed for $31,095, with interest; judgment thereon was affirmed by the United States Circuit Court of Appeals for the Fifth Circuit (268 F. 22), and a petition for writ of certiorari was granted (254 U. S. 624, 41 S. Ct. 13, 65 L. Ed. 444). The sole question presented for our decision is the amount of damages recoverable.

For more than 50 years prior to the transaction here in suit the Western Union had maintained these two classes of rates for general cable and telegraph service. The usual or basic rate was for service practically at the sender's risk; liability being limited to the amount of the toll collected. Another special rate entitled the sender to have the message repeated back to the point of origin and rendered the company liable in case of mistake or nondelivery up to fifty times the amount of the extra charge. The extra charge for this additional service was for telegrams one-half and for cables one-quarter of the basic rate. In Primrose v. Western Union Telegraph Co., 154 U. S. 1, 14 S. Ct. 1098, 38 L. Ed. 883, decided in 1894, this classification of rates and the limitations upon the company's liability were declared by this court to be reasonable and valid, in the absence of willful misconduct or gross negligence. The limitation upon the company's common-law liability was held to be in the nature of contract, and this liability, unlike that of a common carrier, was not an insurer's. It was merely for the damage flowing from failure to use due care in transmission. Primrose v. Western Union Telegraph Co., supra,

154 U. S. 14, 14 S. Ct. 1098, 38 L. Ed. 883. Since the limitation of liability was in the nature of contract, the provision had to be brought home to the sender of a message in order to be legally binding upon him. Assent by the sender was ordinarily established, if the message was written upon one of the company's blanks which set forth the limitation of liability. Primrose v. Western Union Telegraph Co., supra, 154 U. S. 25, 14 S. Ct. 1098, 38 L. Ed. 883. Compare Cau v. Texas & Pacific Ry. Co., 194 U. S. 427, 431, 24 S. Ct. 663, 48 L. Ed. 1053. Whether, in view of long-established practice, the mere sending of a message, although not written on such a blank, imported assent to the usual terms of the rate, involved, then, an issue of fact. See New Jersey Navigation Co. v. Merchant's Bank, 6 How. 344, 383, 12 L. Ed. 465. The question presented for our decision is whether, since the amendment of June 18, 1910, to the Act to Regulate Commerce, the sender is, without assent in fact, bound as matter of law by the provision limiting liability, because it is a part of the lawfully established rate.

The Act of June 18, 1910, c. 309, § 7, 36 Stat. 539, 544 (Comp. St. § 8563), broadened the scope of the Act to Regulate Commerce to include "telegraph, telephone and cable companies (whether wire or wireless) engaged in sending messages from [a] state * * * to any foreign country." And whatever may have been the legal incidents of transmitting the message from Barcelona to Havre under Spanish and French law, the Western Union, in sending the message over its own lines from Havre to New Orleans, was governed by the provisions of that act. Galveston, H. & S. A. Ry. Co. v. Woodbury, 254 U. S. 357, 41 S. Ct. 114, 65 L. Ed. 301. In the third paragraph of section 1 of the amended act Congress provided that messages might be "classified into day, night, repeated, unrepeated, letter, commercial, press, government and such other classes as are just and reasonable, and different rate [might] be charged for the different classes of messages." Acting, in May, 1916, under the authority of that provision, the Western Union by appropriate action approved the tariff involved in the present case, and by permission of the Interstate Commerce Commission filed with it the tariff, including the provisions here in question. The company was not required so to do by the terms of the act or by any order of the Commission. Compare 25th Annual Report I. C. C. (1911) pp. 5, 6. But the rate, long before established, then formally adopted and filed, was thereafter the only lawful rate for an unrepeated message, and the limitation of liability became the lawful condition upon which it was sent. Postal Tel.-Cable Co. v. Warren-Godwin, 251 U. S. 27, 30, 40 S. Ct. 69, 64 L. Ed. 118; Clay County Produce Co. v. Western Union Telegraph Co., 44 Interst. Com. Com'n R. 670, 674.

The lawful rate having been established, the company was by the provisions of section 3 of the Act to Regulate Commerce prohibited from granting to any one an undue preference or advantage over

the public generally. For, as stated in Postal Tel.-Cable Co. v. Warren-Godwin Co., supra, 251 U. S. 30, 40 S. Ct. 70, 64 L. Ed. 118, the "act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates." If the general public upon paying the rate for an unrepeated message accepted substantially the risk of error involved in transmitting the message, the company could not, without granting an undue preference or advantage extend different treatment to the plaintiff here. The limitation of liability was an inherent part of the rate. The company could no more depart from it than it could depart from the amount charged for the service rendered.

The act of 1910 introduced a new principle into the legal relations of the telegraph companies with their patrons which dominated and modified the principles previously governing them. Before the act the companies had a common law liability from which they might or might not extricate themselves according to views of policy prevailing in the several states. Thereafter, for all messages sent in interstate or foreign commerce, the outstanding consideration became that of uniformity and equality of rates. Uniformity demanded that the rate represent the whole duty and the whole liability of the company. It could not be varied by agreement; still less could it be varied by lack of agreement. The rate became, not as before a matter of contract by which a legal liability could be modified, but a matter of law by which a uniform liability was imposed. Assent to the terms of the rate was rendered immaterial, because when the rate is used, dissent is without effect.

This principle was established in cases involving the limitation upon a carrier's liability for baggage by Boston & Maine Railroad v. Hooker, 233 U. S. 97, 34 S. Ct. 526, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915B, 593, and Galveston, H. & S. A. Ry. Co. v. Woodbury, 254 U. S. 357, 41 S. Ct. 114, 65 L. Ed. 301, decided by this court December 13, 1920. In the former case it was said: "If the charges filed were unreasonable, the only attack which could be made upon such regulation [limiting liability] would be by proceedings contesting their reasonableness before the Interstate Commerce Commission. While they were in force they were equally binding upon the railroad company and all passengers whose baggage was transported by carriers in interstate commerce."

So here the limitation of liability attached to the unrepeated cable rate is binding upon all who send messages to or from foreign countries until it is set aside as unreasonable by the Commission.

It is strongly argued that the rule is not applicable to the situation before us, because of the difference in the provisions of law which govern the establishment of railroad and of telegraph rates. The railroad rate is established, and can only be established by filing the tariff with the Commission. Telegraph companies may initiate rates without filing tariffs with the Commission. Clay County Produce Co.

v. Western Union Telegraph Co., supra. Plaintiffs insist that it is the filing and subsequent publication of the railroad rate which gives it the force of law and requires the shipper to take notice of it. But the contention, by dwelling unduly upon the procedural features of the act, would defeat the end which Congress had in view. Both railroad and telegraph-cable rates are initiated by the carrier. It is true that a railroad rate does not have the force of law, unless it is filed with the Commission. But it is not true that out of the filing of the rate grows the rule of law by which the terms of this lawful rate conclude the passenger. The rule does not rest upon the fiction of constructive notice. It flows from the requirement of equality and uniformity of rates laid down in section 3 of the Act to Regulate Commerce (Comp. St. § 8565). Since any deviation from the lawful rate would involve either an undue preference or an unjust discrimination, a rate lawfully established must apply equally to all, whether there is knowledge of it or not.

Congress apparently concluded, in the light of discrimination theretofore practiced by railroads among shippers and localities, that in transportation by rail equality could be secured only by provisions involving the utmost definiteness and constant official supervision. Accordingly by section 6 (Comp. St. § 8569) it forbade a carrier of goods from engaging in transportation unless its rates had been filed with the Commission; and it prohibited, under heavy penalties, departure in any way from the terms of those rates when filed. In the case of telegraph and cable companies Congress appears to have considered that such stringent provisions were not required to secure the end in view. It did not make filing with the Commission a condition precedent to the existence of a lawful telegraph and cable rate. When, therefore, the Western Union initiated and established this reasonable rate the principle of equality and uniformity laid down in section 3 required that it should have exactly the same force and effect as the rate initiated by a rail carrier and filed according to the provisions of section 6.

It was suggested that the attempted limitation of liability must fail under the rule recently applied in Union Pacific Railroad Co. v. Burke, 255 U. S. 317, 41 S. Ct. 283, 65 L. Ed. 656, decided February 28, 1921, because both the alternative rates offered in the Western Union tariff for cable messages were for limited liability, and because, therefore, no offer was made to the sender of a rate under which the company would assume full liability for all losses suffered through its negligence. It is by no means clear that the rule of the Burke Case—established for common carriers of goods—should be applied to telegraph and cable companies. See the Primrose Case, supra, 154 U. S. 14, 14 S. Ct. 1098, 38 L. Ed. 883. In any event, it is not applicable here. The Western Union did not, as in the case of telegrams, offer to send cable messages upon a special valuation to be made by the sender and paid for by an extra charge "based

upon such value equal to one-tenth of 1 per cent. thereof." But it offered alternative rates for repeated and for unrepeated cable messages. This long-established classification was expressly recognized as just and reasonable for cable as well as for telegraph messages in the amendment made by the Act of June 18, 1910, to section 1 of the Act to Regulate Commerce. The provision in the terms offered by the company is:

"To guard against mistakes or delays the sender of a cable message should order it repeated, that is, telegraphed back to the originating office for comparison. For this one quarter of the unrepeated message rate is charged in addition. Unless indicated on its face this is an unrepeated message and paid for as such.

"* * * This company shall not be liable for mistakes or delays in transmission or delivery * * * of any unrepeated message, beyond the amount of that portion of the tolls which shall accrue to this company, * * * [nor] of an repeated message, beyond fifty times the extra sum received by this company from the sender for repeating such message over its own lines. * * *"

The repeated rate, offering greater accuracy and greater liability in case of error, was open to anyone who wished to pay the extra amount for extra security. Whether the limitation of liability prescribed for the repeated message would be valid as against a sender who had endeavored, by having the message repeated, to secure the greatest care on the part of the company, we have no occasion to decide, because it is not raised by the facts before us. It is enough to sustain the limitation of liability attached to the unrepeated rate that another special rate was offered for messages of value and importance, and not availed of. The fact that the alternative rate had tied to it a provision which, if tested, might be found to be void, is not material in a case where no effort was made to take advantage of it.

Reversed.

Mr. Justice PITNEY and Mr. Justice CLARKE dissent.

WESTERN UNION TELEGRAPH CO. v. CZIZEK.

(Supreme Court of the United States, 1924. 264 U. S. 281, 44 S. Ct. 328, 68 L. Ed. 682.)

Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit against the Telegraph Company for failure to forward and deliver to the plaintiff a message from one Jones, found by the Court below to have been acting as agent for the plaintiff in the matter. The District Court found for the defendant, but the judgment was reversed by the Circuit Court of Appeals, 272 F. 223, and at a second trial, in deference to the Circuit Court of Appeals, a judgment was entered for the plaintiff, which was affirmed, 286 F. 478. Certiorari granted. 262 U. S. 739, 43 S. Ct. 700, 67 L. Ed. 1208.

The plaintiff owned fifty shares of stock in the Idaho National Bank at Boise, Idaho. Miller, vice president of the bank, was buying the stock with a view to a merger. He talked with the plaintiff and told him that he would buy his stock and that they would have no difficulty in agreeing on the price. The plaintiff told this to Jones, an attorney at Boise, who owned fifteen shares, asked Jones to act for him, saying that they would sell their stock together, and told Miller that Jones would represent him. Later Miller called on Jones and at Miller's request Jones, on November 30, 1917, wrote on a Western Union form—directing the Company to send it "subject to the terms on back hereof," the following telegram addressed to the plaintiff at 5767 Shafter Avenue, Oakland, California, where the plaintiff lived:

"Miller advises Idaho National sold to Pacific offers me ninety dollars per share otherwise wait year and chances of liquidation says if fails to get two thirds stock liquidation will follow Will you take ninety dollars per share for yours I am inclined to accept offer for mine Answer."

The form had been filed with the Interstate Commerce Commission and the Commission had approved the provisions and rates that it set forth. Among the terms on the back of the form were the following:

"To guard against mistakes or delays, the sender * * * should order it *repeated,* that is, telegraphed back to the originating office for comparison," an additional half rate being charged. "Unless otherwise indicated on its face, *This is an unrepeated telegram and paid for as such,* in consideration whereof it is agreed * * * 1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any *unrepeated* telegram, beyond the amount received for sending the same. * * * 2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the nondelivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of *fifty dollars,* at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof."

This telegram was an unrepeated message of the class known as night letter, and was not specially valued or paid for upon a value in excess of $50. It was the duty of the receiving clerk, Margaret Brown, to indorse her initials, the filing time and the amount of toll received, and to place the message on the sending hook for transmission. By inadvertence, although a competent clerk, she put it in a file of earlier messages instead of upon the hook, and it was not sent. The next day Jones's son inquired at the telegraph office for an answer and being told that there was none, asked if they had sent the telegram and was

answered yes. On December 3 he asked again and was told that the plaintiff had received the message. Miller was ready and willing to buy the stock until December 5, 1917, and the plaintiff testified that he would have sold if he had received the telegram. Later the stock became worthless. The District Court found that there was no gross negligence but the Circuit Court of Appeals distinguished between a failure to take the first step toward transmission and some later neglect, held that the failure was not and as a matter of public policy could not be within the protection of the terms that we have stated and held the company liable for $4,500 with interest at seven per cent. from June 18, 1918, on which day the plaintiff made a demand.

The plaintiff, the respondent here, does not deny that he is bound by the terms that we have recited. That was assumed below and is established law. Western Union Telegraph Co. v. Esteve, 256 U. S. 566, 41 S. Ct. 584, 65 L. Ed. 1094. Those terms apply as definitely to a nondelivery in consequence of a neglect or oversight at the first office as at any other. The moment that the message is received the contract attaches along with the responsibility, and the transit begins. We can perceive no legal distinction between that moment and the next when the message is handed to a transmitting clerk, or that on which a copy is given to a boy at the further end. The hand that holds the paper technically is that of the Company, but no more at the beginning than at the end, and as in fact it is that of servants, reasonable self-protection is allowed to the master against their neglects. One such self-protection sanctioned by the decisions is a valuation of the message, with liberty to the sender to fix a higher value on paying more for it. Adams Express Co. v. Croninger, 226 U. S. 491, 33 S. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257. The plaintiff finds no difficulty in valuing the message now. It was at least equally possible to value it when it was sent. See Western Union Telegraph Co. v. Esteve, 256 U. S. 566, 574, 41 S. Ct. 584, 65 L. Ed. 1094; Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co., 251 U. S. 27, 40 S. Ct. 69, 64 L. Ed. 118.

When the message is valued it may be doubted whether the valuation can be affected by the intensity of the vituperative epithet applied to an admitted fault. Kirsch v. Postal Telegraph Cable Co., 100 Kan. 250, 252, 264 P. 267. At all events something more would have to be shown than is proved here to take the case out of the general rule. The act of the receiving clerk cannot reasonably be supposed to have been more than a momentary inadvertence. It was not a wilful wrong. The answers to the inquiries were probably the natural consequence of the first error, and the second answer probably was too late to have had any effect upon the plaintiff's position. See Primrose v. Western Union Telegraph Co., 154 U. S. 1, 15, 14 S. Ct. 1098, 38 L. Ed. 883. With regard to the amount of the valuation, if it is too low now, Unrepeated Message Case, 61 Interst. Com. Com'n R. 541, it was reasonable in 1917, Primrose v. Western Union Telegraph

Co., 154 U. S. 1, 15, 14 S. Ct. 1098, 38 L. Ed. 883; Unrepeated Message Case, 44 Interst. Com. Com'n R. 670. Whatever effect may be given to the judgment of the Commission in the later case, it was not intended to be retroactive. The rules prescribed by the Commission were to take effect on July 13, 1921.

We have not adverted to the first clause of the exemptions, limiting liability to the amount received for sending the message. Obviously this has a narrower scope than the valuation clause and we should hesitate to hold that it exonerated the defendant in this case. Unrepeated Message Case, 61 Interst. Com. Com'n R. 541.

Another clause not mentioned as yet reads: "The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the Company for transmission."

This could not be held to apply literally to a case where through the fault of the Company the plaintiff did not know of the message until the sixty days had passed. It might be held to give the measure of a reasonable time for presenting the claim after the fact was known, in the absence of anything more. But here the plaintiff called on Hackett, the General Manager at Boise, about February 14, 1918, as soon as he knew the facts. Directly after, he received a letter from Hackett regretting the occurrence and enclosing the amount paid by the plaintiff as toll. Three days later the plaintiff returned the check by letter saying "an acceptance of this check on my part might be construed as a settlement of this matter," so that the defendant then had written notice that a claim was made. There was further communication and finally on June 18 the plaintiff made a formal written demand. We should be unwilling to decide that the action was barred by this clause. But we are of opinion that his claim is limited to fifty dollars for the reasons given above.

Judgment reversed.

Mr. Justice McKENNA dissents.

CHICAGO, R. I. & P. RY. CO. v. MAUCHER.

(Supreme Court of the United States, 1919. 248 U. S. 359, 39 S. Ct. 108, 63 L. Ed. 294.)

Mr. Justice BRANDEIS delivered the opinion of the court.

Barnum & Bailey, who owned rolling stock adapted to carrying their circus equipment and personnel, made, in 1913, a special contract with the Chicago, Rock Island & Pacific Railway Company concerning transportation on its lines. The railway ageed, for a sum fixed, to give the right to use its tracks and locomotives, fully manned and supplied, to haul the circus trains. Barnum & Bailey agreed, among other things, that the railway was not acting therein as a common car-

rier; that it should not be liable for any injury, though arising from negligence, either to their own person or property, or to that of any other of their employés; and that they would indemnify the railway against any such injury.

While the circus train was being moved in Nebraska, from Lincoln, to Atlantic, Iowa, it was crashed into by one of the railway's regular passenger trains, and Maucher, an employé of the circus was injured. He had, by his contract of employment, agreed to release all railroad companies from any claim for injuries suffered while traveling with the circus on their lines; but he brought, in a state court of Nebraska, an action against the railway for damages, alleging that he had been injured by its negligence. The railway defended on the ground that its contract with Barnum & Bailey, and thus with the plaintiff, operated to release it from all liability; that, since the contract related to a movement in interstate commerce, its validity was to be determined by the federal law; and that by the federal law the contracts were valid, although undertaking to release the railway from liability, since it was not acting as common carrier. Santa Fé, Prescott & Phœnix Railway Co. v. Grant Bros. Construction Co., 228 U. S. 177, 33 S. Ct. 474, 57 L. Ed. 787. The trial court held that the liability was to be determined by the law of Nebraska, and entered judgment for plaintiff, which was affirmed by the Supreme Court of the state. Maucher v. Chicago, R. I. & P. R. Co., 100 Neb. 237, 159 N. W. 422. The case came here on writ of error under section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156 [Comp. St. § 1214]).

The railway admits that prior to the enactment of the Carmack Amendment (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 584, 595 [Comp. St. §§ 8604a, 8604aa]) Congress had not dealt with the right of carriers to limit by contract their liability for injuries occurring in interstate transportation, and that consequently the states were free to establish their own laws and policies and apply them to such contracts. Pennsylvania R. R. Co. v. Hughes, 191 U. S. 477, 24 S. Ct. 132, 48 L. Ed. 268. But it contends that this power of the states were superseded by the Carmack Amendment, since that amendment dealt with the power of carriers to contract in respect to such liability (Adams Express Co. v. Croninger, 226 U. S. 491, 33 S. Ct. 148, 57 L. Ed. 314, 44 L. R. A. [N. S.] 257; Boston & Maine Railroad v. Hooker, 233 U. S. 97, 34 S. Ct. 526, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593); that it was the intention of Congress to deal with the whole subject; and that the rights of plaintiff in respect to personal injuries are governed by the federal law. But the Carmack Amendment deals only with the shipment of property. Its language is so clear as to leave no ground for the contention that Congress intended to deal with the transportation of persons. Furthermore plaintiff was not even a passenger on the railway. His claim rests not upon a contract of carriage, but upon the general right of

a human being not to be injured by the negligence of another. Compare Southern Pacific Co. v. Schuyler, 227 U. S. 601, 613, 33 S. Ct. 277, 57 L. Ed. 662, 43 L. R. A. (N. S.) 901.

The case presents no substantial federal question. The writ of error is dismissed.

KANSAS CITY SOUTHERN RY. CO. v. VAN ZANT.

(Supreme Court of the United States, 1923. 260 U. S. 459, 43 S. Ct. 176, 67 L. Ed. 348.)

Mr. Justice McKENNA delivered the opinion of the court.

The case presents the effect of a condition in a free pass issued by petitioner to respondent and used by her in transportation in interstate commerce—whether determined by the provisions of section 1 of the Hepburn Act (34 Stat. 584 [Comp. St. § 8563]) or by the laws of Kansas and Missouri.

There is practically no dispute about the facts. The pass was authoritatively and gratuitously issued and she sustained injuries in Missouri while using it in an interstate journey. This injury she alleged and prayed judgment against the railway company in the sum of $25,000.

The railway company opposed the pass to the action. It contained the following condition: "The person accepting and using it, thereby assumes all risk of accident and damage to person and baggage."

The company averred that it was an interstate carrier by rail and issued the pass under article 5 of the federal law, known as the Interstate Commerce Act (24 Stat. 379), and it was to be "interpreted and controlled in its effect and operation by decisions of the federal courts" construing the act.

To the defense respondent replied that at the time of receiving the pass she resided in Kansas, and that in accepting it "she did not and could not assume the risk of accident or damage to her person and baggage, caused by the negligence" of the company, and that the condition upon the pass expressing such effect was void under the provisions of article 3, c. 98, of the General Statutes of the State of Kansas of 1915, relating to railroads and other carriers, and that under the statutes and the common law of Kansas the condition was against public policy.

She further pleaded that under the laws of Missouri the condition was also against public policy and void, and that the action was not, and is not, brought "upon any federal statute or under any federal law, but upon the common-law liability in force in Missouri, and that the action was, and is, brought in the circuit court of Jasper county, Mo., under the laws of the state of Missouri," and that the company's liability to her was to be determined by the laws of that state.

The trial court took that view of the determining law, took and expressed the view that the condition upon the pass was void under

the laws and public policy of both states, and ruled that the condition upon it constituted no defense to the action and excluded it from the case. Declarations of law recognizing the relevancy and controlling effect of the condition were refused.

The court thereupon found for respondent (plaintiff) and fixed her damages at $8,000—that amount having been stipulated as representing her injury. Judgment was entered for that amount and was affirmed by the Supreme Court of the state.

The Supreme Court discussed at some length the Hepburn Act, the extent of its regulation, and what it permitted to state powers or excluded from them, and said, adopting the language of the railroad commissioner of the state:

"Our conclusion is that Congress has not legislated on the subject of the rights and liabilities of the parties in cases of interstate carriage of passengers under free passes, not coming within the prohibition of the Hepburn Act, or respecting the validity of stipulations or conditions annexed to such passes exempting the carrier from liability, and that therefore these matters remain the subject of regulation by the several states."

The comment concedes the supremacy of federal control, and leaves only the inquiry: Has control been exerted in the Hepburn Act?

The act was passed June 29, 1906, and was an amendment to the Interstate Commerce Act of 1887. It was, as the act it amended was, a regulation of carriers in interstate commerce, and it provided that no common carrier subject to its provisions "shall, after January 1, 1907, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families. * * *" And a carrier violating the act is subject to a penalty, and any person not of those excepted, who uses the pass, is also subject to a penalty.

The provision for passes, with its sanction in penalties, is a regulation of interstate commerce, to the completion of which the determination of the effect of the passes is necessary. We think, therefore, free passes in their entirety are taken charge of, not only their permission and use, but the limitations and conditions upon their use; or to put it another way, and to specialize, the relation of their users to the railroad which issued them, the fact and measure of responsibility the railroad incurs by their issue, and the extent of the right the person to whom issued acquires, are taken charge of. And that responsibility and those rights, this court has decided, the railroad company can control by conditions in the passes. Antecedently to the passage of the Hepburn Act, we decided that a passenger who accepts a free pass may exempt a carrier from responsibility for negligence, and no public policy is violated thereby. Northern Pacific Railway Co. v. Adams, 192 U. S. 440, 24 S. Ct. 408, 48 L. Ed. 513; Boering v. Chesapeake Beach Railway Co., 193 U. S. 442, 24 S. Ct. 515, 48 L. Ed. 742.

Those cases were considered and applied as giving validity to the stipulations of passes issued under the act in Charleston & Western Carolina Railway Co. v. Thompson, 234 U. S. 576, 34 S. Ct. 964, 58 L. Ed. 1476, according thereby freedom of transportation to the possessor of a pass, and giving assurance to the railroad company that its gratuity will not be given the consequences of compensated right and its incident obligations, and be a means of exacting from the company indefinite damages. In this case the prayer was for $25,000; the recovery was for $8,000. Circumstances might have made it the larger sum; and this, it is the contention and decision, is the determination of state laws which could neither permit nor forbid the gift. We cannot assent. The pass proceeded from the federal act; it is controlled necessarily in its incidents and consequences by the federal act, to the exclusion of state laws and state policies, and such is the effect of the cited cases.

Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion.[11]

WESTERN UNION TELEGRAPH CO. v. SPEIGHT.

(Supreme Court of the United States, 1920. 254 U. S. 17, 41 S. Ct. 11, 65 L. Ed. 104.)

Mr. Justice HOLMES delivered the opinion of the court.

This is a suit brought in a state court by the respondent against the petitioner, the Telegraph Company, to recover for mental suffering caused by a mistake in delivering a telegraphic message. The message handed to the defendant was: "Father died this morning. Funeral tomorrow, 10:10 a. m.," and was dated January 24. As delivered to the plaintiff on January 24, it was dated January 23, and thus caused her to fail to attend the funeral which otherwise she would have done. The message was from Greenville, North Carolina, to Rosemary in the same state, and was transmitted from Greenville through Richmond, Virginia, and Norfolk, to Roanoke Rapids, the delivery point for Rosemary. This seems to have been the route ordinarily used by the company for years, and the company defends

11 The decision in the principal case was based upon the provisions of section 1 of the Interstate Commerce Act (U. S. Comp. St. § 8563), regulating the issuance of free passes. In Chicago, R. I. & P. Ry. Co. v. Maucher, 248 U. S. 359, 35 S. Ct. 108, 63 L. Ed. 294 (1919), the Supreme Court stated that the Carmack Amendment deals only with the shipment of property. Does it follow, in view of the decision in Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 24 S. Ct. 132, 48 L. Ed. 268 (1903), that, although the liability of carriers to interstate passengers riding on free passes is governed by federal law, the states are still free to apply their own rules in determining the liability of carriers to interstate passengers for hire? For an excellent discussion of the application of federal law to contracts limiting liability of interstate carriage, see note, 23 Colum. Law Rev. 576.

on the ground that the message was sent in interstate commerce, and that therefore a suit could not be maintained for mental suffering alone. Southern Express Co. v. Byers, 240 U. S. 612, 36 S. Ct. 410, 60 L. Ed. 825, L. R. A. 1917A, 197. The jury found that the message was sent out of North Carolina into Virginia for the purpose of fraudulently evading liability under the laws of North Carolina and gave the plaintiff a verdict. The presiding judge then set the verdict aside "as a matter of law" and ordered a nonsuit. But on appeal the Supreme Court of the state set aside the nonsuit and directed that a judgment be entered on the verdict.

We are of opinion that the judge presiding at the trial was right and that the Supreme Court was wrong. Even if there had been any duty on the part of the Telegraph Company to confine the transmission to North Carolina, it did not do so. The transmission of a message through two states is interstate commerce as a matter of fact. Hanley v. Kansas City Southern Ry. Co., 187 U. S. 617, 23 S. Ct. 214, 47 L. Ed. 333. The fact must be tested by the actual transaction. Kirmeyer v. Kansas, 236 U. S. 568, 572, 35 S. Ct. 419, 59 L. Ed. 721.

As the line was arranged and had been arranged for many years, ever since Roanoke Rapids had been an independent office, Richmond was the relay point from Greenville to the latter place. The message went through Weldon, North Carolina, and was telegraphed back from Richmond, as Weldon business always was. It would have been possible, physically, to send direct from Weldon, but would have required a rearrangement of the wires and more operators. The course adopted was more convenient and less expensive for the Company and there was nothing to show motives except the facts. As things were, the message was sent in the quickest way. The court below did not rely primarily upon the finding of the jury as to the purpose of the arrangement but held that when as here the termini were in the same state the business was intrastate unless it was necessary to cross the territory of another state in order to reach the final point. This, as we have said, is not the law.[12] It did, however, lay down that

[12] In view of the decisions in Adams Express Co. v. Croninger, 226 U. S. 491, 33 S. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257 (1913), and Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co., 251 U. S. 27, 40 S. Ct. 69, 64 L. Ed. 118 (1919), it frequently becomes important to determine whether a transaction was interstate or intrastate in character. This question is often a difficult one to answer. Suppose, for example, goods are shipped from point X in state A to point Y in state B, and then reshipped from point Y in state B to point Z in state B. Obviously the transportation from X to Y is interstate. But is the transportation from Y to Z part of one continuous journey from X to Z and, therefore, interstate, or is it a separate and distinct transaction wholly intrastate in character? Is it important that there are two bills of lading or only one? See Louisiana R. Comm. v. Texas & Pac. Ry. Co., 229 U. S. 336, 33 S. Ct. 837, 57 L. Ed. 1215 (1913); Reynolds v. St. Louis, Southwestern Ry. Co., 195 Mo. App. 215, 190 S. W. 423 (1916). Is it material that the goods were shipped from Y to Z in the same cars? See Chicago, Milwaukee & St. P. Ry. v. Iowa, 233 U. S. 334, 34 S. Ct. 592, 58 L. Ed. 988 (1913). Does the motive which prompted the break in the transportation affect the result? Compare,

the burden was on the company to show that what was done "was not done to evade the jurisdiction of the State." If the motive were material, as to which we express no opinion, this again is a mistake. The burden was on the plaintiff to make out her case. Moreover the motive would not have made the business intrastate. If the mode of transmission adopted had been unreasonable as against the plaintiff, a different question would arise, but in that case the liability, if it existed, would not be a liability for an intrastate transaction that never took place, but for the unwarranted conduct and the resulting loss.[13]

Judgment reversed.

Mr. Justice PITNEY concurs in the result.

Southern Pac. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 31 S. Ct. 279, 55 L. Ed. 310 (1910); Gulf, Colo. & Santa F. Ry. Co. v. Texas, 204 U. S. 403, 27 S. Ct. 360, 51 L. Ed. 540 (1907); Alabama, G. S. R. Co. v. George H. McFadden & Bros. (D. C.) 232 F. 1000 (1916). For a discussion of the above questions, see 17 Colum. Law Rev. 612; 29 Yale Law J. 803.

[13] For an interesting discussion of the question left unanswered by the Supreme Court, see note, 21 Colum. Law Rev. 270.

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State must give the operator a rate which will give a fair return on his investment. -

What is a fair return?

Power of Court to review order of In. Com.

CHAPTER 5

RATES

SECTION 1.—JUDICIAL REVIEW OF RATES

I. Judicial Review of Commission or Legislative Rates

INTERSTATE COMMERCE COMMISSION v. UNION PAC. R. CO.

(Supreme Court of the United States, 1912. 222 U. S. 541; 32 S. Ct. 108, 56 L. Ed. 308.)

Mr. Justice Lamar delivered the opinion of the court.[1]

* * * There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. Int. Com. Com. v. Ill. Cent., 215 U. S. 452, 470, 30 S. Ct. 155, 54 L. Ed. 280; Southern Pacific v. Int. Com. Com., 219 U. S. 433, 31 S. Ct. 288, 55 L. Ed. 283; Int. Com. Com. v. Northern Pacific, 216 U. S. 538, 544, 30 S. Ct. 417, 54 L. Ed. 608; Int. Com. Com. v. Alabama Midland Ry. Co., 168 U. S. 144, 174, 18 S. Ct. 45, 42 L. Ed. 414.

In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. "The findings of the Commission are made by law prima facie true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed

[1] The statement of facts and parts of the opinion are omitted. The part here printed appears at pages 547, 548, of 222 U. S. (32 S. Ct. 110, 111).

by experience." Ill. Cent. v. I. C. C., 206 U. S. 441, 27 S. Ct. 700, 51 L. Ed. 1128. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order. * * *

OHIO VALLEY WATER CO. v. BEN AVON BOROUGH.

(Supreme Court of the United States, 1920. 253 U. S. 287, 40 S. Ct. 527, 64 L. Ed. 908, P. U. R. 1920E, 814.)

Mr. Justice McReynolds delivered the opinion of the court.

Acting upon a complaint charging plaintiff in error, a water company, with demanding unreasonable rates, the Public Service Commission of Pennsylvania instituted an investigation and took evidence. It found the fair value of the company's property to be $924,744 and ordered establishment of a new and lower schedule which would yield 7 per centum thereon over and above operating expenses and depreciation.

Claiming the commission's valuation was much too low and that the order would deprive it of a reasonable return and thereby confiscate its property, the company appealed to the Superior Court. The latter reviewed the certified record, appraised the property at $1,324,621.80, reversed the order, and remanded the proceeding, with directions to authorize rates sufficient to yield 7 per centum of such sum.

The Supreme Court of the state reversed the decree and reinstated the order, saying: "The appeal [to the Superior Court] presented for determination the question whether the order appealed from was reasonable and in conformity with law, and in this inquiry was involved the question of the fair value, for rate-making purposes, of the property of appellant, and the amount of revenue which appellant was entitled to collect. In its decision upon the appeal, the Superior Court differed from the commission as to the proper valuation to be placed upon several items going to make up the fair value of the property of the water company for rate-making purposes."

It considered those items and held that as there was competent evidence tending to sustain the commission's conclusion and no abuse of discretion appeared, the Superior Court should not have interfered therewith. "A careful examination of the voluminous record in this case has led us to the conclusion that in the items wherein the Superior Court differed from the commission upon the question of values there was merely the substitution of its judgment for that of the commission in determining that the order of the latter was unreasonable."

Looking at the entire opinion we are compelled to conclude that the Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment when the action of the commission comes to be considered on appeal.

The order here involved prescribed a complete schedule of maximum future rates and was legislative in character. Prentis v. Atlantic Coast Line, 211 U. S. 210, 29 S. Ct. 67, 53 L. Ed. 150; Lake Erie & Western R. R. Co. v. State Public Utility Commission, 249 U. S. 422, 424, 39 S. Ct. 345, 63 L. Ed. 684. In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment. Missouri Pac. R. R. v. Tucker, 230 U. S. 340, 347, 33 S. Ct. 961, 57 L. Ed. 1507; Wadley Southern Ry. Co. v. Georgia, 235 U. S. 651, 660, 661, 35 S. Ct. 214, 59 L. Ed. 405; Missouri v. Chicago, Burlington & Quincy R. R., 241 U. S. 533, 538, 36 S. Ct. 715, 60 L. Ed. 1148; Oklahoma Operating Co. v. Love (March 22, 1920), 252 U. S. 331, 40 S. Ct. 338, 64 L. Ed. 596.

Here the insistence is that the Public Service Company Law as construed and applied by the Supreme Court has deprived plaintiff in error of the right to be so heard; and this is true if the appeal therein specifically provided is the only clearly authorized proceeding where the commission's order may be challenged because confiscatory. Thus far plaintiff in error has not succeeded in obtaining the review for which the Fourteenth Amendment requires the state to provide.

Article 6, Public Service Company Law of Pennsylvania (P. L. 1913, p. 1429):

"Sec. 31. No injunction shall issue modifying, suspending, staying, or annulling any order of the commission, or of a commissioner, except upon notice to the commission and after cause shown upon a hearing. The court of common pleas of Dauphin county is hereby clothed with exclusive jurisdiction throughout the commonwealth of all proceedings for such injunctions, subject to an appeal to the Supreme Court as aforesaid. Whenever the commission shall make any rule, regulation, finding, determination, or order under the provisions of this act the same shall be and remain conclusive upon all parties affected thereby, unless set aside, annulled, or modified in an appeal or proceeding taken as provided in this act."

It is argued that this section makes adequate provision for testing judicially any order by the commission when alleged to be confiscatory, and that plaintiff in error has failed to take advantage of the opportunity so provided.

The Supreme Court of Pennsylvania has not ruled upon effect or meaning of section 31, or expressed any view concerning it. So far

as counsel have been able to discover, no relief against an order alleged to be confiscatory has been sought under this section, although much litigation has arisen under the act. It is part of the article entitled "Practice and Procedure Before the Commission and upon Appeal." Certain opinions by the Supreme Court seem to indicate that all objections to the commission's orders must be determined upon appeal—St. Clair Borough v. Tamaqua & Pottsville Electric Ry. Co., 259 Pa. 462, 103 A. 287; Pittsburgh Railways Co. v. Pittsburgh, 260 Pa. 424, 103 A. 959—but they do not definitely decide the point.

Taking into consideration the whole act, statements by the state Supreme Court concerning the general plan of regulation, and admitted local practice, we are unable to say that section 31 offered an opportunity to test the order so clear and definite that plaintiff in error was obliged to proceed thereunder or suffer loss of rights guaranteed by the federal Constitution. On the contrary, after specifying that within 30 days an appeal may be taken to the Superior Court (section 17), the act provides (section 22):

"At the hearing of the appeal the said court shall, upon the record certified to it by the commission, determine whether or not the order appealed from is reasonable and in conformity with law."

But for the opinion of the Supreme Court in the present cause, this would seem to empower the Superior Court judicially to hear and determine all objections to an order on appeal and to make its jurisdiction in respect thereto exclusive. Of this the latter court apparently entertained no doubt; and certainly counsel did not fatally err by adopting that view, whatever meaning finally may be attributed to section 31.

Without doubt the duties of the courts upon appeals under the act are judicial in character—not legislative, as in Prentis v. Atlantic Coast Line, supra. This is not disputed; but their jurisdiction, as ruled by the Supreme Court, stopped short of what must be plainly intrusted to some court in order that there may be due process of law.

Plaintiff in error has not had proper opportunity for an adequate judicial hearing as to confiscation; and unless such an opportunity is now available, and can be definitely indicated by the court below in the exercise of its power finally to construe laws of the state (including of course section 31), the challenged order is invalid.

The judgment of the Supreme Court of Pennsylvania must be reversed, and the cause remanded there, with instructions to take further action not inconsistent with this opinion.

Reversed.

Mr. Justice BRANDEIS dissenting.

The Public Service Commission of Pennsylvania, acting upon complaint of Ben Avon borough and others, found, after due notice and hearing, that increased rates adopted by the Ohio Valley Water Company were unreasonable, and it prescribed a schedule of lower rates which it estimated would yield 7 per cent. net upon the value of the

property used and useful in the service. The company appealed to the Superior Court, contending that the property had been undervalued and that the rates were, therefore, confiscatory in violation of the Fourteenth Amendment. That court, passing upon the weight of the evidence introduced before the commission, found that larger amounts should have been allowed for several items which entered into the valuation, reversed the order on that ground, and directed the commission to reform its valuation accordingly and upon such revised valuation to fix a schedule of rates which would yield the net return which it had found to be fair. From the decision of the Superior Court the commission appealed to the Supreme Court of the state, contending that the Superior Court had in passing upon the weight of the evidence exceeded its jurisdiction. The Supreme Court sustained this contention, and, holding, upon a careful review of the evidence and of the opinions below, that the commission had been justified in its findings by "ample testimony" or "competent evidence," and that they were not unreasonable, reversed the decree of the Superior Court and reinstated the order of the commission. Borough of Ben Avon v. Ohio Valley Water Co., 260 Pa. 289, 103 A. 744. The case comes here on writ of error under section 237 of the Judicial Code, as amended (Comp. St. § 1214), the company claiming that its rights guaranteed by the Fourteenth Amendment have been violated: (1) Because the Public Service Company Law, as construed by the Supreme Court of the State, denies the opportunity of a judicial review of the commission's order; and (2) that the order, which was reinstated by the Supreme Court, confiscates its property.

First. The commission's order, although entered in a proceeding commenced upon due notice, conducted according to judicial practice and participated in throughout by the company, was a legislative order; and, being such, the company was entitled to a judicial review. Prentis v. Atlantic Coast Line, 211 U. S. 210, 228, 29 S. Ct. 67, 53 L. Ed. 150. The method of review invoked by the company under specific provisions of the statute was this: A stenographic report is made of all the evidence introduced before the commission. On a record consisting of such evidence, the opinion and the orders, the case is appealed to the Superior Court, which is given power, if it finds that the order appealed from "is unreasonable or based upon incompetent evidence materially affecting the determination of the commission or is otherwise not in conformity with law" either to reverse the order or to remand the record to the commission with direction to reconsider the matter and make such order as shall be reasonable and in conformity with law. No additional evidence may be introduced in the Superior Court; but it may remand the case to the commission with directions to hear newly discovered evidence and upon the record thus supplemented to enter such order as may be reasonable and in conformity with law. From such new order a like appeal lies to that court. Act July 26, 1913, No. 854, §§ 21–25 (P. L. 1913, pp. 1427, 1428):

Act June 3, 1915, No. 345 (P. L. 1915, p. 779). The Supreme Court construed this act as denying to the Superior Court the power to pass upon the weight of evidence; and the company contends that for this reason the review had does not satisfy the constitutional requirements of a judicial review.[2]

Whether the appeal to the Superior Court fails, for the reason assigned or for some other reason, to satisfy the constitutional requirements of a judicial review, we need not determine, because the statute left open to the company, besides this limited review, the right to resort in the state courts, as well as in the federal court, to another and unrestricted remedy, the one commonly pursued when challenging the validity of a legislative order of this nature, namely, a suit in equity to enjoin its enforcement. See Louisville & Nashville Ry. v. Garrett, 231 U. S. 298, 311, 34 S. Ct. 48, 58 L. Ed. 229; Wadley Southern Ry. v. Georgia, 235 U. S. 651, 661, 35 S. Ct. 214, 59 L. Ed. 405. For section 31 (P. L. 1913, p. 1429) provides:

"No injunction shall issue modifying, suspending, staying, or annulling any order of the commission, or of a commissioner, except upon notice to the commission and after cause shown upon a hearing. The court of common pleas of Dauphin county is hereby clothed with exclusive jurisdiction throughout the commonwealth of all proceedings for such injunctions, subject to an appeal to the Supreme Court as aforesaid. Whenever the commission shall make any rule, regulation, finding, determination, or order under the provisions of this act the same shall be and remain conclusive upon all parties affected thereby, unless set aside, annulled, or modified in an appeal or proceeding taken as provided in this act."

Resort to suit for injunction is made easy in rate controversies like the present by section 41, p. 1432, in which it is provided that the penalties for failure to obey the commission's orders imposed by sections 35, 39, and 59, pp. 1430, 1431, shall not apply to an order declaring a rate unreasonable, if the tariff of rates actually charged is filed with the commission. The appeal provided for in sections 22–25 was under the original act also to the court of common pleas, but was changed to the Superior Court by the act of July 3, 1915.

No decisions of the Supreme Court of Pennsylvania construing section 31 of this act have been brought to our attention. The company contends, however, that the construction here suggested has been inferentially made untenable by dicta in St. Clair Borough v. Tamaqua & Pottsville Elec. Ry. Co., 259 Pa. 462, 103 A. 287; Pittsburgh Rys. Co.

[2] In Napa Valley Electric Co. v. Railway Commissioners, 251 U. S. 366, 40 S. Ct. 174, 64 L. Ed. 310 (1920), this court had before it in section 67 of the Public Utilities Act of California (St. Extra Sess. 1911, p. 55), a procedure substantially similar to that provided by sections 21–25 of the Pennsylvania act set forth above. The court strongly intimated, if it did not decide, that under the provisions of the act the mere denial of a petition to the Supreme Court of the state for a writ of certiorari amounted to an adequate judicial determination of the petitioner's rights.—[Footnote in the opinion.]

v. Pittsburgh, 260 Pa. 424, 103 A. 959; Klein-Logan Co. v. Duquesne Light Co., 261 Pa. 526, 104 A. 763. But the language relied upon was in each instance used by the court in making the point, not that the sole method of review was by appeal, as distinguished from a bill in equity, but that the function of the courts was to review only after the commission had in the first instance passed upon the case.

Where a state offers a litigant the choice of two methods of judicial review, of which one is both appropriate and unrestricted, the mere fact that the other which the litigant elects is limited, does not amount to a denial of the constitutional right to a judicial review. The alternative or additional remedy in the present case was in effect an appeal on the law applicable to facts found below. It is in substantial accord with the practice pursued in other appellate courts and approved in New York & Queens Gas Co. v. McCall, 245 U. S. 345, 38 S. Ct. 122, 62 L. Ed. 337. It is true, however, that an additional or alternative remedy may deny the constitutional right to due process of law because of its nature or the course of the proceeding. See Iowa Central Railroad Co. v. Iowa, 160 U. S. 389, 16 S. Ct. 344, 40 L. Ed. 467. And it is the contention of the plaintiff that because the Supreme Court did not weigh the evidence, but reinstated the order of the commission on account of there being substantial evidence to support it, the procedure was not a judicial review and denied it due process of law. The defendants, on the other hand, insist that the action of the Supreme Court, in reinstating the order, found not merely that there was substantial evidence, but, upon a full review, that there was ample evidence to support the findings, and that the order was reasonable. They contend that the course pursued by the Supreme Court in making such review was that customarily followed in Pennsylvania, both by appellate courts on appeals from chancellors and by trial courts on exceptions to reports of auditors, masters or referees (Barnes' Estate, 221 Pa. 399, 70 A. 790); and they point out that the same method was pursued on appeal to the Supreme Court prior to the enactment of the Public Service Company Law, at a time when proceedings by consumers to secure reduction of water rates alleged to be unreasonably high were brought in the court of common pleas, subject to appeal to the Supreme Court (Turtle Creek Borough v. Penna. Water Co., 243 Pa. 401, 90 A. 194).

The contention of neither party is in my opinion wholly correct. Both overlook the nature of the question of law which was under review by the Supreme Court. It is true that there was no statutory limitation upon the scope of its review; but it does not follow either that the Supreme Court weighed the evidence and found that the preponderance supported the findings, or that because it failed to weigh the evidence there was either a denial of due process or even a mistake of law. The questions of law before the Supreme Court were, first, whether the Superior Court had jurisdiction to weigh the evidence; second, whether in rendering its decision it weighed the evidence; and, third,

whether the valuation of the plaintiff's property was so low that a rate based upon it would operate to deprive the plaintiff of property without due process of law, would confiscate its property. On each of these questions the Supreme Court found against the contentions of the plaintiff. It held that the Superior Court did not have revisory legislative powers, but only the power to review questions of law—in the present case, whether there was evidence on which the valuation adopted could reasonably have been found—and in so holding it acted upon the established principle applied in reviewing the findings of administrative boards, that "courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order." Interstate Commerce Commission v. Union Pacific R. R. Co., 222 U. S. 541, 547, 548, 32 S. Ct. 108, 111 (56 L. Ed. 308). It, therefore, reinstated the order of the commission. But it did not do so as an appellate court reviewing on the weight of the evidence findings of fact made by the Superior Court. It did so solely because the only question before it was whether there was substantial evidence to support the finding of value; for if the valuation was legally arrived at, the order was confessedly reasonable. Interstate Commerce Commission v. Union Pacific R. R. Co., supra; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 441, 442, 23 S. Ct. 571, 47 L. Ed. 892. The presumption created by section 23, P. L. p. 1427, by which an order of the commission is made prima facie evidence of its reasonableness is in no sense a limitation upon the scope of the review. It is in effect the presumption which this court has declared to exist in rate cases, independently of statute, in favor of the conclusion of an experienced administrative body reached after a full hearing. Darnell v. Edwards, 244 U. S. 564, 569, 37 S. Ct. 701, 61 L. Ed. 1317.

Second. As the company had the opportunity for a full judicial review through a suit in equity for an injunction, as it was not denied due process by disregard in the proceedings actually taken of the essentials of judicial process, and since it is clear that the findings of the commission were supported by substantial evidence, the judgment of the Supreme Court of Pennsylvania must be affirmed, unless, as contended, the claim of confiscation compels this court to decide, upon the weight of the evidence, whether or not its property has been undervalued, or unless some error in law is shown.

The case is here on writ of error to a state court. It is settled that in such cases we accept the facts as there found, not only in actions at law (Dower v. Richards, 151 U. S. 658, 14 S. Ct. 452, 38 L. Ed. 305), but also where, as in chancery, the record contains all the evidence and it was open for consideration by and actually passed upon by the highest court of the state (Egan v. Hart, 165 U. S. 188, 17 S. Ct. 300, 41 L. Ed. 680; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 107, 29 S. Ct. 220, 53 L. Ed. 417). And this is true, although the existence of a federal question depends upon the determination of the issue of fact, and although the finding of fact will determine whether or

not there has been a taking of property in violation of the Fourteenth Amendment. Minneapolis & St. Louis Railroad Co. v. Minnesota, 193 U. S. 53, 65, 24 S. Ct. 396, 48 L. Ed. 614. This court may, of course, upon writ of error to a state court, " examine the entire record, including the evidence, to determine whether what purports to be a finding" upon questions of fact is "so involved with and dependent upon questions of federal law as to be really a decision" of the latter. Kansas City Southern Co. v. Albers Commission Co., 223 U. S. 573, 591–593, 32 S. Ct. 316, 320 (56 L. Ed. 556); Cedar Rapids Gaslight Co. v. Cedar Rapids, 223 U. S. 655, 658, 32 S. Ct. 389, 56 L. Ed. 594; Graham v. Gill, 223 U. S. 643, 645, 32 S. Ct. 396, 56 L. Ed. 586. But in order that such examination may be required or be permissible, its purpose must not be to pass upon the relative weight of conflicting evidence (Oregon Railroad & Navigation Co. v. Fairchild, 224 U. S. 510, 528, 32 S. Ct. 535, 56 L. Ed. 863) and to substitute the judgment therein of this court for that of the lower court, but to ascertain whether a finding was unsupported by evidence, or whether evidence was properly admitted or excluded, or whether in some other way a ruling was involved which is within the appellate jurisdiction of this court (Northern Pacific Railway v. North Dakota, 236 U. S. 585, 593, 35 S. Ct. 429, 59 L. Ed. 735, L. R. A. 1917F, 1148, Ann. Cas. 1916A, 1; Norfolk & Western Railway v. West Virginia, 236 U. S. 605, 35 S. Ct. 437, 59 L. Ed. 745).

Here, it is clear, there was substantial evidence to support the findings of the commission; and no adequate reason is shown for declining to accept as conclusive the facts found by the state tribunals. See Portland Railway Light & Power Co. v. Oregon Railroad Commission, 229 U. S. 397, 33 S. Ct. 820, 57 L. Ed. 1248; Miedreich v. Lauenstein, 232 U. S. 236, 34 S. Ct. 309, 58 L. Ed. 584. The rates are predicated on the company's earning 7 per cent. net on the value of its property used and useful in the service, after deducting from the income all expenses and charges for depreciation. It is conceded that 7 per cent. is a fair return upon the investment, and it is not contended that any erroneous rule has been applied in ascertaining the expenses of operation or the depreciation charges. The claim that the rates are confiscatory rested wholly on the contention that the property was undervalued; and on that question the contention is that the court failed to give due weight to the evidence adduced by the company and that the processes by which the commission arrived at the value it fixed differed from that often pursued by courts and administrative bodies. To this the Supreme Court of Pennsylvania said: "The ascertainment of the fair value of the property, for rate-making purposes, is not a matter of formulas, but it is a matter which calls for the exercise of a sound and reasonable judgment upon a proper consideration of all relevant facts."

The objections to the valuation made by the company raise no question of law but concern pure matters of fact; and the finding of the

commission, affirmed by the highest court of the state, is conclusive upon this court. The case at bar is wholly unlike Great Northern Railway v. Minnesota, 238 U. S. 340, 35 S. Ct. 753, 59 L. Ed. 1337, and Union Pacific Railroad Co. v. Missouri, 248 U. S. 67, 39 S. Ct. 24, 63 L. Ed. 131, where this court reversed the judgments as matter of law upon the facts found by the commission.

In my opinion the judgment of the Supreme Court of Pennsylvania should be affirmed.

Mr. Justice HOLMES and Mr. Justice CLARKE concur in this dissent.[3]

Delay in doing away with the old rate might be a confiscation of property.

SMITH et al. v. ILLINOIS BELL TELEPHONE CO.

(Supreme Court of the United States, 1926. 270 U. S. —, 46 S. Ct. 408, 70 L. Ed. —.)

Mr. Justice SUTHERLAND delivered the opinion of the Court.*

The telephone company, an Illinois corporation, owns and operates a telephone system in the city of Peoria and vicinity. It brought suit on June 18, 1924, against appellants (members of the state Commerce Commission and Attorney General of the state of Illinois), to enjoin them from enforcing or attempting to enforce a schedule of rates alleged to be confiscatory, and from taking any steps or proceedings against the company by reason of the collection by it of rates and charges under another and higher schedule. A motion to dismiss the bill was overruled, and, upon the bill and attached exhibits and affidavits, appellants refusing to plead further, a permanent injunction in accordance with the prayer was granted by the lower court. The appeal in No. 670 is from that decree.

* * *

The averments of the bill, which, upon this record, must be taken as true, disclose the following facts:

The operations of the company were conducted with reasonable economy. For the year 1921, the net revenues, after payment of operating expenses and taxes, were, in round figures, $46,000; for the year 1922, there was a deficit of over $48,000; for 1923, a deficit of nearly $65,000; and a deficit for each month of the year 1924 preceding the filing of the bill. The fair value of the property, including working capital, material and supplies, and going value, was at least $3,800,000.

In July, 1919, the predecessor in ownership of the company filed with the commission a schedule of rates covering the telephone service in question, which the commission, by final order after a hearing, approved. Prior to that order, however, the predecessor of the company had filed with the commission a second schedule of increased rates, to become ef-

[3] For an adverse criticism of the decision, see Ray A. Brown, "The Functions of Courts and Commissions in Public Utility Rate Regulation" (1924), 38 Harv. Law Rev. 141.

* Portions of the opinion are omitted.

fective May 1, 1920. The commission first suspended the effective date of this schedule until August 29, 1920, and then, by successive orders, until February 26, 1921, August 26, 1921, and February 23, 1922. The present company, in December, 1920, succeeded to the property and rights of its predecessor.

During 1920, hearings were had before the commission in respect of the justice and reasonableness of the rates proposed by the second schedule, but no determination of the matter was reached. The commission, although often requested by the company to do so, thereafter failed and refused to hold further hearings, but on October 31, 1921, entered an order purporting permanently to suspend, cancel, and annul the second schedule. A hearing was applied for and denied.

Thereupon an appeal was prosecuted to the circuit court of Peoria county, and that court, on April 6, 1922, reversed the commission's order and remanded the cause for further proceedings. The commission redocketed the cause and had hearings in June, July, and September, 1922, after which the company filed its written motion requesting the commission to make effective a temporary schedule of rates pending a final determination. This motion was denied on September 28, 1922. On July 5, 1923, the company called attention to the delay in the determination of the cause, and to the fact that the revenues derived from the operation of the Peoria exchange fell short of meeting its operating expenses, and requested the commission to set the cause for an early hearing. This request was ignored, and the commission ever since has failed and refused to determine the issues in the cause, or to determine whether the rates and charges provided in the second schedule are just and reasonable, but has continued in effect the rates and charges contained in the first schedule approved by it. These rates, not only do not yield a fair return, but are insufficient to pay the operating cost of rendering telephone service to the subscribers and patrons of the exchange. Finally, it is alleged that the company is deprived of its property without due process of law, and is denied the equal protection of the law, in violation of the Fourteenth Amendment to the federal Constitution.

This conclusion, which necessarily results from the facts, is not seriously challenged, but a reversal of the decree below is sought on the ground that the company, prior to filing its bill, had not exhausted its legislative remedies. The argument seems to be that the second proposed schedule of rates, filed while the first was pending, purported to cancel the first schedule; that the order putting into force the rates in the first schedule was in effect a finding against the second, and put an end to it; that no legal application for an increase of rates has since been made; therefore, when the suit was brought nothing was before the commission upon which that body could lawfully act. The short answer is that the commission, after disposing of the first schedule, had uniformly treated the second as pending; had held hearings and made interlocutory orders in respect of it; had entered an order for its permanent suspension; after reversal

by the state court on appeal, by which tribunal it was regarded as properly pending, had restored it to the docket for further proceedings; and had held further hearings. To say now that all this shall go for naught, and that the company must institute another and distinct proceeding, would be to put aside substance for needless ceremony.

It thus appears that, following the decree of the state court reversing the permanent order in respect of the second schedule and directing further proceedings, the commission for a period of two years remained practically dormant, and nothing in the circumstances suggests that it had any intention of going further with the matter. For this apparent neglect on the part of the commission, no reason or excuse has been given; and it is just to say that, without explanation, its conduct evinces an entire lack of that acute appreciation of justice which should characterize a tribunal charged with the delicate and important duty of regulating the rates of a public utility with fairness to its patrons, but with a hand quick to preserve it from confiscation. Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them; and where, in that respect, such a state of facts is disclosed as we have here, the injured public service company is not required indefinitely to await a decision of the rate-making tribunal before applying to a federal court for equitable relief. The facts, which the motion to dismiss conceded, present a far stronger case for such relief than any of the cases with which this court dealt in Okla. Gas Co. v. Russell, 43 S. Ct. 353, 261 U. S. 290, 293, 67 L. Ed. 659, Prendergast v. N. Y. Tel. Co., 43 S. Ct. 466, 262 U. S. 43, 49, 67 L. Ed. 853; Pacific Tel. Co. v. Kuykendall, 265 U. S. 204 (44 S. Ct. 553), and Banton v. Belt Line Ry., 45 S. Ct. 534, 268 U. S. 413, 415, 69 L. Ed. 1020.

Some complaint is made to the effect that the decree attempts to bind persons not parties to the suit, including thousands of subscribers, and to prohibit appellants from enforcing in the future any legislative remedy for excessive charges, hereafter imposed, however unreasonable they may be. As to the first branch of the complaint, it is only necessary to say that the commission represents the public and especially the subscribers, and they are properly bound by the decree. In re Engelhard & Sons Co., 34 S. Ct. 258, 231 U. S. 646, 651, 58 L. Ed. 416. As to the other objection, there is nothing in the decree, rightly construed, which attempts to curtail or could curtail the legislative or rate-making powers of appellants to proceed hereafter under the state law, subject to such limitations, if any, as may be required by the doctrines of res judicata, ordinarily applicable in such cases.

Decree affirmed.

Mr. Justice STONE took no part in the consideration or decision of these cases.

II. Power To Set Aside Contractual Rates

(A) Contracts Between Company and Private Consumers

UNION DRY GOODS CO. v. GEORGIA PUBLIC SERVICE CORPORATION.

(Supreme Court of the United States, 1919. 248 U. S. 372, 39 S. Ct. 117, 63 L. Ed. 309, 9 A. L. R. 1420.)

Mr. Justice Clarke delivered the opinion of the Court.

The Georgia Public Service Corporation and the Union Dry Goods Company, both corporations organized under Georgia law and doing business in Macon on July 18, 1912, contracted together in writing for the term of five years, the former to supply electric light and power to the latter, which agreed to pay stipulated rates for the service.

The contract was performed for almost two years until in April, 1914, when the Dry Goods Company refused to pay a bill for service rendered during March, in which a rate higher than that of the contract was charged. The Service Corporation claimed that this rate was authorized and required by an order of the Railroad Commission of Georgia, entered after investigation and hearing.

Soon thereafter the Dry Goods Company commenced this suit to compel specific performance of its contract, which had three years yet to run; to enjoin the Service Corporation from charging the higher rate, and from executing a threat to cut it off from a supply of electricity, because of failure to pay the increased rate.

The trial court and the Supreme Court of Georgia both held against the claims of the Dry Goods Company, and the case is here for review on writ of error.

The order of the Railroad Commission of Georgia, entered on February 24, 1914, reads:

"Ordered: That on and after March 1, 1914, and until the further order of the Commission, the following schedule of rates shall be the maximum schedule of rates to be charged by the Georgia Public Service Corporation."

Then follow the rates complained of.

No opinion was rendered in this case, but on the same date, in prescribing the same rates in a proceeding instituted by the Macon Railway & Light Company, also of Macon, the Commission said:

"The rates prescribed herein are in the opinion of the Commission at this time just and reasonable. We have no power to compel the company to accept less, except as implied in the power to prevent unlawful discrimination. * * * All special rates, whether in the form of contracts for definite periods, or informal, in excess of these prescribed rates are illegal."

Of the several claims pressed in argument, we need notice only two: That the obligation of the contract of July 18, 1912, was impaired, and that the plaintiff in error was deprived of its property without due process of law, by the decision of the Supreme Court of Georgia, holding that the rates prescribed by the Railroad Commission were valid and superseded those of the contract between the parties.

Long prior to the contract of 1912 the Railroad Commission was given jurisdiction over, and power to regulate, the rates of electric light and power companies by statutes in form not greatly different from those of many other states, and, since no reason is assigned for assailing their validity, other than the result in this case, they must be accepted as valid laws.

As we have seen, the rates prescribed by the Commission were declared by it to be reasonable and the Service Company was given authority to charge them. The plaintiff in error did not assert in its pleadings, or offer evidence tending to prove, that these commission rates were unreasonable, but complained, only that they were higher than the contract rates, and for this reason, it argued, that to give effect to the order as the state Supreme Court did, violated the provisions of the Constitution referred to.

The presumption of law is in favor of the validity of the order, and the plaintiff in error did not deny, as it could not successfully, that capital invested in an electric light and power plant to supply electricity to the inhabitants of a city is devoted to a use in which the public has an interest which justifies rate regulation by a state in the exercise of its police power. Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; Budd v. New York, 143 U. S. 517, 12 S. Ct. 468, 36 L. Ed. 247; German Alliance Ins. Co. v. Lewis, Superintendent of Insurance of the State of Kansas, 233 U. S. 389, 407, 34 S. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189.

Thus it will be seen that the case of the plaintiff in error is narrowed to the claim that reasonable rates, fixed by a state in an appropriate exercise of its police power, are invalid for the reason that if given effect they will supersede the rates designated in the private contract between the parties to the suit, entered into prior to the making of the order by the Railroad Commission.

Except for the seriousness with which this claim has been asserted and is now pursued into this court, the law with respect to it would be regarded as so settled as not to merit further discussion.

That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this court. Thus in Manigault v. Springs, 199 U. S. 473, 480, 26 S. Ct. 127, 130 (50 L. Ed. 274), it was declared that:

"It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from"

properly exercising its police powers "for the general good of the public, though contracts previously entered into between individuals may thereby be affected."

This on authority of many cases which are cited.

In Hudson Water Co. v. McCarter, 209 U. S. 349, 357, 28 S. Ct. 529, 531 (52 L. Ed. 828, 14 Ann. Cas. 560), it is said that:

"One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject-matter."

In L. & N. R. R. Co. v. Mottley, 219 U. S. 467, 482, 31 S. Ct. 265, 270 (55 L. Ed. 297, 34 L. R. A. [N. S.] 671), this is quoted with approval from Knox v. Lee, 12 Wall. 457, 550, 551, 20 L. Ed. 287, viz.:

"Contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority."

In the same report, in Chicago, B. & Q. R. R. Co. v. McGuire, 219 U. S. 567, 31 S. Ct. 259, 262 (55 L. Ed. 328), it is said:

"There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."

In Atlantic Coast Line R. R. Co. v. Goldsboro, 232 U. S. 548, 558, 34 S. Ct. 364, 368 (58 L. Ed. 721), the court said:

"It is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."

And in Rail & River Coal Co. v. Ohio Industrial Commission, 236 U. S. 338, 349, 35 S. Ct. 359, 362 (59 L. Ed. 607), the state of the law upon the subject is thus aptly described:

"This court has so often affirmed the right of the state in the exercise of its police power to place reasonable restraints, like that here involved, upon the freedom of contract, that we need only to refer to some of the cases in passing."

These decisions, a few from many to like effect, should suffice to satisfy the most skeptical or belated investigator that the right of private contract must yield to the exigencies of the public welfare

when determined in an appropriate manner by the authority of the state, and the judgment of the Supreme Court of Georgia must be Affirmed.

FT. SMITH SPELTER CO. v. CLEAR CREEK OIL & GAS CO.

(Supreme Court of the United States, 1925. 267 U. S. 231, 45 S. Ct. 263, 69 L. Ed. 588.)

Mr. Justice HOLMES delivered the opinion of the court: The Clear Creek Oil & Gas Company, a corporation of Arkansas, petitioned the Corporation Commission of the state for an increase of rates for gas used by smelters and the like. The Fort Smith Spelter Company objected on the ground that it received the gas under a private contract made by the gas company, when it was a private corporation, with two men to whose rights the spelter company had succeeded; and that, therefore, the contract was not subject to the modification asked. The Commission increased the rate, and after intermediate proceedings, the order of the Commission was affirmed by the Supreme Court of the state. 161 Ark. 12, 255 S. W. 903, P. U. R. 1924B, 851; Id., 153 Ark. 170, 239 S. W. 733; 148 Ark. 260, 230 S. W. 897. The case is brought here by writ of error on the ground that the order is a law impairing the obligation of contracts. Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 318, 34 S. Ct. 48, 58 L. Ed. 229, 244.

The Supreme Court decided that the gas company had power under the laws of the state to become a public service corporation, but was not bound to do so. Soon after the contract in question was made, the gas company did become such a corporation, and as such exercised the power of eminent domain. The Supreme Court held that if the contract was made when the company had not yet devoted itself to the public service, still the instrument on its face, and also the circumstances, showed that public service on the part of the company was contemplated with the consequence that the company and all its contracts would become subject to public regulation. We see no sufficient reason for disturbing this finding. As was said below, the fact that the gas was to be delivered at Fort Smith, 18 to 20 miles from the gas field specified in the agreement, showed that a pipe line would be necessary, which in the ordinary course of events would require the exercise of eminent domain. The gas field was large and additions were agreed for. The contractors were entitled to call for 150,000,000 cubic feet of gas for each thirty days, with a possible extension up to 300,000,000. They were given the "first call" upon the company's gas supplies, and it was agreed that if the company should sell gas to consumers, except churches, schools, hospitals, or charitable institutions, at a rate less than that fixed by the contract, there should be a corresponding reduction. Everything in short point-

ed to a very extensive enterprise which hardly would be possible without the power incident to this public service under the laws of the state. It would be most unusual, as all know, for such a company to attempt to work in any other way. It already had franchises in several towns and cities to supply gas.

Judgment affirmed.

(B) Franchise Provisions

CITY OF SAN ANTONIO v. SAN ANTONIO PUBLIC SERVICE CO.

(Supreme Court of the United States, 1921. 255 U. S. 547, 41 S. Ct. 428, 65 L. Ed. 777.)

Mr. Chief Justice WHITE delivered the opinion of the Court.

The decree below enjoined the city of San Antonio from enforcing a five-cent fare against the Public Service Company, operating street railway lines in that city, on the ground that the right to enforce such rate was not secured to the city by contract, and such enforcement was beyond the power of the city, because of the confiscation of the property of the railway company which would result, in violation of the Fourteenth Amendment to the Constitution of the United States.

The consideration we must give the subject will be clarified by outlining the origin and development of the controversy.

In March, 1899, the city of San Antonio by ordinance extended to July 1, 1940, "the rights, privileges and franchises heretofore granted to and existing in the San Antonio Gas Company, Mutual Electric Light Company, San Antonio Street Railway Company, and the San Antonio Edison Company." The ordinance provided, among other things, that the two companies last named, which operated street railways in the city, "shall charge five cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other."

In April, 1900, all the property of the two railway companies was sold under a decree of a state court to the San Antonio Traction Company, and that company, with the approval of the city, thereafter controlled and carried on both lines.

In 1903 the state enacted a half-fare law (Laws 1903, c. 116), making it the duty of the Traction Company to carry school children and students for half fare, and subsequently an ordinance was passed by the city in furtherance of this law. The company refusing to carry out this legislation, on the ground that it impaired the obligation of its contract as to rate of fare resulting from the ordinance of 1899, in violation of the Constitutions of the state and of the United States,

a suit by mandamus to compel it to do so was begun by an individual, and from a ruling adverse to the company's contention the case was taken to the Court of Civil Appeals. That court held that it was unnecessary to consider whether the rate requirement was a contract, because, as it was adopted long after the provision of the state Constitution (article 1, § 17) that "no irrevocable or uncontrollable grant of special privileges or immunities shall be made, but all privileges and franchises granted by the Legislature or created under its authority shall be subject to the control thereof," it was necessarily to that extent restricted, and therefore left the state free, within the limits of the restriction, to exert the authority to regulate. As a result, the half-fare law was upheld, obviously upon the conclusion that it was within the power to regulate as restricted by the constitutional provision. San Antonio Traction Co. v. Altgelt (Tex. Civ. App.) 81 S. W. 106.

Because of the federal question the case was brought to this court and the decree was affirmed substantially on the ground which had controlled the decision below. In addition, however, the court was careful to point out that the state Constitution prohibited a rate regulation which was confiscatory, but that, in view of the absence of all averment that the rate in question was confiscatory, it was unnecessary to deal with that subject. San Antonio Traction Co. v. Altgelt, 200 U. S. 304, 26 S. Ct. 261, 50 L. Ed. 491.

Presumably under the power to regulate as thus established the city thereafter passed, and the Traction Company carried out, an ordinance imposing the duty of free transportation of policemen and firemen.

In 1912 the state Constitution was amended, so as to authorize cities having more than 5,000 inhabitants, by vote of their electors, to amend their charters or adopt new ones, subject to the limitation that the charters should not contain any provision inconsistent with the Constitution or general laws of the state. Const. Tex. art. 11, § 5.

In the meantime the two companies, gas and electric, dealt with in the ordinance of 1899, were consolidated and became the San Antonio Gas & Electric Company, and in 1917 appellee, the San Antonio Public Service Company, petitioned the city government to consent to its acquisition of all the rights and property of the San Antonio Traction Company and of the San Antonio Gas & Electric Company, thus proposing to bring under one control the four corporations dealt with in the ordinance of 1899. The city consented by an ordinance which expressly subjected the Public Service Company to all the limitations, duties and obligations which rested upon the Traction Company and the Gas & Electric Company. The ordinance further provided that:

"In accepting the provisions of this ordinance the San Antonio Public Service Company agrees that the city shall hereafter have the right to pass all ordinances not in direct conflict with the laws of this

state fixing and regulating the rates, prices and terms at which gas and electricity shall be furnished for public and private purposes to the city and its inhabitants."

This was followed by provisions requiring the keeping of such accounts by the Public Service Company in its gas and electric departments as would enable the city to exercise the power to fix rates as to gas and electricity. The ordinance having been accepted by the Public Service Company, the consolidation was accomplished.

At and for a long time prior to the consolidation the penal code of the city contained a provision, accompanied by a penalty for its violation, forbidding, except during certain hours of the night, the charging of more than a five-cent fare within the city limits. Shortly after the approval of the consolidation, another ordinance was passed forbidding and penalizing any person, firm or corporation, enjoying franchises within the city limits, or their agents or employees, from charging more than the rate then charged and collected, without obtaining the permission of the city. In conformity with this last-mentioned ordinance the Public Service Company, in August, 1918, applied to the city for permission to increase its rate of fare from five to six cents, based upon the ground that although the five-cent fare was remunerative at the time it was fixed, it had, by the increase in cost of operation in practically every department, became wholly insufficient for that purpose and could not be continued without confiscating the property of the company. After a hearing the city, by an ordinance reciting that as the company was bound by the 40-year franchise granted in 1899 to charge five-cent fare, the city did not feel authorized nor called upon to set it aside, and furthermore that the hearing had shown no necessity for the change in rate asked, refused the company's request, at the same time prohibiting, under a penalty which was stated, any person, firm, or corporation operating any street railway within or partly within the city from charging more than a five-cent fare.

Thereupon the company commenced this suit by filing its bill to enjoin the city from enforcing the five-cent fare ordinance. The bill, after alleging the adequacy of the rate of five cents when originally fixed in 1899, contained the amplest averments concerning its present confiscatory character. The prayer was for a temporary injunction restraining the enforcement of the five-cent fare ordinances and from interfering with the company in putting in a seven-cent fare instead, and from enforcing the ordinances which forbade a change of fare. It was prayed that, if the company was not permitted to put in effect the seven-cent fare, the court would itself establish that rate, or such other as it might find necessary to enable the company to pay its operating expenses and to earn a reasonable sum on its investment, and that a permanent injunction securing the results prayed be awarded.

The city moved to dismiss the bill for want of jurisdiction because it presented no substantial federal question, as it showed on its face that the parties were bound by the five-cent fare provision of the franchise ordinance as a contract subject to be enforced even though the rate was confiscatory, and moreover because the bill otherwise stated no ground for equitable relief. The court overruled the motion. It reviewed the history of the case and decided that, in view of the controversy as to contract growing out of the enforcement of the half-fare law terminated by the ruling of this court in the Altgelt Case, as well as of all the subsequent dealings between the parties, the existence of a contract as to the five-cent fare was not established and hence the attempt to enforce it, because of the confiscation to result, gave a cause of action under the Constitution of the United States. San Antonio Public Service Co. v. San Antonio (D. C.) 257 F. 467.

The city then answered, reiterating the grounds of its previous challenge to the jurisdiction and asserting that the franchise ordinance rate was based upon a contract resulting from that ordinance and from the action taken at the time and in furtherance of the consolidation. It further asserted an estoppel to deny the contract arising from various acts of the city and the corporation or its predecessors from the time of the ordinance in 1899 to the bringing of the suit in 1918. Moreover, disputing the confiscatory character of the five-cent fare, it claimed the right to compel its continued exaction in virtue of its general governmental authority to regulate the fares of street railway companies.

The case was referred to a master to report on the facts and the law. Before the master a hearing was had, followed by an elaborate report on both subjects. As the action of the court overruling the exception to its jurisdiction had adversely disposed of the question of the existence of the contract concerning the five-cent fare, the master put that subject out of view and therefore reported only on the facts as to the confiscatory character of the five-cent rate and of the power of the court, under the assumption that it was confiscatory, to restrain its enforcement.

A few words from the report will suffice to make manifest the conclusion of the master. He said:

"The rate prescribed by the ordinance is insufficient, because of the changed conditions since the rate was fixed 20 years ago, to enable the company to earn a fair return; but I have reached the conclusion that to admit the contention of the company would be for the court to exercise a power it does not possess. * * * A rate, reasonable when fixed, does not become unreasonable, from the judicial point of view, because of changed conditions."

Although the Public Service Company excepted to the conclusion of law thus stated and to some of the separate conclusions of fact made by the master, no exception whatever to the report was made by the city, and the case therefore went to the court upon the admitted

confiscatory character of the rate, upon the question of contract, and upon the power of the court, if no such contract existed, to restrain the confiscation which would result from giving effect to the rate. Adhering to its previous ruling, the court declared that it had jurisdiction to prevent the admitted confiscation which would result from the five-cent rate. Concluding, however, that as the court was not a primary rate-making authority, it would not fix a reasonable rate to replace the five-cent rate, the enforcement of which would be enjoined, and expressing the hope that the parties might agree upon such a rate, it announced that it would postpone shaping the final decree for that purpose.

Some weeks afterward the final decree was entered. It enjoined the city from interfering with the complainant in substituting a seven-cent fare for the five-cent fare, and besides enjoined the city from enforcing the various ordinances complained of in the bill, prohibiting and punishing the charging of a higher rate than five cents. The decree reserved, however, the right to the city to ask relief whenever, because of a change in conditions, the five-cent fare should cease to be confiscatory. In addition, the enforcement of the city ordinance imposing the half-fare rate for school children was enjoined, although the continued enforcement of the state half-fare law, which had been upheld in the Altgelt Case, was expressly declared not to be restrained. On the direct appeal of the city because of the constitutional question involved, we are called upon, as at the outset stated, to determine whether error was committed in the decree thus rendered.

That, in view of the admitted fact of confiscation, the court had power to deal with the subject, we are of opinion is too clear for anything but statement. And we think it is equally clear that, as the right to regulate gave no power whatever to violate the Constitution by enforcing a confiscatory rate, a result which could only be sustained as a consequence of the duty to pay such rate arising from the obligations of a contract, it follows that the solitary question to be considered is whether a contract existed empowering the city to enforce the confiscatory rate.

Primarily the answer to that question must depend upon whether the ordinance of 1899 fixing the five-cent rate was a contract. That it was not, and could not be, we are of opinion is the necessary result of the provision of section 17, article 1, of the state Constitution, existing in 1899, prohibiting "any irrevocable or uncontrollable grant of special privileges," etc., when considered in the light of the irrevocable and uncontrollable elements which must necessarily inhere in the ordinance of 1899 to give it the contract consequence relied upon. Indeed, this result is persuasively established by the ruling in the Altgelt Case, to the effect that, if the contract right were conceded, there would, in view of the constitutional restriction, be such an inevitable conflict between that right and the dominant power to regulate as to render the contract right inoperative, and therefore to cause

it to perish from the mere fact of admitting its conflict with the authority to regulate.

But it is urged that as, by the amendment to the state Constitution of 1912, the city was endowed with authority broad enough to enable it to contract in granting a street railway franchise concerning the rate of fare to be charged, disenthralled from the limitation of section 17, article 1, of the state Constitution, it follows that the franchise ordinance must after that date be viewed as such a contract and treated accordingly. But as no contract between the city and the Traction Company, made after the constitutional amendment in 1912 concerning the fare in question, is referred to, it is plain that, even if the proposition as to power of the city after 1912 be, for the sake of the argument, conceded, it is irrelevant to the case we are considering.

And this is true, also, of the suggestion, made in argument, that, although no contract was possible under the constitutional restriction which would bind the city not to lower the rate, nevertheless there was a unilateral contract or condition, resulting from the granting of the franchise, which bound the railway company to the franchise rate, since again there is not the slightest suggestion of any attempt on the part of the parties consciously to produce such a condition. But, besides, the error underlying the proposition is not far to seek. The duty of an owner of private property used for the public service to charge only a reasonable rate, and thus respect the authority of government to regulate in the public interest, and of government to regulate by fixing such a reasonable rate as will safeguard the rights of private ownership, are interdependent and reciprocal. Where, however, the right to contract exists, and the parties, the public on the one hand and the private owner on the other, do so contract, the law of the contract governs both the duty of the private owner and the governmental power to regulate. Were, therefore, as in the case supposed in the argument, the regulating power of government wholly uncontrolled by contract, it would follow that that power would be required to be exerted and hence the supposed condition operating upon the private owner would be nugatory. Such a case really presents no question of a condition, since it resolves itself into a mere issue of the exercise by government of its regulatory power.

Further, however, it is urged that, as at the time of the consolidation in 1917 the powers of the city were not limited by the constitutional provision referred to, the necessary effect of the obligations which the Public Service Company came under was to convert the five-cent fare ordinance into a contract conferring the right to enforce it, even though confiscatory. But that question rests upon mere implications, as no express provision to that effect is pointed out. Moreover, its entire want of merit, not only results from that fact, but from the unwarranted character of the implications upon which it is based. They proceed upon assumptions that, because the city

exacted as a condition for consenting to the consolidation, that the existing obligations and duties of the corporations should be preserved, a contract as to the five-cent fare arose. The error of the proposition in all its aspects is equally apparent from a broader view, since from the date of the final decision in the Altgelt Case up to the time when the contention as to confiscation resulting from the changed conditions arose, the acts and dealings of the parties unmistakably indicated the purpose to exert the authority derived from the power to regulate, to the exclusion of the limitations resulting from the right of contract which had been unsuccessfully asserted by the Traction Company in the Altgelt litigation. This deduction arises not only from the exertion by the city, after the finality of the Altgelt litigation, of the power to compel the carrying of policemen and firemen without charge, but also from the general limitations expressed in ordinances making no reference whatever to contract rights, and asserting the right of the city to give or not to give consent to a change of rate.

In fact, the city ordinance expressing the consent to the consolidation makes this clear, since having, in the second section, imposed upon the Public Service Company "all the limitations, duties, contracts, forfeitures and obligations imposed on or required of either of said companies at this time," yet expressly, in the third section, it stipulated for the right of the city to regulate the charges for the gas and electric services, and imposed upon the Public Service Company the duty of keeping the accounts as to such services in such a manner as to enable this to be done. Light is necessarily thrown on the purpose of this provision by considering that the right of the Public Service Company to assert that the maximum rates fixed by the ordinance of 1899 in favor of the gas and electric companies were contracts limiting the power of the city to regulate, had not been determined adversely to those companies, as had been done as to the Traction Company by the Altgelt Case—a view the force of which will be felt by recalling that by the amendment to the city's charter which we have stated the constitutional limitation which led to the deflection of the contract clause in the Altgelt Case was no longer applicable.

The bold contrast between the ordinance referred to and the statement made by the city in the ordinance refusing the increase in rate to meet the confiscation, because of the assumed restraint put by an existing contract, tends to throw abundant light on the situation. The fact is that all the contentions of the city as to implication of contract as to the 1899 rates but illustrate the plainly erroneous theory upon which the entire argument for the city proceeds; that is, that limitations by contract upon the power of government to regulate the rates to be charged by a public service corporation are to be implied for the purpose of sustaining the confiscation of private property. Home Telephone Co. v. Los Angeles, 211 U. S. 265, 273, 29

S. Ct. 50, 53 L. Ed. 176, and cases cited; Milwaukee Electric Railway Co. v. Wisconsin R. R. Commission, 238 U. S. 174, 180, 35 S. Ct. 820, 59 L. Ed. 1254.

Affirmed.

ST. CLOUD PUBLIC SERVICE CO. v. CITY OF ST. CLOUD.

(Supreme Court of the United States, 1924. 265 U. S. 352, 44 S. Ct. 492, 68 L. Ed. 1050.)

Mr. Justice SANFORD delivered the opinion of the Court.

This suit was brought by the Public Service Company to enjoin the City from interfering with a proposed increase in the rates charged for fuel gas.

The allegations of the bill, shortly stated, are: The Company is a public service corporation organized under the laws of Minnesota, and the City, a municipal corporation of that State. In 1905 the City by ordinance granted the Company's predecessor, its successors and assigns, the right to construct and maintain for thirty years works for the manufacture, distribution and sale of gas to the City and its inhabitants, and authorized it to sell fuel gas at a rate not exceeding $1.35 per thousand cubic feet. The grantee's rights were assigned to the Company in 1915, and since then it has been engaged in manufacturing and selling fuel gas under the ordinance.[4] Since 1917 the Company has sold fuel gas at the maximum rate of $1.35 prescribed by the ordinance. This rate has not yet yielded, and cannot yield any return on the value of the property devoted to the gas business, has resulted in a constant loss and steadily increasing operating deficit, is inadequate and confiscatory, and deprives the Company of its property without due process of law in violation of the Fourteenth Amendment to the Constitution. The City Commission has refused to entertain a petition to prescribe a rate yielding a reasonable return on the invested capital. To secure a fair and reasonable return, a rate of $3.39 per thousand cubic feet is necessary. The Company intends to increase its rate to that price. The City, however, has threatened to interfere with the collection of the proposed increased rate, and, unless restrained, will attempt to force the Company to continue to sell gas at the prescribed maximum rate, resulting in controversies and multiplicity of suits, and inflicting irreparable loss and injury upon the Company.

The bill prays that the court adjudge that the maximum rate prescribed by the ordinance is confiscatory and violates the rights of the Company under the Fourteenth Amendment; and that the City be enjoined from interfering with the Company in raising the rate

[4] A footnote by the court is omitted.

to $3.39, or attempting in any manner to force it to continue to sell gas at the ordinance rate.

A motion by the Company for a preliminary injunction was denied. Thereafter, on motion of the City, the court dismissed the bill for want of equity, on the ground that there was a "valid and subsisting contract between the City and the plaintiff Company governing the matter of a maximum rate for fuel gas." The Company, by reason of the constitutional question involved, has appealed directly to this Court. Judicial Code, § 238 (Comp. St. § 1215); Columbus Railway Co. v. Columbus, 249 U. S. 399, 39 S. Ct. 349, 63 L. Ed. 669, 6 A. L. R. 1648.

It has been long settled that a State may authorize a municipal corporation to establish by an inviolable contract the rates to be charged by a public service corporation for a definite term, not grossly unreasonable in time, and that the effect of such a contract is to suspend, during its life, the governmental power of fixing and regulating the rates. Home Telephone Co. v. Los Angeles, 211 U. S. 265, 273, 29 S. Ct. 50, 53 L. Ed. 176, and cases there cited. And where a public service corporation and the municipality have power to contract as to rates, and exert that power by fixing the rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and the question whether they are confiscatory is immaterial. Southern Iowa Elec. Co. v. Chariton, 255 U. S. 539, 542, 41 S. Ct. 400, 65 L. Ed. 764, and cases there cited; Paducah v. Paducah Ry., 261 U. S. 267, 273, 43 S. Ct. 335, 67 L. Ed. 647; Georgia Ry. Co. v. Decatur, 262 U. S. 432, 438, 43 S. Ct. 613, 67 L. Ed. 1065. The existence of a binding contract as to the maximum rate for fuel gas is therefore the controlling issue upon which this controversy depends. Its solution turns upon the question whether the City had power to contract on this subject by the ordinance of 1905; and, if so, whether the ordinance constituted such a contract.

1. Was the city authorized to enter into a contract as to the rate to be charged for fuel gas? Such authority must clearly and unmistakably appear. Home Telephone Co. v. Los Angeles, supra, page 273; Paducah v. Paducah Ry., supra, page 272. Whether it existed depends upon the laws of Minnesota in force at the time. The consolidated charter of the City (Special Laws of 1889, c. 6, p. 131) provided as follows:

The City "shall be capable of contracting and being contracted with; and shall have all the powers possessed by municipal corporations at common law." Subchapter 1, § 1.

"The common council in addition to all powers herein * * * specifically mentioned, shall have full power and authority to make * * * all such ordinances * * * for the general welfare of the city and the inhabitants thereof, as they shall deem expedient." Subchapter 4, § 4.

"The common council shall have full power by ordinance: * * * To provide for and control the erection and operation of gas works, electric lights, or other works or material for lighting the streets and alleys, public grounds, and buildings of said city, and supplying light and power to said city and its inhabitants; and to grant the right to erect, maintain and operate such works, with all rights incident or pertaining thereto, to one or more private companies or corporations; * * * to provide for and control the erection and operation of works for heating the public buildings of said city by steam, gas, or other means, and supplying light, heat, and power to the inhabitants of said city; to grant the right to erect such works and all incident rights to one or more private companies or corporations, and to control and regulate the erection and operation of such works: * * * Provided, * * * that the common council shall have authority to regulate and prescribe the fees and rates and charges of any and all companies hereinbefore mentioned." Subchapter 4, § 5, cl. 10.

In construing and giving effect to these provisions of the charter we look to the decisions of the Supreme Court of the State. In Reed v. City of Anoka, 85 Minn. 294, 297, 298, 88 N. W. 981, 982 (1902) the city charter—likewise enacted in 1889—conferred upon the municipality the power "to make and establish public pumps, wells, cisterns and hydrants, and to provide for and control the erection of waterworks for the supply of water for the city and its inhabitants." The city, by ordinance entered into a contract with individuals for the construction and operation of a system of waterworks for such purposes, for a term of thirty-one years; the city agreeing to pay the grantees a specified sum per year for each hydrant, and restrictions and limitations being imposed as to the charges to be made by the grantees for water furnished the inhabitants. In a suit brought by taxpayers to enjoin the performance of this contract the court said that there could be "no doubt but that these charter provisions confer upon the municipality authority to enter into contracts with individuals for the purpose of providing itself and its inhabitants with a supply of water. * * * The authorities are very uniform that contracts of this nature are not within the legislative or governmental prerogatives of the municipality, but rather within its proprietary or business powers. Their purpose is not to govern the inhabitants, but to secure for them and for itself a private benefit. * * * It was so held in * * * Flynn v. Little Falls E. & W. Co., 74 Minn. 180. * * * While this precise point of distinction was not made in that case, it is authority for the proposition that a municipality does not exercise its legislative functions in entering into contracts of this kind, but only its business or proprietary powers, to which the rules and principles of law applicable to contracts and transactions between individuals apply."

In City of St. Cloud v. Water Co., 88 Minn. 329, 332, 92 N. W. 1112, 1113 (1903), there was involved an ordinance passed by the present appellee in 1887, providing for the sale of the City's waterworks

to certain persons and granting them the right to maintain the system for the period of thirty years and to furnish water to its inhabitants at certain specified rates; in consideration of which the grantees agreed to extend the system, to furnish water without charge for certain purposes, and to supply a specified amount of pure water for domestic purposes. The original charter of the City (Special Laws of 1868, c. 28, p. 144) made it capable of contracting, vested it with all the general powers possessed by municipal corporations at common law, and gave it the power of establishing and constructing public pumps, wells, cisterns, reservoirs and hydrants. In a suit by the City to set aside the contract entered into by the ordinance for failure of the grantees to furnish pure water in the stipulated quantities, the court said:

"The obligations of the parties, as set out in the ordinance, constitute a contract. The city was enabled to enter into such obligation by virtue of its charter powers and the general laws of the state, and was endowed with the right to construct, or cause to be constructed, a water system for the benefit of its inhabitants, and had control of its streets, and could contract with reference to their use for the purpose of extending the system. * * * The obligations thus entered into were mutual. Upon the one hand, the grantees, their successors and assigns, would be protected by the courts in the enjoyment of their rights—for instance, in the collection of the hydrant rentals; on the other hand, the courts of the state are open to the city to secure the enforcement of its rights. No serious question can arise as to the nature of the contract obligation. * * *"

In the light of these decisions of the Supreme Court of the State of Minnesota we think it is clear that the City had authority, in 1905, under its charter and the laws of the State, to enter, by ordinance, into a contract, in its proprietary capacity and for the benefit of its inhabitants as well as itself, providing for the construction and operation of gas works for a period of thirty years and fixing the rates to be charged for gas sold to it and its inhabitants. This power existed, under the doctrine of the Reed Case, under the provisions of the charter giving the council the power to provide for the control and erection of gas works for the purpose of supplying the city and its inhabitants with heat and light. And we do not think that this contractual power was limited by the proviso that the council should have the right to "regulate and prescribe" the rates and charges of the companies to which it might grant the right of constructing such works. It is true that, standing alone, this proviso, in the absence of any State decision to the contrary, would, under the construction given similar language in Home Telephone Co. v. Los Angeles, supra, page 274, be regarded as conferring authority merely to exercise the governmental power of regulating rates, and not authority to enter into a contract. In that case, however, it was pointed out that there was no other provi-

sion of the charter authorizing the city to contract as to rates. And in the present case, as the other provisions of the charter gave the City authority so to contract, we must regard the proviso as merely an alternative provision; that is to say, we think that the City might either contract as to the rates, as an incident to its power of granting the right to construct and operate the public utility, or, if it did not exercise this power to contract, might thereafter "regulate and prescribe" the rates in the exercise of the governmental authority conferred by the proviso. One power, however, is not destructive of the other. And where a municipality has both the power to contract as to rates and also the power to prescribe rates from time to time, if it exercises the power to contract, its power to regulate the rates during the period of the contract is thereby suspended, and the contract is binding. Paducah v. Paducah Ry., supra, pages 272, 273.

We find nothing in conflict with our conclusion as to the City's authority to contract in section 33 of article 4 of the Minnesota Constitution, as amended in 1881, providing that:

"The Legislature is prohibited from enacting any special or private laws in the following cases: * * * 7th. For granting corporate powers or privileges, except to cities. * * * 10th. For granting to any individual, association or corporation, except municipal, any special or exclusive privilege, immunity or franchise whatever." General Laws 1881, p. 22, c. 3, § 1.

Clauses 7 and 10 read together plainly show that the prohibition against the granting of special or exclusive privileges by the Legislature does not apply to the granting of corporate powers or privileges to cities. It did not prohibit the Legislature from granting to the City by the consolidated charter of 1889, the power of contracting in its proprietary capacity in reference to the construction and operation of gas works. If it had had such an effect we cannot assume that it would have been overlooked by the Supreme Court of Minnesota in the Reed Case, in which no reference was made to this provision. It is unnecessary, therefore, to consider whether the provisions of the consolidated charter were authorized as an amendment to the original charter of 1862. See Brady v. Moulton, 61 Minn. 185, 63 N. W. 489. This constitutional provision is obviously entirely different from that involved in San Antonio v. Pub. Service Co., 255 U. S. 547, 549, 41 S. Ct. 428, 65 L. Ed. 777, providing "that no *irrevocable or uncontrollable grant* of special privileges or immunities shall be made, but all privileges and franchises granted by the Legislature, or *created under its authority,* shall be subject to the control thereof," which was held to prevent a municipality, acting under the authority of the Legislature, from entering into a binding contract as to public service rates. The provision of the Minnesota Constitution makes no reference either to irrevocable or uncontrollable privileges, or to privileges created by a municipality acting under the authority of the Legislature and is,

as we view it, merely a limitation upon the direct authority of the Legislature itself, to the extent that we have indicated.

Nor do we find anything in the Laws of 1893, c. 74, p. 189 (General Statutes of 1913, § 6137), in conflict with the conclusion which we have reached as to the power of the city to contract as to rates.

2. Did the ordinance constitute a contract fixing the maximum rate for gas? The intention to so contract must clearly and unmistakably appear. Paducah v. Paducah Ry., supra, page 272. The essential provisions of the ordinance are:

The right and privilege is granted to construct and maintain for thirty years works and instrumentalities for the manufacture and distribution of electricity and gas. Section 1.

The grantee is "authorized" to manufacture and sell electricity and gas to the City and its inhabitants during such period. Section 2.

The construction shall be done with the least practicable inconvenience to the public and individuals, and the "grantee shall restore" all places where excavated to their original condition as far as practicable, and repair all damage done by such excavation. Section 3.

In laying down pipes or erecting wires the grantee "shall conform" to all reasonable regulations prescribed by the City. Section 4.

"In consideration of the rights and privileges herein granted, the grantee hereby *covenants and agrees* that it will * * * erect * * * an efficient coal gas generating plant or system of ample capacity, and after the erection thereof will manufacture and offer for sale to the city and its inhabitants coal gas of at least fourteen candle power." Section 5.

"The grantee is authorized hereby to sell illuminating gas when the works therefor shall have been completed * * * at the price of not to exceed" $1.85 per thousand cubic feet, "and fuel gas at the rate of not to exceed" $1.35 per thousand cubic feet, and shall be at liberty to cut off the supply from any person not paying for a period of thirty days. Section 6.

"The rights hereby granted are upon the express condition" that the City may purchase the electric and gas works of the grantee at specified intervals at the appraised value thereof, as determined by arbitrators to be chosen in a prescribed manner. Section 7.

We think that the language of the ordinance, viewed in its entirety, clearly shows that it was the intention of the parties to enter into a contract for the construction of gas works and the manufacture and supply of gas to the City and its inhabitants during the thirty-year period, at the maximum rate prescribed. Although section 6 "authorizing" the sale of fuel gas at a price not exceeding $1.35, is not phrased in the language of an agreement—as the preceding section whereby the grantee "agreed" to construct the plant and manufacture and sell gas to the City and its inhabitants—it is an essential part of the agreement. It is no less contractual than the provision in section 2 "authorizing" the

grantee to manufacture and sell electricity and gas to the City and its inhabitants for thirty years—upon which the Company necessarily relies as the basis of the rights which it now claims and is seeking to enforce—or than that in section 7 giving the City the right to purchase the plant at an appraised value. The provision that the grantee is "authorized" to sell fuel gas at a rate not exceeding $1.35, clearly implies that it shall not sell such gas at a higher rate. This is recognized by the bill itself.[5] In this respect the language has the same effect as that involved in Vicksburg v. Water Works Co., 206 U. S. 496, 508, 516, 27 S. Ct. 762, 51 L. Ed. 1155. There the ordinance granted the right to make such charges for the use of water as the grantees might determine, provided that they should not exceed fifty cents for each thousand gallons. This was held to constitute a binding contract fixing the maximum rates for water supplied to private consumers for the period of thirty years as set forth in the ordinance. So in Reed v. City of Anoka, supra, page 296, the ordinance imposed "restrictions and limitations" upon the charges to be made; and in City of St. Cloud v. Water Co., supra, page 332, the ordinance "gave the right" to furnish water at specified rates. And provisions in ordinances granting franchises to street railway companies that the rate of fare shall not be more than five cents, or that the grantee shall not charge a higher fare, are contractual. Detroit v. Street Ry., 184 U. S. 368, 369, 22 S. Ct. 410, 46 L. Ed. 592; Cleveland v. City Ry., 194 U. S. 517, 524, 24 S. Ct. 756, 48 L. Ed. 1102; Cleveland v. Electric Ry., 201 U. S. 529, 532, 26 S. Ct. 513, 50 L. Ed. 854; Georgia Ry. v. Decatur, supra, page 434. And the fact that here the parties intended to contract as to the gas rates is emphasized by the contrast between the provisions of the ordinance as to gas and electricity. While the grantee is authorized to maintain both gas and electric works for the period of thirty years, the ordinance specifies the maximum rates for gas but contains no provision as to the rates for electricity; the apparent purpose being to establish definitely by contract the maximum rates for gas but to leave the rates for electricity to be thereafter "regulated and prescribed" by the council from time to time under the power given it by the proviso of the charter.

3. The general provision of the Laws of 1919, c. 469, p. 603, authorizing cities of the class of the appellee "through its city council or like governing body, by ordinance, to prescribe from time to time the rates which any public service corporation supplying gas or electric current for lighting or power purposes within said city may charge for such service," has no application to the present case. Even if, in any aspect, it could otherwise be applicable, it is excluded from operating here by the specific proviso that it shall not be "construed to impair

[5] There are repeated references in the bill to this provision as fixing a maximum rate, thus: The "maximum rate fixed for the price of gas in the ordinance," section 36; and similar references to the "maximum rate" in sections 39, 41, 42 and 44, cl. 1.—[Court's footnote.]

the obligation of any contract or franchise provision now existing between any such city [council] and any such public service corporation." Section 1. The City, clearly, could not avail itself of this statute to reduce the gas rates below the maximum prescribed in the contract of 1905; and the Company, conversely, cannot under it obtain higher rates. The contract is binding on both parties alike.

The decree of the District Court is affirmed.

Mr. Justice BUTLER took no part in the hearing or decision of this case.

SOUTHERN UTILITIES CO. v. CITY OF PALATKA, FLA.

(Supreme Court of the United States, 1925. 268 U. S. 232, 45 S. Ct. 488, 69 L. Ed. 930.)

Mr. Justice HOLMES delivered the opinion of the Court.

The City of Palatka brought this bill to restrain the petitioner, the Southern Utilities Company, from charging more than ten cents per kilowatt, metre measurement, for commercial electric lighting in the city. It alleged a contract in the grant of the petitioner's franchise by which the petitioner was bound not to charge nore than that sum. The defendant pleaded that in present circumstances the rate prescribed in the ordinance granting the franchise was unreasonably low and that to enforce it would deprive defendant of its property without due process of law contrary to the Constitution of the United States. The plea was overruled and defendant having declined to plead further a decree was entered for the plaintiff by the Circuit Court for Putnam County which subsequently was affirmed by the Supreme Court of the State. 86 Fla. 583, 99 So. 236.

The Supreme Court held that the City had power to grant the franchise and to make the contract and that it had no power of its own motion to withdraw, but it concedes the unfettered power of the legislature to regulate the rates. On that ground the defendant contends that there is a lack of mutuality and therefore that it is free and cannot be held to rates that in the absence of contract it would be unconstitutional to impose. The argument cannot prevail. Without considering whether an agreement by the Company in consideration of the grant of the franchise might not bind the Company in some cases, even if it left the city free, it is perfectly plain that the fact that the contract might be overruled by a higher power does not destroy its binding effect between the parties when it is left undisturbed. Georgia Railway & Power Co. v. Decatur, 262 U. S. 432, 438, 43 S. Ct. 613, 67 L. Ed. 1065; Opelika v. Opelika Sewer Co., 265 U. S. 215, 218, 44 S. Ct. 517, 67 L. Ed. 983. Such a notion logically carried out would impart new and hitherto unsuspected results to the power to amend the Constitution or to exercise eminent domain. There is nothing in this decision inconsistent with Southern Iowa Electric Co. v. Chariton, 255

U. S. 539, 41 S. Ct. 400, 65 L. Ed. 764, San Antonio v. San Antonio Public Service Co., 255 U. S. 547, 41 S. Ct. 428, 65 L. Ed. 777, and Ortega Co. v. Triay, 260 U. S. 103, 43 S. Ct. 44, 67 L. Ed. 153.

Decree affirmed.

III. Tests of "Confiscatory" and "Reasonable" Rates in General

PETITION OF LEBANON TELEPHONE CO.

(Public Service Commission of Indiana, 1924. P. U. R. 1925B, 114.)

By the Commission:[6] * * * An inadequate rate confiscates the property of the utility. By exactly the same rule of law an excessive rate confiscates the property of the utility patron. An excessive utility rate takes the property of the patron without due process of law just as effectively as an inadequate rate thus takes the property of the utility. The utility patron is entitled to have his property protected from confiscation to exactly the same degree as the utility operator. If not, then he fails of the equal protection of the law guaranteed by the Fourteenth Amendment. * * *

ST. PAUL BOOK & STATIONERY CO. v. ST. PAUL GAS-LIGHT CO.

(Supreme Court of Minnesota, 1915. 130 Minn. 71, 153 N. W. 262, L. R. A. 1918A, 384, Ann. Cas. 1916B, 286.)

Holt, J.[7] This is an action in equity, brought by plaintiff in its own behalf and in behalf of the denizens of the city of St. Paul, Minnesota, similarly circumstanced, to enjoin the defendant, a public service corporation, from enforcing an alleged unreasonable and exorbitant schedule of rates adopted by it, which schedule, however, is not claimed to violate the provisions of an ordinance of the city fixing a maximum price for the distribution and sale of electric current by defendant to patrons within the city. The court is also asked to direct defendant to fix just and nondiscriminatory rates, and to compel it to account for its previous dealings with plaintiff, and therein disclose the true value of all its property and business. A demurrer to the complaint was overruled, and the question involved certified as doubtful. Thereafter a large number of parties joined in a complaint in intervention. To this pleading a demurrer was sustained. The correctness of each order is presented by the appeals.

[6] Portions of the opinion are omitted. The portion here printed is on page 131 of P. U. R. 1925B.

[7] Portions of the opinion are omitted.

These matters of important bearing appear from the complaint: The plaintiff corporation has for some years past conducted a business in the city of St. Paul wherein it has used electricity for lighting and power purposes, and its business is dependent upon obtaining a supply of electric current. For about two years prior to May 1, 1913, defendant had voluntarily supplied plaintiff with electric current for lighting purposes at a certain rate, which is alleged to be adequate and not unreasonable, unless unreasonably high. And that, during the same time, electric current for power purposes was furnished, upon a different basis of computations, under an agreement between plaintiff and defendant as to price, which price is stated to be remunerative to defendant and not unreasonable, unless unreasonably high. Defendant is a public service corporation holding an exclusive franchise from the city under which it, upon compensation paid, supplies to the city, and to persons and business enterprises within its borders electric current for light and power purposes. The common council of the city of St. Paul by Ordinance No. 3119, approved April 7, 1913, and taking effect May 1, 1913, fixed the maximum price which defendant might charge its customers for electric current. This maximum price is in some degree governed by the quantity consumed during a given time. It is alleged that defendant, using said ordinance as an excuse immediately upon its going into effect, on May 1, 1913, raised the rates theretofore charged plaintiff and other patrons, nearly 70 per cent., and since that time has continued to send plaintiff inadequate and incorrect statements, calling for payment of unreasonable and exorbitant prices for the electricity furnished. There are no averments that the price or rate now fixed and demanded exceeds in any respect the maximum established by the ordinance, or is as high as thereby permitted, or that plaintiff has paid the alleged excessive amounts asked by the statements or bills. Discrimination is charged in general terms.

The attempt by this suit to fix or establish reasonable and just rates for the future must fail. Prescribing or regulating rates for public service corporations falls within the domain of legislation, and courts should not intrude. Interstate Commerce Com. v. Ry. Co., 167 U. S. 479, 17 S. Ct. 896, 42 L. Ed. 243; Nebraska Tel. Co. v. State, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113; City of Madison v. Madison Gas & Electric Co., 129 Wis. 249, 108 N. W. 65, 8 L. R. A. (N. S.) 529, 116 Am. St. Rep. 944, 9 Ann. Cas. 819. * * *

The important and decisive question presented by the demurrer to the complaint is, whether, at the suit of a consumer of a commodity supplied by a public service corporation, the court can inquire into the reasonableness of rates fixed by the proper legislative body, and enjoin such rates if found exorbitant. It is well settled now that a public service corporation may seek and obtain the aid of the court enjoining the enforcement of unreasonably low rates, no matter by what authority established. Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418, 10 S. Ct. 462, 702, 33 L. Ed. 970. And, at the

first blush, a just and necessary corollary of that rule would seem to demand that the same right be accorded the consumer to have a judicial determination whether a rate, established by legislative authority, is so unreasonably high that its enforcement should be enjoined. Justice Miller, in his concurring statement in the last case cited, seems to be of that opinion. Of course, by technical refinement a legal distinction in the position occupied by a public service corporation and its patrons may be made. The former is compelled to furnish the commodity or service, whereas the latter may accept or reject the same at pleasure. Hence only the public service corporation, and not its possible patrons, can, under a strict construction, be held to be deprived of property without due process of law through unreasonable rates. This is the reasoning of the Supreme Court in Brooklyn Union Gas Co. v. City of New York, 50 Misc. Rep. 450, 100 N. Y. S. 570. While it is not specifically referred to in the opinion by Judge Gaynor, on appeal in the same case, speaking for the court in the Appellate Division (115 App. Div. 69, 100 N. Y. S. 625), nor by the Court of Appeals, when the case came there in 188 N. Y. 334, 81 N. E. 141, 15 L. R. A. (N. S.) 763, 117 Am. St. Rep. 868, the result reached was that the city could not raise the question of the unreasonableness of the rate demanded, since it did not exceed the maximum permitted by statute. See, also, Pinney & Boyle Co. v. Los Angeles Gas & Electric Co., 168 Cal. 12, 141 P. 620, L. R. A. 1915C, 282, Ann. Cas. 1915D, 471. We are not strongly impressed with the proposition that, at the present time, the inhabitants of our large cities can dispense with the utilities supplied by the public service corporations, if the price seems too high. They are dependent upon these corporations for matters of daily need and comfort, such as light, water, power and the like. If these necessities may be obtained only upon the payment of exorbitant prices, it really results in an enforced taking from the consumer of whatever he pays in excess of a reasonable compensation. But there is a practical side to the question which should weigh heavily against the courts entertaining actions, at the instance of the individual consumer, to destroy rates, or render of no effect a maximum price fixed by competent legislative authority for the control of public service corporations. Rate regulation is justly deemed of great importance in securing to the public cheap, efficient, and impartial service from these corporations, and is undertaken by the government or its agencies. Whether done by the nation, state or municipality, it is by representatives elected by the people and accountable to them. Such being the case, there is little danger of excessive rates being fixed. But if, perchance, it should happen, the remedy of the public is by appeal to the rate-fixing body, or, if necessary, by a change in its membership. If, instead of thus righting the wrong, every consumer is free to seek the injunctional remedy from the courts, no rate schedule would have stability. We know what divergent views consumers have regarding the reasonableness of rates charged by a public service

corporation. Every case brought by the individual consumer to test a rate would have to be decided upon the evidence adduced therein. Different cases, involving the same rate, may have to be determined upon testimony materially unlike, and different judgments result. Neither judges nor juries draw the same conclusion from the same testimony, let alone divergent. Once open the door to actions of this character and courts would be kept busy. If a statutory rate can be enjoined by a consumer, it would seem to follow that he may also sue for any amount which he deems he has paid in excess of an alleged reasonable rate. It would be almost certain that no two juries would fix upon the same amount as the reasonable rate. We think the result of permitting such litigation, at the instance of the individual consumer, would be utterly destructive of all legislative regulation of public service corporation rates. Moreover, if under a complaint, like the one before us, which really does not attack the maximum fixed by the ordinance, hence not the ordinance itself, an injunction be granted, there is such a possibility of innumerable suits that thereby the public service corporation would be put to such expense and annoyance that it would react upon the consumer both in respect to service and price. The arguments used by the court in Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; Van Patten v. Chicago, M. & St. P. Ry. Co. (C. C.) 81 F. 545, and Griffith v. Waterworks Co., 88 Miss. 371, 40 So. 1011, 8 Ann. Cas. 1130, for holding the consumer to the established rates, may be applied to the situation presented by this complaint. So applied they tend to sustain the demurrer.

There can be no doubt of the authority of the city of St. Paul to regulate the rates of public service corporations, the same as might have been done by the Legislature prior to the constitutional amendment prohibiting special legislation. The charter provision is of the same force as a statute upon the subject. We do not think Agua Pura Co. v. Las Vegas, 10 N. M. 6, 60 P. 208, 50 L. R. A. 224, controls here. Section 31 of the city's Home Rule Charter provides: "The common council shall have the power to regulate and control the maximum price charged by any corporation or person exercising any privilege or franchise in the city for service rendered by it to the city or to any other person or corporation, but such price shall be fair and reasonable." The last clause is contended by plaintiff to be a limitation, or a proviso, under which the reasonableness of the rate may be judicially inquired into. We think the Legislature itself is similarly limited. All rate-fixing bodies must proceed upon the implied or expressed direction that they are to ascertain what rate will be fair and reasonable to both producer and consumer, and to establish the one so found and none other. Nor do we agree with defendant that the clause referred to was inserted for the protection of the public service corporations alone, although there is force in the claim that, when the Legislature

and its agencies undertake to establish rates for such corporations, it is chiefly in the interest and protection of the public. * * *

Our conclusion is that the reasonableness of the rates for electric current, supplied by defendant, cannot be raised at the instance of the individual user, so long as such rate does not exceed the maximum established by the ordinance referred to. * * *

It follows that the order overruling the demurrer to the complaint is reversed, and the order sustaining the demurrer to the complaint in intervention is affirmed.[8]

SMYTH v. AMES.

(Supreme Court of the United States, 1898. 169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819.)

Mr. Justice HARLAN delivered the opinion of the court.[9] * * *

We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And, in order to ascertain that value, the original cost of construction, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth. * * *

[8] In Dayton-Goose Creek Ry. Co. v. United States (infra, p. 1176), Taft, C. J., holding that rates on the low-cost railroads were not unreasonable because high enough to yield excess earnings above a fair return, part of which excess was "recaptured" by the government, found it "unnecessary to discuss the question mooted whether shippers are deprived of constitutional rights when denied reasonable rates."

[9] Portions of the opinion are omitted. The portion here printed appears on pages 546, 547 of 169 U. S. (18 S. Ct. 434). The decision holds that a statute of Nebraska fixing intrastate rates was a violation of the Fourteenth Amendment, in that the rates fixed thereby were insufficient to yield a fair return on the fair value.

SECTION 2.—FAIR VALUE

I. Fair Value Conceived as Exchange Value of Entire Property

CITY OF ERIE et al. v. PUBLIC SERVICE COMMISSION.

(Supreme Court of Pennsylvania, 1924. 278 Pa. 512, 123 A. 471.)

Appeal from Superior Court.

Proceedings by the Pennsylvania Gas Company for increases in rates, opposed by the City of Erie, the Burgess and Town Council of the Borough of Warren, and others. From judgments affirming an order by the Public Service Commission fixing a rate, opponents appeal. Record remitted to Superior Court with directions.

Argued before Moschzisker, C. J., and Frazer, Simpson, Kephart, Sadler, and Schaffer, JJ.

Kephart, J.[10] * * * An engineering conference to determine a fair rate was organized, composed of representatives from the Commission, the company and the complainants. This body submitted a statement agreed to by all members showing reproduction cost of the physical properties, plant equipment, pipe lines, and appurtenances. Their report gave a complete inventory. It was received, accepted, and approved by the Commission; no evidence appears to the contrary. The committee could not agree upon the value of the gas lease holdings or gas lands, the franchise in Erie, working capital, bond discount and brokerage, capital requirements, depreciation and going-concern value. The attack on the Commission's findings is based on these items. The questions presented are: What is a proper value of the gas lands, rate of return on property employed in public service, depletion allowance, going-concern value? And should not the value of gasoline sold by another company be considered in the return? Some minor questions are raised, but we do not consider them of merit. The assignments directed to them are accordingly dismissed.

Three judges of the Superior Court supported the theory that—

"The gas holdings should be valued at their original cost; that, though treated as real estate for many purposes, they are not of the same permanent character as ordinary land and the improvements thereon, but are consumed by use and after a term of years are wholly exhausted; that they should be treated, rather, as a stored product which the company will sell in the course of years and eventually exhaust; that the purchase of additional gas rights, the reasonable cost of prospecting for gas, the drilling of wells, etc., should be allowed as operating charges, necessary to secure the product which the company

[10] Portions of the opinion are omitted.

sells; and that the Commission erred as matter of law in capitalizing the company's gas holdings at their present value."

This is substantially the position of the municipalities. In addition they urge the rates were unfair and unreasonable.

The theory of the utility, the Commission, and the other judges of the Superior Court was that of present value of the entire property used and useful in the public service, including the gas-producing lands. * * *

Finding the rate base is a stubborn and at times a difficult task, and present value (its chief element) is the storm center, even as to lands such as we are now considering; but, though that theory may be slightly indefinite, original cost is a creature having the same frailties, only in a more aggravated state. The assembling of materials on which to base a judgment of true value is more certain in the former. Time has usually wiped out much of the evidence to show original cost. The records then kept did not account for all the various items entering into it, nor do the books of to-day, though kept with meticulous care, exactly cover such items. As stated by Mr. Justice Brandeis in his concurrence in the Southwestern Bell Case,[11] wherein the present value method is assailed in what may be termed the last word on the subject:

"Ordinarily, stocks and bonds did not indicate the amount of capital embarked in the enterprise. Depreciation accounts were unknown, and * * * book values or property accounts furnished no trustworthy evidence either of cost or of real value."

It is here that a part of the difficulty is met, if original cost were adopted as the rule of value, and as for a sum "prudently invested," based not on judgment but political expediency or other uncertain factor, it is open to the grave charge of favoritism or oppression founded on socialism. It is a matter of very common observation that cost does not indicate the value of property; nor does present value indicate original cost. Present value is the basis on which all bargains and sales are conducted, from the purchase of the smallest article to the sale of gigantic steel mills. It is the economic rule of equality of exchange. Original cost, long since lost sight of, is not the basis of bargain and sale, though it is considered in fixing the present value for a rate base. Original cost cannot be used as a substitute for value. In the Minnesota Rate Cases it was contended that as the carriers had received public lands as a donation, any value attaching to them should not be included in the rate base. Mr. Justice Hughes, in disposing of this question, said:

"It is clear that in ascertaining the present value we are not limited to the consideration of the amount of the actual investment. If that has been reckless or improvident, losses may be sustained which the community does not underwrite. As the company may not be pro-

[11] Infra, page 1018.

tected in its actual investment, if the value of its property be plainly less, so the making of a just return for the use of the property involves the recognition of its fair value if it be more than its cost. The property is held in private ownership and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law." Minnesota Rate Cases, 230 U. S. 352, 454, 33 S. Ct. 729, 762 (57 L. Ed. 1511, 48 L. R. A. [N. S.] 1151, Ann. Cas. 1916A, 18).[12]

See, also, San Joaquin, etc., Co. v. Stanislaus County, 233 U. S. 454, 34 S. Ct. 652, 58 L. Ed. 1041. This question was discussed in Ben Avon Borough v. Ohio Valley Water Co., 68 Pa. Super. Ct. 561, 576, 577, 578, 581.

If we were to make the return on original cost of these gas lands, plus the cost of production, the measure for the price of gas to be sold to the consumer, we would establish an economic theory of value and sale for this kind of a utility differing from that applied to others. And the fact that gas stored in these lands is taken from thence and sold, ultimately consuming the entire product, does not alter the rule. In that respect it is no different from any physical plant having a life of 20 years—an oil field or a lumber operation. Present value is what we are now dealing with, and as to gas lands it includes at the time fixed such elements as depreciation, depletion, and the like.

True, here successive stock issues (claimed as evidence of cost), some paid for and some reaching the shareholders through stock dividends, were shown; the total amount outstanding at the time of the hearing being $7,300,000. But against this issue we have the total value of the company's property largely in excess of this figure, including as well the value of the gas land. It may be the property representing this total value was secured largely from earnings received from the rate payer, but that does not change its status as private property so as to eliminate it from the rate base. It is not for that reason to be discriminated against.

The theory of municipalities in applying cost basis that individuals purchasing gas lands (and there is no reason why, if it is correct, it should not be applied to any species of property) "should give thanks to Providence" because it is afforded the opportunity of being extremely prosperous and well rewarded through the enormous production sold to consumers from such low-priced lands, overlooks the fact that, no matter what the production may be, the rate (fair return) is applied on the rate base. As production increases the rate must decrease, for the line fixed is fair return on the rate base. "The company is entitled to receive a reasonable return for the service it furnishes, and no more." Citizens' Passenger Ry. Co. v. P. S. C., 271 Pa. 39, 56, 114 A. 642, 648. These considerations do not give to the owners of this class of lands the

[12] A detailed criticism of Justice Hughes' reasoning in the paragraph quoted is contained in a note by the editor of this chapter in 24 Mich. Law Rev. 166 (December, 1925), entitled "Pseudo-Protection of Property in Rate Cases."

same constitutional protection accorded other property. It singles out this land for confiscation for the benefit of the rate payer. We have not yet adopted this system of division of property. Nor can we adopt the other equally erroneous theory that the public is entitled to share in the appreciated value. It is merely a modification of the preceding one. As the point of division could not be controlled by any known rule, it would cause this property to be subject to a will which could be arbitrary without a governing hand to restrain its application. The same observation may be made as to "sum prudently invested."

While the business of supplying gas is national in character, affected with great public interest, and the commodity a product of nature, such circumstances do not differentiate these holdings from any other class of property in private ownership. There should not be one rule for valuing property generally for rate-making, another for gas lands used in public service, another for condemnation, another for taxation, and still another for private sale or exchange. If the property which legally enters into the consideration of the question of rates has increased in value since it was acquired, the company is entitled to the benefit of such increase. Willcox v. Consolidated Gas Co., supra [212 U. S.] 52 (29 S. Ct. 192 [53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034]); Georgia Ry. Co. v. R. R. Comm., supra [262 U. S.] 631 (43 S. Ct. 680 [67 L. Ed. 1144]); Bluefield Co. v. P. S. C. of West Virginia, supra [262 U. S.] 690 (43 S. Ct. 675 [67 L. Ed. 1176]).

But there is a more formidable reason why the present value rule should be adhered to. It has only been within recent years that governments have seriously taken up the regulation of public utilities. Prior thereto, and since, the acquisition of property by individuals had a fixed status in the law; whether that property was directly owned or indirectly through stock in a corporation, "the property is held in private ownership." Smyth v. Ames, supra, [169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819], was decided in 1897. [Sic.] It recognized the rights in and to such property. Since then courts and commissions in a host of cases have followed the supreme law fixing values. Securities and properties of all kinds have been sold, and money borrowed in reliance thereon. Property rights have thus become fixed, and if there is a place where the law of stare decisis applies, it should be here. It should be changed only when it is apparent the rule works a manifest hardship out of all proportion to any good accomplished by it.

The standard to be applied in fixing present value of the lands would be "present market value." Denver v. Denver Union Water Co., supra [246 U. S.] 191 (38 S. Ct. 278 [62 L. Ed. 649]); Willcox v. Consolidated Gas Co., supra. In so considering it (Minnesota Rate Cases, supra), a greater value cannot attach because used in public service. The rule is limited to general market value outside the public service, or in a market not considering such service. While this may call for

careful scrutiny of the evidence, such considerations afford no excuse for refusing to give the value required by law. The rule was applied in valuing Neville Island. Ben Avon Boro. v. Ohio Valley Water Co., 271 Pa. 346, 114 A. 369. The test, under the Fourteenth Amendment, in rate cases, is whether the utility is deprived of its property or a part of its value in the return allowed. The rule of just compensation, as in condemnation cases, should be applied to gas lands (Smyth v. Ames, supra, 546 [18 S. Ct. 418]; Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 410, 14 S. Ct. 1047, 38 L. Ed. 1014; Minnesota Rate Cases, supra; Mercersburg, etc., Electric Co. v. P. S. C., 76 Pa. Super. Ct. 58, 65), though generally the rate base may include elements not properly cognizable in condemnation cases. Property is protected by protecting its value, which, in this class, is what it is worth in a fair market. In fixing market value for a present value, we bring the holdings under the constitutional protection governing condemnation for public or quasi public uses. * * *

FUHRMANN v. CATARACT POWER & CONDUIT CO.

(Public Service Commission of New York, Second District, 1913. 3 P. S. C. [2d Dist. N. Y.] 656.)

STEVENS, Chairman.[13] * * * The language used in the Westchester Case [14] concerning the value of a street railroad is directly applicable to an electric plant:

"Its one characteristic which gives it value is its supposed power to yield directly or indirectly a money return equal to the investment with a profit thereon. Its value lies, not in what it is but in what it will produce or what it is believed it will produce in money. Generally speaking, what it will produce in money depends upon its earning power, direct or indirect."

The foregoing language was used in a capitalization case, where the exchange value was directly in question and the matter to be ascertained by the investigation in hand. The present case, however, is a rate case. In a rate case, the exchange value cannot logically be a basis of inquiry for the reason that the exchange value depends upon the net income, present and prospective: and the net income depends upon three principal factors, one of which is the rate, the others being amount of service sold and cost of operation. A reduction of rate which does not increase the demand for service necessarily diminishes the net income, and hence by so much diminishes the exchange value of the property employed in the service. If the reduction of rate increases the demand for service, such reduction may increase the ex-

13 Portions of the opinion are omitted. The portion here printed appears in 3 P. S. C. (2d Dist. N. Y.) 680, 681 (1913).

14 3 P. S. C. (2d Dist. N. Y.) 286 (1912).

change value, provided the increase in service be sufficiently great and without increase in operating expenses sufficient to absorb the increased earnings.

Exchange value being dependent upon the rate, it is clear that such exchange value is not the subject of inquiry in a rate case. To base the rate upon the exchange value would be generally merely to continue the rate, and it would absolutely continue it so far as the value is dependent upon the rate. If the change in rate affects the net income, it changes the exchange value; and if there be no change in exchange value there can be no change in rate.

In a very careful and exhaustive report upon plans for ascertaining the fair value of railroad properties, submitted to the National Association of Railway Commissioners at their annual convention for the year 1912, the committee said:

"But no one expressly contends that value for rate-making purposes should be based upon the earnings of the property. If the rates are too high the earnings would be too high, and vice versa. One cannot be used to justify the other, or else we must assume that whatever is, is right."

There would seem to be no escape from the conclusion that, when courts have used the term "fair value" in rate cases, they had something in mind different from "exchange value," or in other words "value." It is not to be supposed that they did not comprehend that value depends upon the rate, and that a change in rate means a change in value if it affects net income. The earning power of a property is what determines its ratio of exchange. High net earnings will give it a high ratio of exchange. No earnings at all, either present or prospective, will deprive it of practically all value.[15] * * *

[15] To the same effect, see Robert H. Whitten, "Valuation of Public Service Corporations" (N. Y. Banks Law Pub. Co., 1912) § 57.

The contrary opinion seemed to be held by Mr. Justice Butler of the United States Supreme Court, when he cited rate-making valuation cases in support of certain methods used for ascertaining the value of a ship in a damage case. Standard Oil Co. v. Southern Pac. Co., 268 U. S. 146, 45 S. Ct. 465, 69 L. Ed. 890 (1925). Commissioner Potter, dissenting in Atlanta, Birmingham & Atlantic R. R. Co., 75 Interst. Com. Com'n R. 645, 672–676 (1923), was also aware of no inconsistency in basing the permissible earnings on a value based on the actual earnings. For his attempt to meet the objection of circular reasoning, in his concurring opinion in the San Pedro Case, see infra, page 985. His reasoning in the Atlanta, B. & A. Case is attacked as fallacious by the concurring opinion of Commissioner Eastman in the same case (pages 677, 678), in which opinion Chairman Meyer concurred. Mr. Justice Butler has in no official opinion found it necessary to attempt to refute the argument that to base rates on exchange value is to reason in a circle.

II. Fair Value Conceived as Exchange Value of Such of the Property as May Have a Value Not Determined by Earnings

(A) In General

In re SAN PEDRO, LOS ANGELES & S. L. R. CO.

(Interstate Commerce Commission, 1923. 75 Interst. Com. Com'n R. 463.)

Potter, Commissioner, concurring in part:[16] * * * The word "value" is used in *different senses,* but I am unable to see how we can find *different values* of the same thing to be used for *different purposes.* Value is used in one sense in "exchange value" when the thing spoken of is the subject of exchange. It is used in another sense when it refers to the thing included in condemnation. In the two cases, however, the same thing is not given two different values. The thing valued is different. Exchange value is what one would pay for what is exchanged. In buying a property one considers the element of probability of an administrative tribunal allowing a particular scale of rates. That element is not included among the elements that determine rates. In the Cedar Rapids Case [223 U. S. 655, 32 S. Ct. 389, 56 L. Ed. 594] and Des Moines Gas Co. Case [238 U. S. 153, 35 S. Ct. 811, 59 L. Ed. 1244], good will and franchise value were excluded from the rate base in determining whether the prescribed charges of the public utility were confiscatory. In these cases the thing valued did not include good will and franchise value. In the Galveston Electric Co. Case [258 U. S. 388, 42 S. Ct. 351, 66 L. Ed. 678] the cost of developing the business as a financially successful concern was excluded from the rate base. In that case the result of the development expenditure was not included in the property valued. The decisions hold that good will and franchise value are important elements when exchange value is involved and where the community acquires a public utility by purchase or condemnation. As between buyer and seller the good will and earning power due to effective organization are often more important elements than tangible property. Where good will is not considered as an element of value, an element is dropped out. The property is not the same as would be the property considered if good will were included. So it seems to me apparent that what are commonly referred to as different values of a thing for different purposes are really different values of different things.† * * *

[16] The other opinions and portions of this opinion are omitted. The portion printed appears on pages 583, 584, of 75 Interst. Com. Com'n R.

† On December 7, 1925, the United States District Court, S. D. California, S. D., composed of Ross, Circuit Judge and James and McCormick, District Judges, enjoined the Commission from enforcing the order fixing the valuation of this railroad. Los Angeles & S. L. R. Co. v. United States, 8 F.(2d) 747. The court held that the Commission had no authority to find that the property "has two kinds of value."

(B) Intangible Values ‡

WILLCOX v. CONSOLIDATED GAS CO. OF NEW YORK.

(Supreme Court of the United States, 1909. 212 U. S. 19, 29 S. Ct. 192, 53 L. Ed. 382, 48 L. R. A. [N. S.] 1134, 15 Ann. Cas. 1034.)

Mr. Justice PECKHAM delivered the opinion of the court.[17] * * *

Prior to 1884 there were seven gaslight companies in New York city, each operated under separate charters, granted at different times between the years 1823 and 1865 or 1871. They each had the right to use the streets of certain portions of the city for the purpose of laying their mains and service pipes in order to furnish gas to the city and the citizens. Not one of the companies had ever been called upon to pay a penny for such right, but the grant to each was, in that aspect, a gratuity. It was not, at the time of granting franchises such as these, the custom to pay for them.

In 1884, by chapter 367 of the Laws of that year, authority to consolidate manufacturing corporations was granted upon conditions mentioned in the act. The directors of the corporations proposing to consolidate were to make an agreement for consolidation, embracing, among other things, the amount of capital and the number of shares of stock into which it should be divided, the capital not to be in amount more "than the fair aggregate value of the property, franchises, and rights of the several companies to be consolidated." The agreement was not to be valid until submitted to the stockholders of each of the companies and approved by two thirds of each. The constituent companies, which were afterwards consolidated under their agreement, and pursuant to the act mentioned, were six in number, the seventh, the Mutual Company, withdrawing. The companies agreed upon the valuation of their property, which was to be paid for in the stock of the consolidated company, and the original stock held by the stockholders of each company was surrendered to the consolidated company. The value of the franchise of all the companies was set at the figure of $7,781,000. The court below said that the master reported there was little direct evidence before him as to the value of the franchises, to which the court added that if the master, by direct evidence, meant testimony of the same kind regarding their value as had been offered regarding every item of tangible property, there was none at all.

The court further stated that it does not appear in the evidence how the valuation of the franchises was measured, or why the figures selected were chosen, but that it was true that, when complainant was

‡ A more complete treatment of certain phases of "going value" will be found infra, section 2, VI.

17 The statement of facts and portions of the opinion are omitted. The portions here printed appear on pages 42–48 of 212 U. S. and pages 196–198 of 29 S. Ct. The decision sustained the validity of a legislative reduction of rates.

organized, in 1884, under the consolidation statute, which, in terms, permitted it to acquire the property and franchises of the other companies, it issued stock of the par value of $7,781,000, representing the franchises it then acquired and nothing else, and that the stock was held by purchasers who, I am compelled to think, had a right to rely upon legal protection for legally issued stock. It is not of course, contended there was special stock issued for this particular item, but it was included in the total sum for which the consolidated company issued its stock, and, upon its receipt, the stockholders in the various companies surrendered their stock in those companies. The result was that the amount of the stock issued by the consolidated company was increased by $7,781,000, representing a value of franchises which was agreed upon by the stockholders in the companies, and which had never cost any of them a single penny.

It cannot be disputed that franchises of this nature are property and cannot be taken or used by others without compensation. Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. Ed. 463, 13 S. Ct. 622; People v. O'Brien, 111 N. Y. 1, 2 L. R. A. 255, 7 Am. St. Rep. 684, 18 N. E. 692, and cases cited. The important question is always one of value. Taking their value in this case as arrived at by agreement of their owners, at the time of the consolidation, that value has been increased by the finding of the court below to the sum of $12,000,000 at the time of the commencement of this suit. The trial court said: "If, however, complainant's franchises were worth $7,781,000 in 1884, and its tangible property, at the same time, was appraised (as appears in evidence) at $30,000,000 (in round figures), then since complainant's business (in sales volume) has, in twenty-three years, almost quadrupled, and its tangible assets grown to $47,000,000, it appears to me that a fair method of fixing value of the franchises in 1905 is to assume the same growth in value for the franchise as is demonstrated by the evidence in the case of tangible property. If, therefore, the franchise valuation of 1884 was proportioned to personalty and realty of $30,000,000, a franchise valuation proportioned to $47,000,000 in 1905 would be over $12,000,000. This, I think, a logical result from the assumption I am compelled to start with, i. e., that franchises have a separable and independent value. But there is, however, no method of valuing franchises, except by a consideration of earnings. Earnings must be proportioned to assets; and both kinds of assets, tangible and intangible, must stand upon the same plane of valuation. Having, therefore, a measure of growth of tangible assets from 1884 to 1905, the franchise assets must be assumed to have grown in the same proportion. I find that the value of complainant's franchises at the date of inquiry was not less than $12,000,000, making a total valuation of $59,000,000, upon which the probable return is $3,030,000, or very considerably less than 6 per cent." The judge stated his own views as opposed to including these franchises in the property upon the value of which a return is to be calculated in

fixing the amount of rates, but held that he was bound by decided cases to hold against his personal views.

We are not prepared to hold with the court below as to the increased value which it attributes to the franchises. It is not only too much a matter of pure speculation, but we think it is also opposed to the principle upon which such valuation should be made. This corporation is one of that class which is subject to regulation by the legislature in the matter of rates, provided they are not made so low as to be confiscatory. The franchises granted the various companies and held by complainant consisted in the right to open the streets of the city and lay down mains and use them to supply gas, subject to the legislative right to so regulate the price for the gas as to permit not more than a fair return (regard being had to the risk of the business) upon the reasonable value of the property at the time it is being used for the public.

The evidence shows that from their creation, down to the consolidation in 1884, these companies had been free from legislative regulation upon the amount of the rates to be charged for gas. They had been most prosperous and had divided very large earnings in the shape of dividends to their stockholders—dividends which are characterized by the Senate committee, appointed in 1885 to investigate the fact surrounding the consolidation, as enormous. The report of that committee shows that several of the companies had averaged, from their creation, dividends over 16 per cent., and the six companies in the year 1884 paid a dividend upon capital which had been increased by earnings, as in the case of the Manhattan and the New York, of 18 per cent.; and, had it been upon the money actually paid in, it would have been nearly 25 per cent.

The committee also said in the same report that these "franchises were in force November 10, 1884, the time of the consolidation, and the money invested in them was earning the same enormous dividends. So far as the evidence shows, there was nothing in the condition of affairs on the 10th of November to indicate that these franchises would not be as valuable for the next twenty years as they had been in the past. There were gas companies enough in the city with a capacity capable of supplying the demands for the next twenty years. A law was on our statute books that virtually prohibited the laying of any more gas pipes in the streets. The gas companies had an agreement among themselves, fixing the price of gas at a figure that paid these dividends. The people were paying this price, as they had in the past, without objection or protest. This price may have been too high, and the dividends were excessive, but they were not illegal, and the valuation of the franchises computed upon these dividends and that state of facts cannot be called a violation of a law that expressly authorized it to be done, unless such valuation was too high."

The committee, upon these facts, were of opinion that the valuation of $7,781,000 for the franchises was not more than their fair aggregate value.

Assuming, as the committee did, that the company would be permitted to charge the same prices in the future which in the past had resulted in these "enormous" or "excessive" dividends, it need not be matter of surprise that a franchise by means of which such dividends had been possible was not regarded as overvalued at the sum stated in 1884.

We think that, under the above facts, the courts ought to accept the valuation of the franchises fixed and agreed upon under the act of 1884 as conclusive at that time. The valuation was provided for in the act, which was followed by the companies, and the agreement regarding it has been always recognized as valid, and the stock has been largely dealt in for more than twenty years past on the basis of the validity of the valuation and of the stock issued by the company.

But, although the state ought, for these reasons, to be bound to recognize the value agreed upon in 1884 as part of the property upon which a reasonable return can be demanded, we do not think an increase in that valuation ought to be allowed upon the theory suggested by the court below. Because the amount of gas supplied has increased to the extent stated, and the other and tangible property of the corporations has increased so largely in value, is not, as it seems to us, any reason for attributing a like proportional increase in the value of the franchise. Real estate may have increased in value very largely, as also the personal property, without any necessary increase in the value of the franchise. Its past value was founded upon the opportunity of obtaining these enormous and excessive returns upon the property of the company, without legislative interference with the price for the supply of gas; but that immunity for the future was, of course, uncertain; and the moment it ceased, and the legislature reduced the earnings to a reasonable sum, the great value of the franchise would be at once and unfavorably affected, but how much so it is not possible for us now to see. The value would most certainly not increase. The question of the regulation of rates did, from time to time thereafter, arise in the legislature, and finally culminated in these acts which were in existence when the court below found this increased value of the franchises. We cannot, in any view of the case, concur in that finding.

This increase in value did, however, form part of the sum upon which the court below held the complainant was entitled to a return. That court found the value of the tangible assets actually employed at the time of the commencement of this suit in the business of supplying gas by the complainant to be $47,831,435, to which it added the $12,000,000 as the value of the franchises as found by it, making the total of $59,831,435, upon which it held that the company was entitled to a return of 6 per cent., being $3,589,886.10. It also found its total net income for the year 1905 amounted to $5,881,192.45, almost 10 per cent. upon the sum above named. Altering the finding of the court so far only as to place the value of the franchises at the time agreed upon in 1884, $7,781,000, the total value upon that basis of the property em-

ployed by the company would be $55,612,435, upon which 6 per cent. would be $3,336,746.10, while the sum estimated as the return on 80-cent gas would have been $3,024,592.14, which is nearly 5½ per cent. on the above total of $55,612,435.

What has been said herein regarding the value of the franchises in this case has been necessarily founded upon its own peculiar facts, and the decision thereon can form no precedent in regard to the valuation of franchises generally, where the facts are not similar to those in the case before us. We simply accept the sum named as the value under the circumstances stated. * * *

CITY OF SPRINGFIELD v. SPRINGFIELD GAS & ELECTRIC CO.

(Public Utilities Commission of Illinois, 1916. P. U. R. 1916C, 281.)

SHAW, Commissioner.[18] * * * In addition to the value of the physical property used in and useful for gas-manufacturing purposes, the respondent has contended that, in fixing rates for gas service in Springfield, an additional value should be considered. The element of value, for which strong contention has been made, is the customary claim of added value of the gas property as a going concern, due to the fact that the utility is engaged actively in business in Springfield, that it has connected to its mains consumers who are purchasing its gas service, that it possesses an organization developed for efficiently conducting its gas business, and that it is a living entity instead of a mere collection of physical assets. Counsel for respondent proposes some one of the following "rules of thumb" as measures of "going value."

"1. Twenty-five per cent. (25 per cent.) of the value of the physical property.

"2. Thirty dollars ($30) for each gas consumer in Springfield.

"3. Five dollars ($5) for each inhabitant of Springfield."

Counsel admits, however, that such "rules of thumb" are indefinite. It is difficult, indeed, to see a direct relation between counsel's measures and a definite "going value." The use of these "rules of thumb" presupposes that "going value" must exist. For instance, it may be assumed for the moment that a "going value" is to be measured at the rate of $5 per person in a city's population. The gas business to be derived from the populace is quite dependent upon the efforts made by the management of the gas utility to obtain new business, and often this is influenced, either directly or indirectly, by a lack of real competition with a local electric utility. It is generally conceded among

[18] Portions of the opinion are omitted. The portions here printed appear on pages 357–373 of P. U. R. 1916C.

gas men that the gas industry, at the present time, is suffering in development because both the gas and the electric utilities, in a given city, are often owned by the same interests. To the stockholders, it seems that electricity is the more profitable. In a city where the gas saturation is low, a measure of "going value," based on total population, leads to obviously unmeritorious reward of a utility's lack of aggressiveness in the securing additional consumers. This Commission holds that the "going value," in its commonly accepted meanings, either may or may not exist in a given utility property, and its determination in any event rests with the facts governing a particular case—not upon "rules of thumb."

In an endeavor to establish intangible elements of value, "going value" has been defined in various ways by different authorities—other than the court of highest standing. Of this array of definitions, four constructions placed on the term "going value" have been recognized more or less authoritatively. (a) "Going value" may be interpreted to mean the mere attribute of a utility, in normal action—operating, engaged in business, and organized. (b) "Going value" may be the difference between the exchange value of a utility (were it possible to sell or to purchase the same in the open market) and the present appraised value of its physical property. (c) "Going value" has been used synonymously with "good will"; i. e., the probable continual resorting of customers to the old stand. (d) "Going value" has been defined to mean the net unrecompensed deficits sustained by a utility when operating at a loss during the very early years of its existence. This Commission, under the law, should determine which of these many phases of "going value," in a particular case, represents property which is used and useful to the public in the rendering of utility service, which possesses value for rate-making purposes, and which is the result of capital expenditure (or denial of reasonable earnings) on the part of the utility. Viewed in this light, "going value" ceases to be indefinite and formidable; but instead reduces itself to a remarkable degree of concreteness. However conscientiously a scientific solution of the intangible elements may be striven for, it is quite apparent that, at the present stage of progress in economic theory applied to rate-making, an expression of "going value" is to be arrived at, not by utilizing mathematical formulas, but by considering judicially all relevant and pertinent facts established in any case under consideration.

As for "going value," heretofore designated as (a)—the organization of a utility business—it is often claimed that this is to be measured by the amount expended by a utility in accounts known as "new business," "free demonstrations," "commercial expense," etc. The advocates of this theory usually fail to distinguish between whether or not such items of expense have been met in the operating accounts, which during past years have been borne by the consumers. If the former consumers have reimbursed the utility fully for this type of expenditures, then it is obviously improper to capitalize a duplicate

charge against the future generation. If the past revenues of the utility have been insufficient to meet fully all expenditures for "new business," "demonstrating," etc., the deficit unavoidably must appear in any proper compilation to determine "going value," by the deficit and surplus method (d). "Going value" (a), if loosely considered, is subject to confusion with "going value" (c)—"good will." The dividing line between the two is by no means definite. As for "going value" (b)—exchange differential—it may be stated that this has no place in a rate determination. A cursory examination is sufficient to demonstrate that a capitalization of an exchange differential is merely to work around a circle, wherever the question involved consists of the determination of rates charged for utility service. Rates produce earnings, and, if an excess of net earnings over a fair return upon a fair value of the property is capitalized as "going value," the rates obviously will remain unchanged. Regulatory commissions, in general, have denied in rate cases any claim for "going value" based upon the capitalization of an exchange differential. Cf. Fuhrmann v. Cataract Power & Conduit Co., 3 P. S. C. R. (2d Dist. N. Y.) 656, 692. The Supreme Court of the United States in the Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729, squarely recognized this view when it criticized an apportionment of values between interstate and intrastate traffic, based upon revenues derived from rates in question.[19] * * *

As to "going value" (c)—"good will"—the courts have established, beyond shadow of doubt, how the claim is to be regarded. This Commission is in perfect harmony with the principles relating to "good will" as laid down by the Supreme Court of the United States in four leading cases. Confer Willcox v. Consolidated Gas Co., 212 U. S. 19, 29 S. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034; Omaha v. Omaha Water Co., 218 U. S. 202, 30 S. Ct. 615, 54 L. Ed. 991, 48 L. R. A. (N. S.) 1084; and Cedar Rapids Gaslight Co. v. Cedar Rapids, 223 U. S. 655, 56 L. Ed. 594, 32 S. Ct. 389.[20] * * *

This exclusion of "good will" by the highest of tribunals has eliminated the use of that term in rate making for monopolistic public utilities; but its equivalent, however, is ever present. Utilities, moreover, owing no doubt to a confusion of terms, display a tendency to make claim for a capitalization of consumers connected to gas mains, for a capitalization of the population served, for an intangible valuation of a business organization occupied in producing and disposing of gas, and for other elements of exchange value—all in lieu of a now obsolete application of the "good will" element to monopolistic public utility properties. Utilities are apt, moreover, to confuse this "good will" point of view of "going value" to mean the attributes of model opera-

[19] Quotations from that case are omitted. They will be found infra, page 1145.

[20] Quotations from some of the cases are omitted.

tion and management, and to claim value in the capital accounts of features which, as far as charges to consumers are concerned, should be considered with more logical propriety in the rate of return. It is axiomatic, that a low rate of return upon a high valuation of a physical property plus a large intangible element is equivalent to a much higher rate of return upon a reasonable valuation of the actual tangible property. In this connection, also, claim is often made for exceptionally competent supervision. It is contended that exceptionally competent supervision of utility operation produces correspondingly excellent financial showing, and, conversely, that incompetent executives and management produce correspondingly poor and destructive results. That consumers should be asked to guarantee competent supervision is indefensible; they have the right to be served with competency. Executives and management are paid currently from operating expenses, and it is to be expected that the service was paid for in relative proportion to its competency. Excellent supervision, like incompetent supervision, cannot be regarded as an element of capital value. The consumers' duty ceases upon payment of fair rates of charge for utility service, and it then becomes the obligation of the utility to see that its business is conducted in a reasonably competent manner. Proper reward for competent management is to be secured in a manner treated elsewhere herein.

As for "going value" (d)—accrued deficits (or surpluses) in early utility operations—the question has been discussed at length by courts and commissions alike. It seems that the Wisconsin Railroad Commission (one of the earliest of the state regulatory boards) developed an apparently scientific method of computing past deficits and surpluses and established therefrom a precedent (by no means generally concurred in) of capitalizing the total deficits, if such is found to exist. Cases are not to be found where the reverse treatment has been pursued; i. e., the reduction of capitalization when past surpluses are found to exceed the past deficits. * * *

Several modifications of the so-called "Wisconsin method" have been suggested to this Commission in rate-making and security-issue cases, and, in applying the method, many of the experts are prone to err in an improper disposition of estimated depreciation. Few appraisers, in computing a "going value," will give the same consideration to depreciation in the capital account that the identical subject receives in the annual operating expenses. When depreciation is consistently treated at every point, many a fanciful "going-value" table is changed from a net deficit to a net surplus. In an application of the theory of depreciation to a going-value table, the treatment should be consistent throughout. Under the Wisconsin method, two courses to pursue in the treatment of depreciation in its relation to going value are open—(1) For each annual charge to cover depreciation, the capital account should be reduced by the identical amount charged against depreciation, taking into consideration, of course, that plant extensions and betterments

should be added progressively to the capital account. (2) If the computer is insistent that the original capital charge must be preserved, the going-value table should be made sufficiently comprehensive to include the depreciation fund which is being accumulated through the medium of annual charges, and this depreciation fund must be credited with its earnings.

Closely allied with the deficit and surplus method of computing "going value" is one commonly designated as the reproduction of a predetermined income method (or by some equivalent cognomen). The method is purely hypothetical and conjectural, is predicated upon the assumption that "going value" absolutely exists in a given utility property, is subject to many varying assumptions, and is susceptible to any solution which the computer may desire to attain. By a change in basic assumptions, the reproduction method is capable of being converted into the deficit and surplus method. Tersely stated, the reproduction method of deriving a "going value" is to conceive that a new utility, the exact counterpart of an existing utility, is started onward in its operating career upon the date of the valuation. The process contemplates that, from some unknown cause, the existing plant is completely obliterated—nonexistent, as it were. It then becomes necessary to imagine, if one can, that the environments for utility service exist practically as before. The method, furthermore, assumes that, at some near future date, the earlier deficits will be overtaken by surpluses—the reverse of which seems to be true in many an expert's computation of the deficit and surplus theory. Once the imagination is fully at play upon this reproduction method of seeking "going value," it is then conjectured, "How much will it cost this new creation to reproduce and develop the existing utility's business?" The answers are as numerous as the individual opinions of the many expert appraisers. The method possesses no foundation whatsoever in fact. Regulatory commissions, as a general rule, have repudiated the method. * * *

Generally speaking, the reproduction method of computing "going values" at best is little better than guesswork, and as such is devoid of any substantial merit. * * *

Among utilities which have become involved in rate-making procedures, there has existed great uncertainty as to what constitutes proper and complete "going value." This uncertainty has been reflected in long discussions by regulatory commissions. No court of last resort has yet defined clearly and fully exactly what shall be included and what method shall be pursued in arriving at a reasonable and proper "going value." It is not to be expected that ideas respecting vague, intangible adherents to property will become crystallized, nor that a reasonable unanimity of thought will prevail for many years to come. "Going value" is not a matter of formulas, and is not susceptible to scientific computations. At the present time, allowances made in the capital account for "going value" must be considered more or less the result of judgment—a judgment in which the presumption is that fair

rates of charge are to be established by the regulatory power that intervenes between the public on the one hand, and the utility, on the other hand.

As typical of the uncertainty which exists among commissions respecting "going value," the California Commission, Re Marin Municipal Water Dist., recently stated:

"There is no element in public-utility valuation as to which there is greater vagueness and confusion than this so-called going-concern value. The courts recognize that some value ought to be added to a going concern over the bare bones of its physical structures, but they do not seem to be clear as to how much should be added or on what basis the amount to be added should be ascertained." P. U. R. 1915C, 471.

But "bare bones" may be inferred to mean the scrap or junk value which a mere collection of physical property would be worth, were not the concern a living entity justly deserving a present-day value. And Mr. Justice Day in the Des Moines Gas Case also has said, to wit:

"While there is a difference between court and counsel as to what the master meant by this, we think it is apparent that he meant to say that, applying the rule of the Cedar Rapids Case, he had already valued the property in the estimate of what he called its physical value, upon the basis of a plant in actual and successful operation; for he said that otherwise its value would be much less." 238 U. S. 153, 35 S. Ct. 811, 59 L. Ed. 1244, P. U. R. 1915D, 589.

An older judicial point of view was expressed by the federal court in the case of Cumberland Teleph. & Teleg. Co. v. Louisville, to wit:

"It is insisted that $50,000 should have been included in the estimate as a distinct and additional enhancement of the value of the plant, because of the fact that the company is a going concern. In valuing property of the character of that involved here, it would indeed be looking only at 'its bare bones' not to take into consideration the fact that the company is a going concern. That fact, however, though possibly somewhat unconsciously to themselves, must necessarily, we think, have been taken into account by the witnesses who testified as to values. Property, underground or overhead, thinly strung out over many miles, would have very diminished value were it not in actual use for the purpose for which it was installed." 187 F. 637.

When utility property is appraised by an expert for rate-making purpose, there is little doubt but that the same is valued as a living and going concern. Counsel for the respondent points with emphasis to the fact that certain of the respondent's appraisers distinctly stated that they had not included any computation of going value in their valuations. In a technical sense, these witnesses meant no more than to say that they had not made distinct and separate calculations of going value by any of the aforesaid methods. Consciously or unconsciously (to apply the court's language in the Cumberland Case, supra), the ex-

perts must have appraised the gas property in Springfield as a living entity. Were this not so, then the only value that could be attached to the property would be the scrap or junk value of its component parts—a very small fraction of the value to be attained by regarding the miscellaneous parts as joined together in one homogeneous system and operating as a living entity. The distribution system, for instance, would be practically a total loss, inasmuch as very little of the pipe would be worth the digging up and removal to a new location. The plant equipment as junk is to be valued at only 5 per cent. of its original cost. Buildings seldom have little salvage value more than sufficient to pay for the removal from a site. The appraised value of the many detail items which make up the gas plant, individually and collectively, receives from an appraiser a fair present value which inherently precludes the possibility of the plant being anything but a going concern.

It would appear that claims for going value should be supported by proof of its existence. In this connection, the case of Pillsbury v. People's Gaslight Co. before the New Hampshire Public Service Commission is illuminating:

"All of the other cases either deny any going value, or in effect hold that the going-concern element finds its principal weight in such unrequited sacrifices of stockholders as existing business may fairly be taken to represent.

"In the Berlin Electric Light Co. Case, 3 N. H. P. S. C. R. 174, we held that, 'if especial weight is to be claimed for the going-concern element on account of alleged failure of returns in earlier years, evidence should be introduced so that an intelligent finding upon that point may be made.'

"This case well illustrates the importance of requiring any such claim to be based on evidence of facts rather than upon opinion evidence." 4 N. H. P. S. C. R. 391.

The respondent herein has offered no real proof of the existence of any going value during early operations. * * *

There is no proof in the record of the case at bar that "the investment necessary to organizing and establishing the business" has not "been already compensated in rates charged and collected under former ordinances." The respondent's past earnings would more than indicate that early losses have long since been reimbursed.[21] * * *

[21] The commission brought proceedings in the circuit court of Sangamon county, on the relation of the city of Springfield. That court set aside the commission's order, and the city appealed to the state Supreme Court. In an opinion by Thompson, J., it was held that the circuit court properly set aside the commission's decision, but that it ought to have remanded the cause for further proceedings. State Public Utilities Commission ex rel. City of Springfield v. Springfield Gas & Electric Co., 291 Ill. 209, 125 N. E. 891 (1919, rehearing denied 1920). One ground for setting aside the commission's order was expressed as follows:

"We are convinced from an examination of the record that it did not give due consideration to that element of value known as 'going value.' Our

*(C) Physical Value and Reproduction Cost Less Depreciation**

R. L. HALE, "VALUATION AND RATE MAKING."

(Columbia University Press, 1918. Pages 29, 30, 33, 34, 67–71.)

There is a sense in which the exchange or market value of the physical property may be differentiated from that of the entire business. Unless the property is now in the actual process of being exchanged, exchange value means what some one *would* pay were conditions sufficiently unlike those existing to bring about an exchange. A hypothetical outsider, buying the physical property from the company to operate it with all the rights now possessed by the company, would

conclusion in this regard is given support by the declaration in the opinion of the commission that—

" 'This commission holds that going value, in its commonly accepted meaning, either may or may not exist in a given utility property.'

"We cannot agree with this statement in view of the authorities hereinbefore cited and discussed. This element of value is always present in every assembled and established plant doing business and earning money. It is a property right, and must be considered by the commission in determining the value of the property upon which the utility has a right to make a fair return. The engineer for the commission and the engineers for the company all state that the valuation fixed by them did not include an allowance for 'going value.' As we have said, this element of value is one that cannot be fixed with mathematical accuracy, and while it is not necessary that the finding of the commission fix a separate value for it, it is necessary that the finding show that due consideration was given to this part of the property of the utility. The evidence in this record is undisputed that there was an element of value over and above the valuations fixed by the engineers which was not considered by the commission in fixing the value of appellant's property."

Contrast this with the decision in Des Moines Gas Co. v. Des Moines, infra, page 1044, which the court here quotes, and with the following language of the court in this very opinion:

"Exchange value should not be considered by the commission in establishing the proper valuation as a basis for rate-making purposes. The exchange value is, in the case of a property whose function is simply to earn money, determined primarily by the earning power, and the more unjust and unreasonable the charge made by the utility the higher the exchange value. In rate cases the question in determining the value is not how much has been or can be got out of the property, but how much has been put into it, in order that from that fact it may be determined how much may be reasonably taken out of it in the way of net income. Exchange value is therefore measured by return. The Supreme Court of the United States said in the Minnesota rate cases [230 U. S. 352, 33 S. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18]:

" 'The value of the use, as measured by return, cannot be made the criterion when the return itself is in question. If the return, as formerly allowed, be taken as the basis, then the validity of the state's reduction would have to be tested by the very rates which the state denounced as exorbitant. And, if the return as permitted under the new rates be taken, then the state's action itself reduces the amount of value upon which the fairness of the return is to be computed.' Simpson v. Shepard, supra."

In other words, the court's reasoning as to "going value" in the previous passage is fallacious, if exchange value was in mind; but it is meaningless otherwise.

* On the general topic of depreciation see infra, section 2 VII. For considerations of policy regarding reproduction cost, see section 2 IV.

pay as much as the market value of the entire business. He would not distinguish between the physical property and the "intangibles." The company, however, already in possession of the "intangibles," would not necessarily pay a hypothetical owner of the physical parts of the property as much as this. It would pay no more than what it would have to pay for the construction or purchase of a substitute which, from the point of view of revenue production, would be equally efficient. It would not pay that much if the business as a whole had a market value which was less. Taking the market value of the physical property, then, to mean what the company would pay for that property to one who was not himself possessed of the operating rights, that value cannot exceed the market value of the whole, but it may fall short thereof. If it does fall short thereof, the difference between the "physical value" and the market value of the entirety would be the value of the "intangibles"—the franchise, "good will," "going value," and the like. * * *

The existence of an intangible value is not to be accounted for exclusively by the possession of a franchise. If capital were perfectly free, not only legally but practically, to enter or leave the business in any quantity, large or small, there could be no intangible value. Sufficient capital would flow in to reduce the earnings until they sufficed only to attract the capital necessary for building a substitute—in other words, until the market value of each concern as an entirety was equal only to the cost of building a substitute. The fact that capital is not free to enter may be due either to legal prohibition of its entry (as where the existing company has an exclusive franchise), or to other business circumstances. Among the latter may be mentioned "good will," "unfair practices" and the mere advantage of being first in a field where the demand for the services is sufficient to create an intangible element of value as long as the existing company is the only producer, without being sufficient to induce an outsider to enter that field and thereby cut down the value by adding to the supply. This last situation is due to the necessity of large-scale production, and would not be present where small-scale production is equally economical.

Only to the extent that the absence of competition, and the consequent presence of intangible value, is to be accounted for by legal prohibition, can that value be attributed to the franchise. The franchise consists of the right to exclude and the right to operate. The right to operate can have no value apart from the right to own the physical property. It is by virtue of the right to operate that the value of the physical property exceeds its junk value. That right accounts, then, for part of the value of the physical property (just as the right to make shoes accounts for part of the value of shoe machinery), but for none of the "intangible" value. As much of the latter as cannot be accounted for by the right to exclude is therefore not franchise value at all, but the value of the other intangibles. In practice, however, it would

be difficult if not impossible to ascertain precisely how much of the intangible value is that of the franchise. * * *

In many cases the cost of replacing with an equally efficient substitute can be determined only indirectly. If the existing plant were partly worn out, we could estimate directly what it would cost to replace it with a new substitute. But this new substitute would be a superior, not an equally efficient one. The cost of replacing with an equally efficient substitute is the cost of the new less the difference in net-earning capacity occasioned by the age of the existing one. This difference in earning capacity may be due either to the fact that the use of the old involves greater expenses in the way of repairs and the like, or merely to the fact that the old is nearer the end of its life, necessitating the collection of a replacement fund in a shorter period of years than would be the case if the accumulation of that fund could be spread over the entire life of the plant.

If the inferiority of the existing plant is due solely to the necessity for greater expense of operation, the difference in the net earning capacity can be quite simply estimated. If, on the other hand, the ordinary expenses of the existing plant are no greater than they would be were the plant new, the depreciated value is to be accounted for solely by the necessity for deducting from the gross earnings a greater amount for replacement. Even this necessity would not exist if a sufficient fund had already been accumulating during the past life of the existing plant. As the [Wisconsin] commission remarked in City of Beloit v. Beloit Water, Gas & El. Co.: [22]

"Where proper depreciation curves have been kept in the past, the present or existing value of a property, as determined by inventory, inspection and appraisal, plus the depreciation reserve, should theoretically equal the cost new of that property." * * *

There may be cases of large and complex plants (such as railroads) where no depreciation reserve is necessary. Does cost new without deduction represent the physical value in such cases (assuming, of course, that the earning-capacity value is greater)? It was so contended by the company in the case of In re Purchase Janesville Water Works Plant.[23]

"The argument is that the plant will constitute a continuous property to be kept up from year to year by expenditures for maintenance, and that because it is such a continuous property which probably will never be entirely scrapped at one time, it should be considered that there has been no element of depreciation which should be deducted from the cost of reproduction." [24]

[22] 7 Wis. R. C. R. 187, 236 (July 19, 1911).

[23] 15 Wis. R. C. R. 674, 695–696 (January 30, 1915).

[24] A similar argument was made in a report of the municipal Public Service Commission of St. Louis, prepared by Commissioner James E. Allison, dated September 11, 1912, and entitled, "Should Public Service Properties be Depreciated?" [Infra, page 1059.] Cf. also, an article by Professor Allyn A. Young entitled "Depreciation and Rate Control," Quarterly Journal of Economics, vol. 28, p. 630 (August, 1914).

From this argument advanced by the company the commission dissented. * * *

Though the commission's reasoning is not entirely explicit, its conclusion seems to be correct, for even if no deductions need to be made from gross earnings for a depreciation fund, it is none the less true that in the case of a completely new plant there would be an initial period before any of the parts would need replacement. During that period the maintenance expenses would be less than when certain parts have to be replaced each year. The net earnings during that period, accordingly, would be greater for a new plant than for one which had already reached the beginning of the period of continuous replacements. The power to earn this temporary excess of net earnings is worth something, and its value must be deducted from the cost new in order to ascertain the value of the old physical property.[25]

BLOCK v. HIRSH.

(Supreme Court of the United States, 1921. 256 U. S. 135, 41 S. Ct. 458, 65 L. Ed. 865, 16 A. L. R. 165.)

Mr. Justice HOLMES delivered the opinion of the court.[26] * * *

The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law. Plainly circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern. It is enough to refer to the decisions as to insurance, in German Alliance Insurance Co. v. Lewis, 233 U. S. 389, 34 S. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189; irrigation, in Clark v. Nash, 198 U. S. 361, 25 S. Ct. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171; and mining, in Strickley v. Highland Boy Gold-Mining Co., 200 U. S. 527, 26 S. Ct. 301, 50 L. Ed. 581, 4 Ann. Cas. 1174. They sufficiently illustrate what hardly would be denied. They illustrate also that the use by the public generally of each specific thing affected cannot be made the test of public interest (Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U. S. 30, 32, 36 S. Ct. 234, 60 L. Ed. 507), and that the public interest

[25] This fact was pointed out and elaborated by Mr. James C. Bonbright, in an article written in answer to Professor Young's article, cited above. Mr. Bonbright's article, entitled "Depreciation and Rate Control. A Further Discussion," appears in the Quarterly Journal of Economics, vol. 30, p. 546 (May, 1916).

For a refutation of the attempt made in the text to distinguish physical from intangible exchange value, see articles by Gerard C. Henderson, "Railway Valuation and the Courts" (1920), 33 Harv. Law Rev. 902, 1031, at 1048–1050.

[26] Portions of the opinion are omitted, as well as the dissenting opinion of Justice McKenna, in which Chief Justice White and Justices Van Devanter and McReynolds concurred. The decision sustains the validity of the emergency rent laws for the District of Columbia.

may extend to the use of land. They dispel the notion that what in its immediate aspect may be only a private transaction may not be raised by its class or charter to a public affair. See, also, Noble State Bank v. Haskell, 219 U. S. 104, 110, 111, 31 S. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487.

The fact that tangible property is also visible tends to give rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay. Under the police power the right to erect buildings in a certain quarter of a city may be limited to from eigthy to one hundred feet. Welch v. Swasey, 214 U. S. 91, 29 S. Ct. 567, 53 L. Ed. 923. Safe pillars may be required in coal mines. Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 34 S. Ct. 359, 58 L. Ed. 713. Billboards in cities may be regulated. St. Louis Poster Advertising Co. v. St. Louis, 249 U. S. 269, 39 S. Ct. 274, 63 L. Ed. 599. Watersheds in the country may be kept clear. Perley v. North Carolina, 249 U. S. 511, 39 S. Ct. 357, 63 L. Ed. 735. These cases are enough to establish that a public exigency will justify the Legislature in restricting property rights in land to a certain extent without compensation. But if to answer one need the Legislature may limit height to answer another it may limit rent. We do not perceive any reason for denying the justification held good in the foregoing cases to a law limiting the property rights now in question if the public exigency requires that. The reasons are of a different nature but they certainly are not less pressing. Congress has stated the unquestionable embarrassment of Government and danger to the public health in the existing condition of things. The space in Washington is necessarily monopolized in comparatively few hands, and letting portions of it is as much a business as any other. Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present. The only matter that seems to us open to debate is whether the statute goes too far. For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law. Martin v. District of Columbia, 205 U. S. 135, 139, 27 S. Ct. 440, 51 L. Ed. 743.

Perhaps it would be too strict to deal with this case as concerning only the requirement of thirty days' notice. For although the plaintiff alleged that he wanted the premises for his own use the defendant denied it and might have prevailed upon that issue under the act. The general question to which we have adverted must be decided, if not in this then in the next case, and it should be disposed of now. The main point against the law is that tenants are allowed to remain in pos-

session at the same rent that they have been paying, unless modified by the Commission established by the act, and that thus the use of the land and the right of the owner to do what he will with his own and to make what contracts he pleases are cut down. But if the public interest be established the regulation of rates is one of the first forms in which it is asserted, and the validity of such regulation has been settled since Munn v. Illinois, 94 U. S. 113. It is said that a grain elevator may go out of business whereas here the use is fastened upon the land. The power to go out of business, when it exists, is an illusory answer to gas companies and waterworks, but we need not stop at that. The regulation is put and justified only as a temporary measure. See Wilson v. New, 243 U. S. 332, 345, 346, 37 S. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024; Fort Smith & Western R. R. Co. v. Mills, 253 U. S. 206, 40 S. Ct. 526, 64 L. Ed. 862. A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.

Machinery is provided to secure to the landlord a reasonable rent. Section 106. It may be assumed that the interpretation of "reasonable" will deprive him in part at least of the power of profiting by the sudden influx of people to Washington caused by the needs of Government and the war, and thus of a right usually incident to fortunately situated property—of a part of the value of his property as defined in International Harvester Co. v. Kentucky, 234 U. S. 222, 34 S. Ct. 853, 58 L. Ed. 1284; Southern Ry. Co. v. Greene, 216 U. S. 400, 414, 30 S. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247. But while it is unjust to pursue such profits from a national misfortune with sweeping denunciations, the policy of restricting them has been embodied in taxation and is accepted. It goes little if at all farther than the restriction put upon the rights of the owner of money by the more debatable usury laws.[27]
* * *

[27] For a very illuminating demonstration of the fallacy of basing the return on any kind of exchange value, see Gerard C. Henderson, "Railway Valuation and the Courts" (1920), 33 Harv. Law Rev. 902 and 1031, particularly the second installment. Mr. Henderson concludes: "The whole doctrine of Smyth v. Ames rests upon a gigantic illusion. The fact which for twenty years the court has been vainly trying to find does not exist. 'Fair value' must be shelved among the great juristic myths of history, with the Law of Nature and the Social Contract. As a practical concept, from which practical conclusions can be drawn, it is valueless."

It must be borne in mind that in eminent domain the function of compensation is supposed to be to leave the owner in as advantageous an economic position as if the government had not sought to acquire his property; whereas the very purpose of the power to reduce rates that are adjudged to be "extortionate" is to deprive the owner of an economic advantage supposed to be "undue"; and depriving him of that advantage necessarily deprives him of part of the value of his property, since his previous power to obtain "excessive" earnings from his customers undoubtedly added economic value to his property. That the earning power is what gives value to the franchises is recognized in the condemnation case of Monongahela Navigation Co. v. United States, 148 U. S. 312, 13 S. Ct. 622, 37 L. Ed. 463 (1893), in an opinion by Justice Brewer. In that case the value of the earning power was required to be paid by way of compensation. That the earning power

III. Fair Value Conceived as an Objective Fact Other Than Exchange Value

FUHRMANN v. CATARACT POWER & CONDUIT CO.

(Public Service Commission of New York, Second District, 1913. 3 P. S. C. [2d D. N. Y.] 656.)

Stevens, Chairman.[28] * * * In the case of Smyth v. Ames the court gave an elaborate enumeration of what should be considered in ascertaining "value." † * * * This enumeration of matters to be considered may be regarded as a demonstration that the court did not have in mind "value" in its economic sense of "exchange value," since the matters enumerated do not lead logically or otherwise to a fixing of exchange value. It would be too much to say that any one ever arrived at a conclusion as to how much he would be willing to part with for a given piece of property by any such process as is here indicated. If, however, the court was endeavoring to point out a method of reaching a just and reasonable conclusion as to the just and reasonable amount upon which the return should be allowed, it could not well have used better or more comprehensive language.

The result to be evolved from such a process as is indicated is the

(which might be excessive) is what gives value to the franchises was also recognized by Justice Peckham in the rate case of Willcox v. Consolidated Gas Co., supra, page 986. In that case the owner was not allowed the benefit of the entire previous value—nor is he, indeed, in any rate case wherein a reduction of net earnings is sustained.

While a "taking" of property is held to require full compensation to the owner, the same is by no means universally true of a "deprivation" of property or of its value. See, for instance, Mugler v. Kansas, 123 U. S. 623, 8 S. Ct. 273, 31 L. Ed. 205 (1887), wherein a certain use which gave value to the property was prohibited, and Omnia Commercial Co. v. United States, 261 U. S. 502, 43 S. Ct. 437, 67 L. Ed. 773 (1923), wherein a certain property right was completely destroyed. Cf. a very able note, "Deprivation of 'Property' by Retroactive Legislation," in 25 Col. Law Rev. 470 (1925), and a suggestive discussion in the note, "The Jurisdiction of the United States Court of Claims over Claims Founded upon Implied Contracts," in 38 Harv. Law Rev. 1104 (1925). If rate regulation were treated on the analogy of a "taking" there could be no reductions in net earnings, unless indeed the value be split up, as suggested by Commissioner Potter, supra, page 985, into physical and intangible elements, and the protection against uncompensated taking applied only to some of the elements. Any such complete protection of some elements of value coupled with complete exposure of others is inconsistent with those decisions which permit some physical values to be impaired by rate making and with those which profess, at least, to give complete protection to the exchange value of intangibles. Cf. Denver v. Denver Union Water Co., 246 U. S. 178, 38 S. Ct. 278, 62 L. Ed. 649 (1918). The analogy of a "deprivation" is more helpful than that of a "taking," with this difference: In rate making, unlike most deprivation cases, the validity of the particular deprivation depends upon how much value is left to the owner after the deprivation. How much should be left is the question of policy really underlying the "valuation" question in rate cases.

[28] Portions of the opinion are omitted. The portion here quoted appears on pages 681, 682, of the report.

† The Commission here quotes the paragraph which will be found supra, p. 978.

reasonable amount of the investment in the public service. If instead of "value" we were to say "fair amount of investment," we would satisfy in such an inquiry every elementary sense of justice and every requirement imposed by courts in the enumeration of the processes to be followed in reaching the desired result.[29] * * *

BUELL v. CHICAGO, M. & ST. P. RY. CO.[30]

(Railroad Commission of Wisconsin, 1907. 1 Wis. R. C. R. 324.)

[After citing the paragraph from Smyth v. Ames, supra, page 978:] We have carefully considered this matter of valuation and the various elements that should be taken into account as decided by the court. Our conclusion is so near to the cost of reproduction new, that we have concluded to adopt that valuation, not because it happens to be made on any particular basis, but because it is equivalent to a composite value, arrived at after taking into account the various elements suggested by the court.[31] * * *

CONSOLIDATED GAS CO. OF NEW YORK v. NEWTON.

(District Court of the United States, S. D. New York, 1920. 267 F. 231.)

LEARNED HAND, District Judge.[32] * * * It must be owned that much of the discussion shows either a timidity or an inability to grasp any principle in dealing with the "rate base." With deference, it appears to me to be merely an abandonment of any attempt to deal intelligibly with the question to say that cost of reproduction and the original cost are each elements to be considered. That statement can mean nothing whatever, unless it is accompanied by a constitutive rule, which will establish some standard in the ascertainment of which these may be used. It would be understandable to say that the two estimates

[29] Cf., however, the following comment on the same case by the same writer, in the following year:

"The court lays down certain matters which must be considered in ascertaining value. The consideration of all these matters and the giving to each of them such weight as may be just in a given case is wholly inconsistent with the investment theory of value and entirely consistent with the ascertainment of exchange value."—The Valuation of Railroad Right of Way, No. 3, pamphlet by Frank W. Stevens, Counsel for New York Central Lines, 1914, p. 30.

For an argument to the effect that the court probably had in mind exchange value, and was therefore guilty of circular reasoning, see the editor's article, "The 'Physical Value' Fallacy in Rate Cases," (1921), 30 Yale Law J. 710, 713–716.

[30] Portions of the opinion are omitted. The portion here printed appears on page 481 of the report.

[31] See, also, In re Houghton County Electric Light Co. (Mich. P. U. C.), P. U. R. 1924B, 32, 34, 35 (1923).

[32] The statement of facts and portions of the opinion are omitted. The portions here printed appear on pages 236, 237 of the report.

should be averaged, but such a rule could obviously command no support, because it would correspond to no relevant considerations of policy. Merely to leave the question with a caution that several elements are to be considered is to abandon any effort to solve it.[33] * * *

IV. Considerations of Policy Favoring Reproduction or Actual Prudent Cost

CONSOLIDATED GAS CO. OF NEW YORK v. NEWTON.

(District Court of the United States, S. D. New York, 1920. 267 F. 231.)

Learned Hand, District Judge.[34] * * * The recurrent appeal to a just rate and a fair value assumes that the effort is to insure such a profit as would induce the venture originally and that the public will keep its faith so impliedly given. That, I think, involves a tacit comparison of the profit possible under the rate with profits available elsewhere; i. e., under those competitive enterprises which offer an alternative investment. The implication is that the original adventurer would compare future rates, varying as they would with the going profit, and would find them enough, but no more than enough, to induce him to choose this investment. By insuring such a return it is assumed that the supply of capital will be secured necessary to the public service. As the profits in the supposed alternative investment will themselves

[33] See, also, Stevens, Chairman, in Application of Westchester Street Railroad Co. for Authorization to Issue Capital Stock, 3 P. S. C. (2d D. N. Y.) 286, 311–316 (1912); Eastman, Commissioner, dissenting, in San Pedro, Los Angeles & Salt Lake R. R. Co., 75 Interst. Com. Com'n R. 463, 550–554 (1923), Meyer, Chairman, concurring in same case at 592–595; and Brandeis, J., concurring, in State ex rel. Southwestern Bell Telephone Co. v. Public Service Commission, infra, at pages 1020–1022.

Whether the United States Supreme Court's position on valuation indicates "an abandonment of any attempt to deal intelligibly with the question," as Judge Hand suggests, or whether it indicates the fallacious belief that the requirement of a fair return on exchange value is compatible with the power to reduce net earnings, is not clear. The court insists on requiring a fair return on something it calls "value," and which varies from time to time. In determining this "value," reproduction cost must be "considered." State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission, 262 U. S. 276, 43 S. Ct. 544, 67 L. Ed. 981, 31 A. L. R. 807 (1923); Bluefield Waterworks & Improvement Co. v. Public Service Commission, 262 U. S. 679, 43 S. Ct. 675, 67 L. Ed. 1176 (1923). On the other hand, if "due" consideration has been given to reproduction cost, the "value" may be appreciably less. Georgia Ry. & Power Co. v. Railroad Commission, 262 U. S. 625, 43 S. Ct. 680, 67 L. Ed. 1144 (1923). What constitutes "due" consideration is not clear. If the court has meant by "value" some objective fact other than exchange value, it has thus still failed to lay down a "constitutive rule," and it has advanced no "relevant considerations of policy." If, on the other hand, it has meant exchange value, then the requirement enunciated in words it has failed to apply in practice each time that it has sanctioned a reduction in net earnings.

[34] The statement of facts and portions of the opinion are omitted. The portion here printed appears on pages 237–239 of the report and follows immediately after the part quoted on page 1004, supra.

vary, so it is assumed to be a condition of the investors' bargain that their profit shall measurably follow the general rates. It is, of course, not relevant here to discuss these presuppositions, since they have now the support of authoritative law.

Certain risks in ordinary competitive enterprises can be reasonably anticipated, and business practice includes them in an amortization account. New processes and machines are constantly appearing which make the old obsolete; ordinary wear and tear makes replacements necessary. The return to make these good is commonly carried in a separate account by all prudent business men, and does not come out of the rate. It is true that individual misfortunes cannot be foretold, and these a given company must bear, just as any single competitive venture would have to bear them. Among these, however, is not a general rise in prices, which, affecting all alike, at least after a time, enables each to raise his price, not only because of his costs in labor and in materials, but to obtain a proportionate increase in his profit, based upon the increased value of his plant and machinery. All competing producers who give the same service must keep invested an increased number of dollars in capital to do so. The risk of the depreciated dollar is not one which industry in general will bear; it is, indeed, no risk at all.

Moreover, a profit based upon the enhanced value of the capital adds nothing in truth at all to the company's wealth. Though its capital be measured in more dollars, and so, too, its profit, that profit is still paid in the fallen dollar, and has no greater buying power than it had before. The increased valuation of the capital will for the years of the depreciated dollar leave the company exactly as it was; it will merely prevent its being compelled to share its putative fair profit with its customers, which by hypothesis it should not be asked to do. The company gains nothing; the customers lose nothing.

Indeed, all this is so much in the primer of economics that it is inconceivable it should be misapprehended as to working capital for instance, and the contrary view has crept in, I think, only when one thinks of the more permanent kinds of capital, and instinctively assumes that the rate will apply after that capital has resumed its former values, if it ever does. There is, in short, a tacit assumption that the valuation must last as long as the permanent capital. There is no warrant for that assumption, because precisely the same reasons which compel the "rate base" to be raised, after a rise in price, compel it to be reduced after a fall. There is a natural enough reluctance to a continuous reappraisal of plants, and properly so. It must, of course, appear that the variation in prices is not transitory, and the period of probation before a company is allowed relief is precisely to insure against that possibility. The chance of loss during that period such companies must endure, and there is an inevitable "lag" in readjustments in each direction. But, once it appears that the new price levels are not transitory, it is no answer to the company's complaint to say

that at some future time prices may fall. When that time comes, if it does, the property must again be revalued; but meanwhile they are entitled to some protection, and since these have become questions for the courts, to the protection of the courts.

The rule of the present reproduction cost, which is a necessary consequence of the foregoing argument,[35] appears to me to have been either expressly or implicitly recognized in all the cases in which the Supreme Court has passed on these matters. Willcox v. Consolidated Gas Co., 212 U. S. 19, 41, 29 S. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034, 48 L. R. A. (N. S.) 1134; Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 35 S. Ct. 811, 59 L. Ed. 1244; Knoxville v. Knoxville Water Co., 212 U. S. 1, 10, 29 S. Ct. 148, 53 L. Ed. 371; The Minnesota Rate Cases, 230 U. S. 352, 434, 454, 455, 33 S. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; San Diego, etc., Co. v. National City, 174 U. S. 739, 757, 19 S. Ct. 804, 43 L. Ed. 1154; San Diego, etc., Co. v. Jaspar, 189 U. S. 439, 442, 23 S. Ct. 571, 47 L. Ed. 892; Darnell v. Edwards, 244 U. S. 564, 568, 37 S. Ct. 701, 61 L. Ed. 1317. It is true that its application has not distinctly arisen since the recent rise in prices, but it is not possible that it should have general application, and yet not cover this, its most glaring illustration.

I am, of course, aware that the present cost of a plant, and especially of a putative standard plant, is hard to prove; but that is no answer. It may in fact be the case, usually it is, that the safest basis for estimate is the evidence of what the actual plant cost, with its additions, which are not renewals, or a cover for renewals. The mere opinions of experts are a doubtful reed; we need not lean upon them; but the question of evidence is one, and of what it shall show is another. I am aware, also, that in the case of railways the principle of reproduction costs presents most baffling problems, perhaps fatal to its application (Gerard C. Henderson, 33 Harv. Law Review, pp. 902,

[35] But many factors other than altered buying power in the dollar may account for a discrepancy between original cost and present reproduction cost—as, for instance, changes in the supply of some of the materials entering into the construction of the plant, and much of the familiar "unearned increment" in land value. A more logical method of allowing for the change in the buying power of the dollar was pursued in Chesapeake & Potomac Telephone Co. v. Whitman (D. C.) 3 F. (2d) 938 (1925). In that case Judge Rose found "that the company's property on the 31st of December, 1923, was worth, as nearly as is possible to ascertain it, the amount invested in it, augmented by the Commission's allowance for intangible value, the investment and allowance both being put in dollars of 1923 by the use of what both sides accept as accurate index figures. We do not wish to be understood as holding that under all, or perhaps under many, circumstances the most accurate valuation can be obtained by the use of such figures." Page 950.

The assumption that reproduction cost is identical with actual prudent cost, translated into dollars of the current purchasing power, was made explicitly in the concurring opinion of Commissioner Potter in San Pedro, Los Angeles & Salt Lake R. R. Co., 75 Interst. Com. Com'n R. 463, 568, and 586, 587 (1923).

1031); but these arise from the fact that the valuation of a substituted service in the case of railways is impossible, without already presupposing the existence of a railway, so much do railways affect the whole life of the community. In the case of the land used by a gas company, the valuation may theoretically be said to involve a similar begging of the question, for without gas a modern city would be another place. Nevertheless, land and building materials and machinery have a value independent of the existence of this or that or any gas company. No "gas value" is involved, as was "railway value" in the Minnesota Rate Cases, supra. All the component elements are purchasable, and the cost of the standard plant can be ascertained with fair accuracy. The single element of the cost of tearing up the streets must, however, on authority be omitted. Des Moines Gas Co. v. Des Moines, supra.[36] * * *

PEOPLE ex rel. KINGS COUNTY LIGHTING CO. v. WILLCOX.

(Court of Appeals of New York, 1914. 210 N. Y. 479, 104 N. E. 911, 51 L. R. A. [N. S.] 1.)

MILLER, J.[37] * * * In determining the cost of reproduction, the commission allowed $12,717 as the cost of restoring the pavement as it existed when the mains and service pipes were laid in the streets. The relator claimed an allowance of at least $200,000 for the cost of restoring pavements subsequently laid, on the theory that that cost would have to be incurred if the mains were to be laid today. But the new pavements in fact added nothing to the property of the relator. Its mains were as serviceable and intrinsically as valuable before as after the new pavements were laid. * * * The question has a double aspect. What will be fair to the public as well as to the relator? (Smyth v. Ames [169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819] supra). Should the public pay more for gas simply because improved pavements have been laid at public expense? It is no answer to say that the new expensive pavements suggest improved

[36] The cost of tearing up the streets has no bearing on the change in the buying power of the dollar. It is therefore difficult to appreciate Judge Hand's apparent reluctance to exclude it.

For a criticism of Judge Hand's general reasoning, see Commissioner Eastman's dissenting opinion in San Pedro, Los Angeles & Salt Lake R. R. Co., 75 Interst. Com. Com'n R. 463, 531–534 (1923), and for an argument against reproduction cost, based on a realistic examination of the effect of its adoption on bondholders and stockholders, see the opinion of the Wisconsin Railroad Commission in Re Duluth Street Railway Co., P. U. R. 1923D, 705, 727–736 (1923). This opinion was criticised as being out of accord with the Supreme Court's attitude, in Ashland Water Co. v. Railroad Commission (D. C.) 7 F.(2d) 924 (1925), the opinion of the divided court being rendered by Geiger, District Judge.

[37] The statement of facts and portions of the opinion are omitted. The portion here printed appears on pages 494, 495 of 210 N. Y. and on page 915 of 104 N. E.

conditions which, though adding to the value of the plant, will not, by reason of the greater consumption, add to the expense per thousand feet of the gas consumed. The public are entitled to the benefit of the improved conditions, if thereby the relator is enabled to supply gas at a less rate. The relator is entitled to a fair return on its investment, not on improvements made at public expense. It is said that the mains will have to be relaid. So will the new pavements, and much oftener. Both might possibly be relaid at the same time. The case is not at all parallel to the so-called unearned increment of land. That the company owns. It does not own the pavements, and the laying of them does not add to its investment or increase the cost to it of producing gas. The cost of reproduction less accrued depreciation rule seems to be the one generally employed in rate cases. But it is merely a rule of convenience and must be applied with reason. On the one hand it should not be so applied as to deprive the corporation of a fair return at all times on the reasonable, proper and necessary investment made by it to serve the public, and on the other hand it should not be so applied as to give the corporation a return on improvements made at public expense which in no way increase the cost to it of performing that service.[38] * * *

STATE JOURNAL PRINTING CO. v. MADISON GAS & ELECTRIC CO.[39]

(Railroad Commission of Wisconsin, 1910. 4 Wis. R. C. R. 501.)

* * * It is true that such elements of value among those which have just been enumerated, as the natural increase in the value of land, and such increases in other property as may be caused by rising prices of labor and material, may not be offset by actual outlays on the part of the owners of such plants; that to include such items in the valuation may, in a sense, amount to a capitalization of unearned increments; and that there may be some question as to whether this is equitable as between company and consumers. There is much, however, to be said on the other side of this question. That the law as well as our social system recognizes such gains in practically all other undertakings is evident from the fact that rents and interest charges

[38] The United States Supreme Court has likewise rejected the company's claim to include the hypothetical cost of cutting through the paving in circumstances similar to those here. Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 172, 35 S. Ct. 811, 817, 59 L. Ed. 1244 (1915).

Despite Judge Miller's attempt to distinguish, a careful examination of the above passage will reveal the fact that every one of the grounds advanced for rejecting the company's claim regarding pavements applies with equal force to claims for increments in land value. For a detailed demonstration of this statement, see R. L. Hale, "The 'Physical Value' Fallacy in Rate Cases" (1921) 30 Yale Law J. 710, 730, 731.

[39] Portions of the opinion are omitted. The portion here printed appears on page 579 of the report.

usually vary with the natural increase in the value of the property they cover. As the cost of reproduction of a plant usually plays perhaps the most important part in determining its value, it is more than likely that the owners would have to bear losses in case land and other property had depreciated instead of appreciated. It would seem only just that the rule should work both ways. Appreciations in value of the kind in question are also of an essentially different nature from such appreciations in value as those which by the respondent's testimony is [sic] classed as going value. It is appreciation of a kind that is generally acknowledged as rightfully belonging to the owners of the property which has thus risen in value. It is based neither on unreasonable rates, nor on assumed business conditions or similar facts of this nature. It is simply due to general growth and development. In view of these facts there would seem to be good ground, from both a legal and economic viewpoint, for giving such appreciations in value consideration in appraising public utilities. At any rate, we cannot now see good reasons upon which to exclude these elements from the appraisal of utility properties.[40] * * *

[40] In reference to this argument, the editor of this chapter has made the following comments in an article entitled "Rate Regulation and the Revision of the Property Concept", (1922) 22 Col. Law Rev. 209, 211–213:

"Some rate bodies profess to feel an obligation to refuse to reduce the value of 'property affected with a public use' below the level which similar property would have if used in a competitive business. Under modern conditions, it may be thought, some industries, because of monopolistic features, are in a position where, but for regulation, they would enjoy special favors at the expense of the rest of the community. The rest are on some sort of equality with one another, brought about perhaps by competition. The function of regulation is to put the favored ones on a level with the rest. Commissions need not consider the wisdom or unwisdom of unearned increments or anything else. Interest on capital and unearned increments may accrue to any one under competition; they must be allowed to accrue to the same degree, but no more, to the utility companies. To fail to allow the utilities as much, would not put them on an equality with the rest, but would put them in an inferior position.

"The above policy may perhaps be derived by intuition from some highly respectable source—the Fourteenth Amendment, or the genius of our institutions, or Herbert Spencer, or the Fourteen Points. But it is incapable of application. The advantages which various businesses possess cannot be classified into those peculiar to utility companies on the one hand, and those common to every one else on the other. There is scarcely a single advantage possessed by a business affected with a public use which cannot be matched in the case of some unregulated concern. Neither intangible values nor virtual monopolies are confined to concerns now subject to regulation. On the other hand, there is not a single income-yielding property right, inside or outside the utility field, which can be enjoyed on equal terms by every one. To speak of equal rights of property is ridiculous. Is the right of property of some unemployed tramp equal to the right of property of the owner of the La Salle Hotel? If all have equal property rights, why are the courts so occupied with disputes over the title to property?

"Perhaps it is meant that all have equal rights to acquire property? But what is the nature of a 'right to acquire property?' It is not an enforceable right. One cannot get a decree of conveyance against any one else on the mere ground that the plaintiff has a 'right to acquire property.' Nor is it a permissive right, a 'privilege' in the Hohfeldian sense; one who goes about acquiring property without regard to any one else will soon find that he had a duty not to do so. True, one may acquire property by consent of a previous

HARRY GUNNISON BROWN, "RAILROAD VALUATION AND RATE REGULATION." [41]

* * * To the proposal that rates should be made so low as to prevent railroads from getting any return whatever on any increased value of their land, but only a return on its original cost to them, there is an important, and it should be an obvious, objection. This is that if persons in all competitive lines of business are permitted to enjoy the so-called unearned increment of land when population increases, while investors in railroads are allowed no such gain, then there will be a tendency to discourage the building of railroads. For we then say, in effect, to the owners of land: If you use your land for any other purpose, you may enjoy any unearned increment that the growth of population happens to bring; but if you use your land for the building of a railroad, you shall not be permitted to enjoy such unearned increment. Is it not to be expected that, under such conditions, the building of railroads would be discouraged? [42]

owner. The government generally puts no restriction on this sort of acquisition—no restriction other than the very important veto power of the existing owner. It restricts or not, at his pleasure. Again, it may be asserted that any one may acquire title to property by producing it. But here again it is not lawful for most persons to handle the apparatus and materials essential for the production of any given kind of property, without first getting consent; and that consent is frequently attainable only on condition of abandoning all claim to title in the product.

"But as a practical matter, it will be said, the consent of previous owners is obtainable by all on equal terms—by paying the market price. There are two flaws in this reasoning. The payment of the market price is not an equally practical matter for all, any more than an equally practical burden is imposed on all when the law in its majestic equality forbids rich and poor alike to sleep under the bridges or on the park benches (to quote from Anatole France). Moreover, a greater inequality lies in the fact that there are some whom the law has enabled to acquire the title without paying the market price. One man bought land very cheap around which a city has subsequently grown up; another inherited valuable property by will or by intestate succession. Will it be contended that the generality, who have to buy these objects at the market price or go without, are on a practical level with the fortunate ones named above? It can be argued even here that every one had the same opportunity before the law to acquire property in these ways—even that everybody had the same right to be born the son of an intestate millionaire. But such arguments can scarcely be called practical.

"Perhaps sufficient has been said to demonstrate the fallacy in the assumption that all (outside of utility companies) have equal rights or equal practical opportunities of acquiring property. It follows that a rate-making body cannot successfully pursue a policy of bringing about an equality between utility companies and the owners of other property. A thing cannot be made equal to a number of other things which are not equal one to another."

[41] Reprinted, by permission, from the Journal of Political Economy (1925) vol. 33, p. 505. Portions of the article are omitted. The portions here printed appear on pages 513–517. In some of the omitted portions Mr. Brown makes it clear that he is not defending the private receipt of "unearned increment," but is opposed to a discrimination among industries in dealing with it. In fact he favors a *general* increase in the taxation of land values.

[42] A footnote by the author at this point is omitted.

But let us look at the matter from a slightly different angle. If the unearned increment can be enjoyed on land used in other ways but not on railroad land, then, it may be, the price which prospective builders of railroads are able to offer for land will tend to be less relatively to the price which can be offered for land by persons intending to use it in other ways. This condition will operate to discourage railroad building. People will not be anxious to sell their land for a lower price to a railroad company than they can get from individuals or corporations planning to use the land otherwise, nor will they usually be compelled to sell their land thus low when condemnation proceedings are started under the law of eminent domain. * * *

Those, however, who advocate regulating the rates of railroads on the basis of original cost so as to prevent the realization by railroad companies of an unearned increment are not always even consistent. For when it occurs to them that to give all other interests a chance to get an unearned increment, and not to give the railways any chance to get it, might be discrimination against railways as such and might even discourage railroad building, then they propose to compensate railroads for this deprivation. Specifically, what they propose is so to regulate rates as to assure the railroads a fairly high average return, high enough to make up for possible deprivation of the unearned increment. In other words, it is proposed that the rates allowed in the early years of a railroad shall be higher and the net return on investment greater to compensate railroad investors for having the land value on which they are allowed to make a return valued at a constant original-cost figure instead of being valued at successively higher figures with the growth of population. In still other words, it is proposed that railroad rates shall be higher (in a growing country where land values tend to increase) than they would otherwise be during the early history of a railroad, and that later they shall be lower than they would otherwise be. The higher rate of return permitted on investment will make the rates higher at the start; but the refusal to count as part of the value of the railroad, on which earnings are allowed, the unearned increment of land, will make the rates lower, as a rule, later, although higher in those exceptional cases where the value of the land declines.

Let us investigate the merits of this proposed policy by inquiring into its probable consequences. To begin with, we may note that the allowing of a higher per cent. return at the beginning will tend to discourage trade and, therefore, will tend to discourage the fullest geographical division of labor. Traffic which is worth taking, which is advantageous enough to the community to more than offset its cost, which can pay a rate capable of yielding (allowing for differences of risk in different industries) the current rate of return on investment, is discouraged and decreased because of an attempt to get more than the current rate of return. This involves loss (despite the larger re-

turns on railroad investment) to the community's productive efficiency.[43]

But as time goes on the community develops and the value of the railroad land (terminals and right of way) goes up. The railroad land, along with other land, comes to have a higher potential yield and so to have a higher salable value. Land along the railroad is worth more for other uses than it was. Even some of the land used by the railroad may be worth more for other uses, because of community development and the growth of population. To keep the land from these other uses is hardly justifiable economically unless the land is equally useful for railroad purposes. But how shall we test its usefulness for railroad purposes better than by the willingness of the public to pay rates for the transportation of their goods, rates high enough to yield the current rate of return upon what the value of the land would be—or upon what the value of adjacent land is—for other purposes? May it not involve economic waste to use land for extra trackage and terminals in order to carry traffic which cannot pay such rates?[44] * * *

[43] Note, however, the proposals of some advocates of "actual cost," infra, pages 1037 ff, for permitting the addition to the rate base of deficits below a fair return during the earlier years of the enterprise. Such proposals would permit of an increment, but not, strictly speaking, an unearned one.—[Editor's footnote.]

[44] The following is a footnote from an article by the editor, "The 'Physical Value' Fallacy in Rate Cases" (1921) 30 Yale Law J. 710, 726:

"Professor Harry Gunnison Brown argues, not only that land *will* not be devoted to utility purposes if shorn of the prospect of an increment which is open in other uses, but that it *cannot* be so devoted without social loss. If the community will pay more for the use of land for other uses than for railroads, it shows that the land is more needed for those other uses. Transportation Rates and Their Regulation (1916) 23, 24. This may be true, though I question the underlying assumption that what consumers will pay for various services indicates their relative desires for them, since the consumers of the various services are not necessarily persons of similar incomes. But grant the assumption. Still, at the time when the owners decide whether to devote their land to railroading or to other uses, if the railroad promises to pay a fair return on the actual cost (to the railroad) of acquiring the land, it indicates the anticipation *at that time* of as great a demand for transportation as for the competing uses. If, *after* the land is devoted to the railroad use, the value of similar land for other uses should rise, the public demand for transportation may or may not have risen in proportion. If the traffic will bear rates yielding a fair return on reproduction cost, the public wants the transportation as badly as the other uses. Were the commission to reduce the rates, this fact would still be true, though the reduction might make it impossible to determine how long the traffic would bear the higher rates. If the traffic will not bear the higher rates, there is no remedy, unless the road is abandoned; and while, on Mr. Brown's theory, it was a misdirection of labor to build it, still it is likely to be too late to devote the land to other uses.

"Mr. Brown may mean, however, that at the lower rates there will be a greater demand for transportation than at the higher rates, and more labor therefore devoted to meeting the demand. But if the higher rate were allowed, this extra labor would be devoted simply to the production of the additional things which the stockholders would be in a position to consume. If the increment were taxed, as Mr. Brown suggests it might be, then the additional labor would be devoted, not to the additional transportation, but to uses determined just as artificially by the government when it spends the revenue.

FREDERIC G. DORETY, "THE FUNCTION OF REPRODUCTION COST IN PUBLIC UTILITY VALUATION AND RATE MAKING."[45]

* * * 6. It was suggested by Mr. Justice Brandeis in his opinion, dissenting from the reasoning of the majority in the Southwestern Bell Telephone Company Case [262 U. S. 276, 43 S. Ct. 544, 67 L. Ed. 981, 31 A. L. R. 807], that the use of present reproduction cost as a rate base may subject those making investments during high price periods to heavy losses due to shrinkage in prices and interest rates, and that, on the other hand, the use of present reproduction costs during a period of high prices might produce fantastic profits for those who had made investments in low price periods. This same thing, of course, is true of investments in other industries. This statement merely places railroad investments on a par with others. And what is the alternative? Suppose that a water or gas plant could normally be built for $1,000,000 and the money secured at 5 per cent., making an annual capital charge of $50,000 per year. Suppose that an investor should find that construction of the plant at the peak costs prevailing in 1920 would cost $2,000,000 and that the money would cost 7 per cent. on thirty-year bonds, an annual charge of $140,000. If we understand the suggestion correctly, it is that the investor should be permitted to build the plant in 1920 and to fasten upon the consumers an annual charge of $140,000 per year for thirty years, to pay for a service which they could reproduce a few years later at an annual charge of $50,000. If this theory could be put into practice, it would afford a unique opportunity for investors. In no other known way could the investor project the benefits of temporary high prices and high interest rates so far and so certainly into the future. The result would be to put an extraordinary premium on the construction of utility plants during peak price periods. On the other hand, the investor in utility construction during low price periods could realize none of the benefits from price increases which accrue to other investors, and at such times capital would consequently be withdrawn from public utility construction. Railroads would be tempted to make all of their additions and improvements at the highest price periods and at the highest interest rates instead of at the lowest.

The channels into which this labor shall flow must be determined artificially in any event.

"However, in arguing against basing the 'fair return' on the replacement cost, I do not mean to prejudge the question whether the excess above the fair return should be reduced by taxation rather than by rate making. It seems to me that regulation of utilities will never be complete until the 'valuation' is treated as bearing primarily, not on what the company ought to *charge*, but on what it ought to *keep*. Policy could then determine whether the keeping of more should be prevented by the one method or the other."

[45] Reprinted, by permission, from 37 Harv. Law Rev. 173 (1923). Portions of the article are omitted.

The result would necessarily be a tremendous economic waste and an ever-increasing burden upon the consumer. It is true that the alternative of fixing rates at the present cost of duplicating the service would tend to discourage investment during high price periods, but it is submitted that unnecessary investment during such periods should be discouraged. Nothing but the most necessary work should be done at excessive cost. And that such a rule would not go so far as to prevent necessary construction entirely is shown by the experience of recent years. Mr. Justice Brandeis himself points out that many heavy investments of this character were actually made at war-time construction costs, notwithstanding the fact that the fixing of rates on the basis of present reproduction cost was a general if not the prevailing practice.

7. The discussion in the preceding paragraphs assumes that the utility constructed during a high cost period could continue to collect a return upon its original cost, notwithstanding a subsequent fall in the general price level. This assumption is of the essence of the original cost doctrine, which would induce the investment of capital in public utilities by assuring the investor a constant return upon his actual investment. However, the proponents of original cost suggest no public guaranty of such a return and, as a matter of fact, no utility could continue to sell its service for substantially more than it would cost another company to duplicate such service. If it attempted to do so, it would soon find itself in competition with a new private or municipal plant. The forces of competition would tend to force rates in low price periods down to the cost of duplicating the service. The doctrine of original cost, therefore, would prevent the investor from ever earning a return on more than his original investment, but it would give him no assurance against a smaller return. He could lose by a fall in prices but could not gain by a rise. No prudent investor would trust his savings in such an enterprise. The proponents of this doctrine, therefore, face a dilemma. If they are right in assuming that a return on a high construction cost can be collected in a subsequent low price period, they will impose an intolerable burden upon the reduced capacity of the shipper for payment. If such a return cannot be collected, the utility will not be built, for the investor will not face the possibility of loss with no possibility of gain. * * *

Much of this reasoning which we have invoked in support of the use of present cost of reproduction of a new plant in fixing the capital cost factor in the rate level of an existing plant, would likewise require that the factor covering reimbursement for operating expenses should be based upon the operating expenses of a new plant. If the existing plant is to be free to fix its own rates, so long as they are not higher than those necessary to induce another company to furnish the service, and if the rates of a new and an old road, otherwise identical, are to be the same, it would follow that both the capital cost factor and the operating cost factor in the rate should be based upon the ne-

cessities of a new plant. It will become important to bear this in mind later when we consider the effect of depreciation, appreciation, and development costs upon rates and value.

This proposed process of determining rates at the cost of duplicating the service suggests that if the service could be duplicated by means of a more efficient or a less expensive plant, both the capital cost factor and the operating expense factor in the rate should be limited to the necessities of such a substitute plant. This is a suggestion which Mr. Justice Brandeis makes in the last paragraph of his opinion in the Southwestern Bell Telephone Company Case. But this does not affect the proposition that rates should be based upon the cost of duplicating the service, and that, in determining the capital cost factor, present rather than original construction costs should be computed, whether the service is to be duplicated by a plant identical with the existing plant or by a more economical substitute plant. In the absence of an affirmative showing that equally efficient service would be rendered by a more economical substitute, the presumption should be that the existing plant would have to be reproduced. * * *

It will be noted that in this discussion the use of reproduction cost has been advocated as a step in the process of determining cost of service and as a direct factor in establishing rates, rather than as a measure of or direct factor in the value of the property. In omitting any predetermination of "value" upon which a "fair return" is to be based and going direct to a determination of the cost of the service, the proposed process is similar to that advocated by the proponents of original cost. The only difference is that in determining the capital cost factor in the rate they would use the original capital cost, while we would use what would be the present capital cost of duplicating the service; and in determining the operating cost factor they would use present operating costs of the existing plant, while we would use estimated present operating costs of a new plant.

Under either of these processes the value of the plant would become a result of the rates rather than a basis for rates. And this is logical. Value is an economic fact not to be created, decreed, or modified by fiat of government. It can be modified by changing the rates, and the amount of value which will result from any assumed rate base can be estimated. But to attempt to decree or predetermine a value in advance of rates is to reverse the process of logic. If rates are established upon a basis of reproduction cost, value will tend to approximate such cost, but this will be through the operation of economic law and not because a certain figure has been decreed as value. * * *

Mr. Justice Brandeis suggests that the use of reproduction cost would necessitate recurrent controversies as to the proper rate base and consequent value, which would result in great expense both direct and indirect to government and carriers alike. We venture to suggest, however, that if cost of reproduction new is once determined as of

any given date, it can readily be adapted to the construction costs prevailing at any other date by the application of an index figure or perhaps of different index figures to different units of the property. And the actual original cost of subsequent additions and improvements may be varied by application of an index figure in the same manner, to show the cost of reproducing such additions and improvements as of a subsequent date.[46] * * *

Under this reasoning, questions of the extent of any depreciation or appreciation in the existing plant should not enter into the determination of its rates, since its rates would be based upon the operating costs and capital costs of a new road. The same would be true of development costs, deferred construction costs, good will, and other incidents peculiar to the existing road. With rates determined to meet the capital and operating cost requirements of a new road, the only questions for determination would be the present cost of constructing the new road, the interest rate necessary to secure its capital, the probable volume of traffic, and the probable operating expense. These facts would fix the cost of duplicating the existing service. With the rate level thus determined and applied to the existing road, its value would be fixed by its earning power under such rates. If its ties were depreciated and required early renewal, this would tend to decrease its earnings and consequently its value. The excess in this item of its operating expenses over that of a new road should be a matter of fairly simple computation, and the consequent difference in value would be the present value of the difference in future operating expenses. If the existing roadbed and grades were appreciated and permitted of cheaper operation and higher earnings, because of greater solidification, the value of the existing road would be similarly increased. If it had a certain amount of good will traffic or other traffic peculiar to its own organization and not available to a new road, its overhead expense per unit of traffic would be less, and its earnings, and therefore its value, correspondingly greater. If development costs, in the shape of deficits during the first years of operation, would be incurred by the new road, its promoters would be compelled to provide a capital fund from which to meet them. Interest on this fund would be a part of the cost of duplicating the service. With the difference between the expenses and the earnings of the existing road and a new one determined under the given rate level, the relation between the value of the existing road and the cost of reproducing a new one would be a matter of mathematical calculation. The value of the existing plant would be greater or less than its cost of reproduction new, according to whether the net of its good will, its depreciation, and its appreciation would produce higher or lower net earnings under the given rate level. This process would still require an estimate of many facts and would, therefore, permit of difference of opinion as to fact, but

[46] See page 1007, note 35, supra, on the discrepancy between original cost, translated into dollars of current purchasing power, and reproduction cost.

the method to be pursued and the effect to be accorded to the estimates would be determined according to a fixed principle instead of by arbitrary judgment.

According to this reasoning, it would be immaterial, for rate-making purposes, whether or not development costs, deferred construction costs, or costs of appreciation in an existing railway have been charged to operating expenses and paid by the public; and it should likewise be immaterial whether or not the company has accumulated a depreciation fund, since the rates would be based upon the necessities of a new road without any depreciation or appreciation. * * *

STATE ex rel. SOUTHWESTERN BELL TELEPHONE CO. v. PUBLIC SERVICE COMMISSION OF MISSOURI.

(Supreme Court of the United States, 1923. 262 U. S. 276, 43 S. Ct. 544, 67 L. Ed. 981, 31 A. L. R. 807.)

Mr. Justice BRANDEIS, with whom Mr. Justice HOLMES concurs.[47] I concur in the judgment of reversal. But I do so on the ground that the order of the state commission prevents the utility from earning a fair return on the amount prudently invested[48] in it. Thus, I differ fundamentally from my brethren concerning the rule to be applied in determining whether a prescribed rate is confiscatory. The court, adhering to the so-called rule of Smyth v. Ames, 169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819, and further defining it, declares that what is termed value must be ascertained by giving weight, among other things, to estimates of what it would cost to reproduce the property at the time of the rate hearing.

The so-called rule of Smyth v. Ames is, in my opinion, legally and economically unsound. The thing devoted by the investor to the public use is not specific property, tangible and intangible, but capital embarked in the enterprise. Upon the capital so invested the federal Constitution guarantees to the utility the opportunity to earn a fair return.[49] Thus it sets the limit to the power of the state to regulate

[47] The majority opinion, rendered by Mr. Justice McReynolds, is omitted. The footnotes, unless otherwise indicated, are taken from the official report.

[48] The term "prudent investment" is not used in a critical sense. There should not be excluded, from the finding of the base, investments which, under ordinary circumstances, would be deemed reasonable. The term is applied for the purpose of excluding what might be found to be dishonest or obviously wasteful or imprudent expenditures. Every investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown.

[49] Except that rates may, in no event, be prohibitive, exorbitant, or unduly burdensome to the public. Covington & Lexington Turnpike Co. v. Sandford, 164 U. S. 578, 596, 17 S. Ct. 198, 41 L. Ed. 560 (1896); Smyth v. Ames, 169 U. S. 466, 544, 18 S. Ct. 418, 42 L. Ed. 819 (1898); San Diego Land & Town Co. v. National City, 174 U. S. 739, 757, 19 S. Ct. 804, 43 L. Ed. 1154 (1899); Minnesota Rate Cases, 230 U. S. 352, 454, 33 S. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18 (1913); Mr. Justice Miller in

rates. The Constitution does not guarantee to the utility the opportunity to earn a return on the value of all items of property used by the utility or of any of them. The several items of property constituting the utility, taken singly, and freed from the public use, may conceivably have an aggregate value greater than if the items are used in combination. The owner is at liberty, in the absence of controlling statutory provision, to withdraw his property from the public service, and, if he does so, may obtain for it exchange value. Compare Brooks-Scanlon Co. v. Railroad Commission of Louisiana, 251 U. S. 396, 40 S. Ct. 183, 64 L. Ed. 323; Erie Railroad Co. v. Public Utility Commissioners, 254 U. S. 394, 411, 41 S. Ct. 169, 65 L. Ed. 322; Texas v. Eastern Texas R. R. Co., 258 U. S. 204, 42 S. Ct. 281, 66 L. Ed. 566. But, so long as the specific items of property are employed by the utility, their exchange value is not of legal significance. The investor agrees, by embarking capital in a utility, that its charges to the public shall be reasonable. His company is the substitute for the state in the performance of the public service, thus becoming a public servant. The compensation which the Constitution guarantees an opportunity to earn is the reasonable cost of conducting the business. Cost includes, not only operating expenses, but also capital charges. Capital charges cover the allowance, by way of interest, for the use of the capital, whatever the nature of the security issued therefor, the allowance for risk incurred, and enough more to attract capital. The reasonable rate to be prescribed by a commission may allow an efficiently managed utility much more. But a rate is constitutionally compensatory, if it allows to the utility the opportunity to earn the cost of the service as thus defined.

To decide whether a proposed rate is confiscatory the tribunal must determine both what sum would be earned under it and whether that sum would be a fair return. The decision involves ordinarily the making of four subsidiary ones:

(1) What the gross earnings from operating the utility under the rate in controversy would be. (A prediction.)

(2) What the operating expenses and charges, while so operating, would be. (A prediction.)

(3) The rate base; that is, what the amount is on which a return should be earned. (Under Smyth v. Ames, an opinion, largely.)

(4) What rate of return should be deemed fair. (An opinion, largely.)

A decision that a rate is confiscatory (or compensatory) is thus the resultant of four subsidiary determinations. Each of the four involves forming a judgment, as distinguished from ascertaining facts; and as to each factor there is usually room for difference in judgment. But the first two factors do not ordinarily present serious difficulties. The doubts and uncertainties incident to prophecy, which affect them,

Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U. S. 418, 459, 10 S. Ct. 462, 33 L. Ed. 970 (1890).

can often be resolved by a test period; and meanwhile protection may be afforded by giving a bond. Knoxville v. Knoxville Water Co., 212 U. S. 1, 18, 19, 29 S. Ct. 148, 53 L. Ed. 371; St. Louis, Iron Mountain & Southern Railway Co. v. McKnight, 244 U. S. 368, 37 S. Ct. 611, 61 L. Ed. 1200. The doubts and uncertainties incident to the last two factors can be eliminated, or lessened, only by redefining the rate base, called value, and the measure of fairness in return, now applied under the rule of Smyth v. Ames. The experience of the 25 years since that case was decided has demonstrated that the rule there enunciated is delusive. In the attempt to apply it insuperable obstacles have been encountered. It has failed to afford adequate protection either to capital or to the public. It leaves open the door to grave injustice. To give to capital embarked in public utilities the protection guaranteed by the Constitution, and to secure for the public reasonable rates, it is essential that the rate base be definite, stable, and readily ascertainable, and that the percentage to be earned on the rate base be measured by the cost, or charge, of the capital employed in the enterprise. It is consistent with the federal Constitution for this court now to lay down a rule which will establish such a rate base and such a measure of the rate of return deemed fair. In my opinion, it should do so.

The rule of Smyth v. Ames sets the laborious and baffling task of finding the present value of the utility. It is impossible to find an exchange value for a utility, since utilities, unlike merchandise or land, are not commonly bought and sold in the market. Nor can the present value of the utility be determined by capitalizing its net earnings, since the earnings are determined, in large measure, by the rate which the company will be permitted to charge, and thus the vicious circle would be encountered. So, under the rule of Smyth v. Ames, it is usually sought to prove the present value of a utility by ascertaining what it actually cost to construct and install it, or by estimating what it should have cost, or by estimating what it would cost to reproduce or to replace it. To this end an enumeration is made of the component elements of the utility, tangible and intangible;[50] then the

[50] In estimating replacement cost the first step is to determine what part of the property owned is used and useful in the public service. That involves, among other things, a consideration of retired or discarded property, and the question whether the size and capacity of the plant are, in part, excessive.

The property included in the valuation is commonly treated under the following heads (see Report of Special Committee on Valuation, Amer. Society of Civil Engineers, October 28, 1916, vol. 42, Proceedings, pp. 1708–1938):

A. Tangibles: (a) Land and buildings. (b) Plant.

B. Incidentals during construction: (a) Administration. (b) Engineering and superintendence. (c) Legal expenses. (d) Brokerage. (e) Promotion fees. (f) Insurance. (g) Taxes. (h) Bond discount. (i) Contingencies.

C. Intangibles: (a) Good will. (b) Franchise value. (c) Going concern value. (d) Working Capital.

"Going value" was declared by the Special Report (page 1727) to embrace, among other things, "efficiency, favorable business arrangements and design"; intangibles to include also "leases, easements, water rights, traffic and operating agreements, strategic location and advantages, and other privileges."

actual, or the proper, cost of producing, or of reproducing, each part is sought; and finally it is estimated how much less than the new each part, or the whole, is worth. That is, the depreciation is estimated.[51] Obviously each step in the process of estimating the cost of reproduction, or replacement, involves forming an opinion, or exercising judgment, as distinguished from merely ascertaining facts. And this is true, also, of each step in the process of estimating how much less the existing plant is worth than if it were new. There is another potent reason why, under the rule of Smyth v. Ames, the room for difference in opinion as to the present value of a utility is so wide. The rule does not measure the present value either by what the utility cost to produce, or by what it should have cost, or by what it would cost to reproduce, or to replace it.[52] Under that rule the tribunal is directed, in forming its judgment, to take into consideration all those and also other elements, called relevant facts.[53]

[51] Several different methods are used for measuring depreciation: (1) The replacement method; (2) the straight-line method; (3) the compound interest method; (4) the sinking fund method; (5) the unit cost method. It is largely a matter of judgment whether, and to what extent, any one of these several methods of depreciation should be applied. They may give widely different results. Special Report, October 28, 1916, Valuation of Public Utilities, Amer. Society of Civil Engineers, vol. 42, Proceedings, pp. 1723–1727, 1846–1900.

[52] This court declared in Smyth v. Ames, 169 U. S. 466, 547, 18 S. Ct. 418, 434 (42 L. Ed. 819 [1898]), that "present as compared with the original cost of construction" is to be considered, and in Minnesota Rate Cases, 230 U. S. 352, 452, 33 S. Ct. 729, 761 (57 L. Ed. 1511, 48 L. R. A. [N. S.] 1151, Ann. Cas. 1916A, 18 [1913]), that "the cost of reproduction method is of service in ascertaining the present value of the plant, when it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty." Reproduction cost was thus held to be evidence of value. But it has never been held to be the measure of value.

[53] Some of these so-called relevant facts are, as the rule has been applied:

(a) Capitalization; i. e., bonds, stock, and other securities outstanding.

(b) Book cost; i. e., the investment account, as shown on the books.

(c) Actual cost; i. e., amounts actually paid in cash for installing the original plant and business, and the additions thereto.

(d) Historical cost; i. e., the proper cost of the existing plant and business, estimated on the basis of the price levels existing at the respective dates when the plant and the additions were constructed. This is often called prudent investment. Historical cost would, under normal conditions, be equal in amount to the original cost. The phrases are sometimes used to denote the same thing. But they are not the same, and they are often ascertained by different processes. Original cost is the amount actually paid to establish the utility. The amount is ascertained, where possible, by inspection of books and vouchers, and by other direct evidence. If this class of evidence is not complete, it may be necessary to supplement it by evidence as to what was probably paid for some items, by showing prices prevailing for work and materials at the time the same were supplied. But the evidence of these prices is merely circumstantial, or corroborative, evidence of the amount actually paid. In determining actual cost, whatever the evidence, there is no attempt to determine whether the expenditure was wise or foolish, or whether it was useful or wasteful. Historical cost, on the other hand, is the amount which normally should have been paid for all the property which is usefully devoted to the public service. It is, in effect, what is termed the prudent investment. In enterprises efficiently launched and developed, historical cost and original cost would practically coincide both in items

Obviously, "value" cannot be a composite of all these elements. Nor can it be arrived at on all these bases. They are very different, and must, when applied in a particular case, lead to widely different results. The rule of Smyth v. Ames, as interpreted and applied, means merely that all must be considered. What, if any, weight shall be given to any one, must practically rest in the judicial discretion of the tribunal which makes the determination. Whether a desired result is reached may depend upon how any one of many elements is treated. It is true that the decision is usually rested largely upon records of financial transactions, on statistics and calculations. But, as stated in Louisville v. Cumberland Telegraph & Telephone Co., 225 U. S. 430, 436, 32 S. Ct. 741, 742 (56 L. Ed. 1151), "every figure * * * that we have set down with delusive exactness" is "speculative."

The efforts of courts to control commissions' findings of value have largely failed. The reason lies in the character of the rule declared in Smyth v. Ames. The rule there stated was to be applied solely as a means of determining whether rates already prescribed by the Legislature were confiscatory. It was to be applied judicially after the rate had been made, and by a court which had had no part in making the rate. When applied under such circumstances, the rule, although cumbersome, may occasionally be effective in destroying an obstruction to justice, as the action of a court is, when it sets aside the verdict of a jury. But the commissions undertook to make the rule their standard for constructive action. They used it as a guide for making or approving rates, and the tendency developed to fix as reasonable the rate which is not so low as to be confiscatory.[54] Thus the rule which assumes that rates of utilities will ordinarily be higher than the minimum required by the Constitution has, by the practice of the commissions, eliminated the margin between a reasonable rate and a merely compensatory rate, and, in the process of rate making, effective judicial review is very often rendered impossible.[55] The result,

included and in amounts paid; that is, the subjects of expenditure would coincide, and the cost at prices prevailing at the time of installation would substantially coincide with the actual cost.

(e) Reproduction cost of plant and business, estimated on price levels prevailing at the date of valuation.

(f) Reproduction cost of plant and business, estimated on average price levels prevailing during periods of, say, 5 to 10 years preceding the valuation.

[54] This, it appears, was the purpose of the board in Galveston Electric Co. v. City of Galveston, 258 U. S. 388, 42 S. Ct. 351, 66 L. Ed. 678 (1922).

[55] A rate order will not be set aside unless the evidence compels conviction that a fair-minded board could not have reached the conclusion that the rate would prove adequate. San Diego Land & Town Co. v. National City, 174 U. S. 739, 754, 19 S. Ct. 804, 43 L. Ed. 1154 (1899); San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 442, 23 S. Ct. 571, 47 L. Ed. 892 (1903); Knoxville v. Knoxville Water Co., 212 U. S. 1, 17, 29 S. Ct. 148, 53 L. Ed. 371 (1909); Van Dyke v. Geary, 244 U. S. 39, 49, 37 S. Ct. 483, 61 L. Ed. 973 (1917); Galveston Electric Co. v. Galveston, 258 U. S. 388, 401, 402, 42 S. Ct. 351, 66 L. Ed. 678 (1922). The range for difference of opinion on each of the many factors to be taken into consideration in fixing the rate base is so wide that such compelling evidence can rarely be adduced, where the report

inherent in the rule itself, is arbitrary action on the part of the rate-regulating body; for the rule not only fails to furnish any applicable standard of judgment, but directs consideration of so many elements that almost any result may be justified.

The adoption of present value of the utility's property, as the rate base, was urged in 1893 on behalf of the community, and it was adopted by the courts, largely, as a protection against inflated claims, based on what were then deemed inflated prices of the past. See argument in Smyth v. Ames, 169 U. S. 466, 479, 480, 18 S. Ct. 418, 42 L. Ed. 819; San Diego Land & Town Co. v. National City, 174 U. S. 739, 757, 758, 19 S. Ct. 804, 43 L. Ed. 1154; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 442, 443, 23 S. Ct. 571, 47 L. Ed. 892; Stanislaus County v. San Joaquin & Kings River Canal & Irrigation Co., 192 U. S. 201, 214, 24 S. Ct. 241, 48 L. Ed. 406. Reproduction cost, as the measure, or as evidence, of present value, was also pressed then by representatives of the public, who sought to justify legislative reductions of railroad rates.[56] The long depression which followed the panic of 1893 had brought prices to the lowest

filed recites that, after full hearing, all the so-called relevant facts were given consideration by the commission in reaching the decision made. There may often be found in opinions of utility commissions, after a lengthy and detailed discussion of a vast quantity of expert opinion, a conclusion like the following from Re Illinois Northern Utilities Co., P. U. R. 1920D, 979, 999:

"After considering all the evidence and arguments of counsel in this case, bearing upon the valuation of the properties herein involved, the investment therein, their original costs, cost to reproduce, and present values, including all overheads, preliminary costs, cost of engineering, supervision, interest, insurance, organization, and legal expenses during construction, working capital, materials and supplies, and all other elements of value, tangible and intangible, and considering the plants are now going concerns in successful operation, the commission finds * * * for the purposes of this proceeding, and for those purposes only, the fair rate-making values * * * as follows."

Hence a commission's order must ordinarily be allowed to stand, unless it appears that there was some irregularity in the proceedings or that some erroneous rule of law was applied.

Since Smyth v. Ames this court has dealt with the validity (under the Fourteenth Amendment) of rate regulation by the states in over 50 cases. In only 25 of these has the court passed upon the question whether a rate fixed, or approved, by a state commission denied to the utility the opportunity of earning a fair return upon the fair value of the property. In none of these 25 cases has an order of a state commission, made after a full hearing, been declared void by this court, on the ground that the finding of the rate base, or value, was too low. In none of them has the order been declared void on the ground that the commission fixed too low a percentage of return. Lower federal courts and state courts have occasionally intervened with effect. But the instances are relatively few as compared with the number of adverse decisions of the commissions. Even where orders fixing rates have been set aside for irregularity or error, the result of the new hearing is not always advantageous to the company.

56 See Steenerson v. Great Northern Ry. Co., 69 Minn. 353, 374, 72 N. W. 713 (1897); San Diego Water Co. v. San Diego, 118 Cal. 556, 568, 50 P. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261 (1897); Metropolitan Trust Co. v. Houston & Texas Central R. Co. (C. C.) 90 F. 683, 687, 688 (1898).

level reached in the nineteenth century. Insistence upon reproduction cost was the shippers' protest against burdens believed to have resulted from watered stocks, reckless financing, and unconscionable construction contracts. Those were the days before state legislation prohibited the issue of public utility securities without authorization from state officials, before accounting was prescribed and supervised, when outstanding bonds and stocks were hardly an indication of the amount of capital embarked in the enterprise, when depreciation accounts were unknown, and when book values, or property accounts, furnished no trustworthy evidence either of cost or of real value. Estimates of reproduction cost were then offered, largely as a means, either of supplying lacks in the proof of actual cost and investment, or of testing the credibility of evidence adduced, or of showing that the cost of installation had been wasteful. For these purposes evidence of the cost of reproduction is obviously appropriate.

At first reproduction cost was welcomed by commissions as evidence of present value. Perhaps it was because the estimates then indicated values lower than the actual cost of installation; for, even after the price level had begun to rise, improved machinery and new devices tended for some years to reduce construction costs.[57] Evidence of reproduction costs was certainly welcomed, because it seemed to offer a reliable means for performing the difficult task of fixing, in obedience to Smyth v. Ames, the value of a new species of property to which the old tests—selling price or net earnings—were not applicable. The engineer spoke in figures—a language implying certitude. His estimates seemed to be free of the infirmities which had stamped as untrustworthy the opinion evidence of experts common in condemnation cases. Thus, for some time, replacement cost, on the basis of prices prevailing at the date of the valuation, was often adopted by state commissions as the standard for fixing the rate base. But gradually it came to be realized that the definiteness of the engineer's calculations was delusive, that they rested upon shifting theories, and that their estimates varied so widely as to intensify, rather than to allay, doubts.[58] When the price levels had risen largely, and estimates of replacement cost indicated values much greater than the actual cost of installation, many commissions refused to consider valuable what one declared to be assumptions based on things that never happened

[57] Compare Mr. Justice Field in Railroad Commission Cases, 116 U. S. 307, 343, 344, 6 S. Ct. 334, 388, 1191, 29 L. Ed. 636 (1886); Steenerson v. Great Northern Ry., 69 Minn. 353, 374, 72 N. W. 713 (1897).

[58] Thus in Re Marin Municipal Water District (Cal.) P. U. R. 1915C, 433, 452, the several valuations of five experts were $670,163, $723,001.85, $763,028, $919,204, and $1,031,436. In Springfield v. Springfield Gas & Electric Co. (Ill.) P. U. R. 1916C, 281, 307, the several valuations of five experts were $547,488, $588,262, $806,404, $898,785, and $940,988. In Duluth Street Ry. Co. v. Railroad Commission, 161 Wis. 245, 152 N. W. 887, P. U. R. 1915D, 211 (1915), the valuations of two experts, both employed by the state, were $600,000 and $1,100,000.

and estimates requiring the projection of the engineer's imagination into the future and methods of construction and installation that have never been and never will be adopted by sane men.[59] Finally the great fluctuation in price levels incident to the World War led to the transfusion of the engineer's estimate of cost with the economist's prophecies concerning the future price plateaus. Then the view that these estimates were not to be trusted as evidence of present value was frequently expressed, and state utility commissions, while admitting the evidence in obedience to Smyth v. Ames, failed, in ever-increasing numbers, to pay heed to it in fixing the rate base.[60] The conviction is widespread that a sound conclusion as to the actual value of a utility is not to be reached by a meticulous study of conflicting estimates of the cost of reproducing new the congeries of old machinery and equipment, called the plant, and the still more fanciful estimates concerning the value of the intangible elements of an established business.[61]

[59] 15 Mich. Law Rev. 205, 216; Re Grafton County Electric Light & Power Co. (N. H.) P. U. R. 1916E, 879, 885–888. Compare Appleton Waterworks Co. v. Railroad Commission, 154 Wis. 121, 154, 142 N. W. 476, 487 (47 L. R. A. [N. S.] 770, Ann. Cas. 1915B, 1160 [1913]), quoting: "Skilled witnesses came with such prejudice in their minds that hardly any weight should be given to their evidence."

In Danbury v. Danbury & Bethel Gas & Electric Light Co. (Conn.) P. U. R. 1921D, 193, at page 206, the commission said:

"This method [reproduction at prices prevailing at time of valuation] of determining value usually includes percentages for engineering services never rendered, hypothetical efficiency of unknown labor, conjectural depreciation, opinion as to the condition of property, the supposed action of the elements, and, of course, its correctness depends upon whether superintendence was or would be wise or foolish, the investment improvident or frugal. It is based upon prophecy, instead of reality, and depends so much upon half truths that it bears only a remote resemblance to fact, and rises at best, only to the plane of a dignified guess."

In Public Service Commission v. Pacific Telephone & Telegraph Co., P. U. R. 1916D, 947, 955, the commission said: "The old methods have proven uncertain, indefinite, and unsatisfactory to honest utilities and commissions alike."

See, also, In re Northampton Gas Petition (Mass.) P. U. R. 1915A, 618, 626; Public Service Commission v. Pacific Telephone & Telegraph Co., P. U. R. 1916D, 947, 955.

[60] Their action is in accord with views commonly held by legal writers. Compare Edwin C. Goddard, "Public Utility Valuation," 15 Mich. Law Rev. 205; Robert L. Hale, "The 'Physical Value' Fallacy in Rate Cases," 30 Yale Law Journal, 710; Donald R. Richberg, "A Permanent Basis for Rate Regulation," 31 Yale Law Journal, 263; Robert H. Whitten, "Fair Value for Rate Purposes," 27 Harv. Law Rev. 419; Henry W. Edgerton, "Value of the Service as a Factor in Rate-Making," 32 Harv. Law Rev. 516; Gerard C. Henderson, "Railway Valuation and the Courts," 33 Harv. Law Rev. 902, 1031; Armistead M. Dobie, "Judicial Review of Administrative Action in Virginia," 8 Va. Law Rev. 477, 504. See, also, 32 Yale Law Journal, 390, 393; 19 Mich. Law Rev. 849.

[61] The Public Utility Reports for 1920, 1921, 1922, and 1923 (to March 1) contain 363 cases in which the rate base or value was passed upon. Reproduction cost at unit prices prevailing at the date of valuation appears to have been the predominant element in fixing the rate base in only 5. In 63 the commission severely criticized, or expressly repudiated, this measure of value. In nearly all of the 363 cases, except 5, the commission either

Many commissions, like that of Massachusetts, have declared recently that "capital honestly and prudently invested must, under normal conditions, be taken as the controlling factor in fixing the basis for computing fair and reasonable rates." [62]

To require that reproduction cost at the date of the rate hearing be given weight in fixing the rate base may subject investors to heavy losses when the high war and post-war price levels pass and the price trend is again downward.[63] The aggregate of the investments which

refused to pay heed to this factor as the measure of value, or indeed as evidence of any great weight.

The following summary shows the predominant element in fixing the rate base in the several cases:

In 5 cases: Reproduction cost at unit prices prevailing at the date of the valuation.

In 28 cases: Reproduction cost at unit prices prevailing at some date, or the averages of some period, prior to the date of the valuation.

In 12 cases: Reproduction cost at unit prices prevailing at some date not specifically stated.

In 22 cases: Reproduction cost of an inventory of a prior date at prices prevailing at that date or prior thereto, plus subsequent additions at actual cost (so-called split inventory method).

In 3 cases: Reproduction cost on basis of future predicted prices (so-called trend prices, or new plateau method).

In 102 cases: A prior valuation by the commission plus the actual cost of subsequent additions.

In 85 cases: The actual original cost (including both initial cost and additions).

In 6 cases: Original cost arbitrarily appreciated.

In 27 cases: The historical cost or prudent investment.

In 28 cases: Book cost or investment.

In 12 cases: Bond and stock capitalization.

In 36 cases: Determination and classification of method impossible.

[62] Middlesex & Boston Rate Case, Public Service Commission (Mass.) Oct. 28, 1914, Report pp. 7–14; Bay State Rate Case, P. U. R. 1916F, 221, 233. And see Id. for a quotation from an address delivered at the "Conference on Valuation" in Philadelphia, November, 1915, in which the late John M. Eshleman, first president of the California Railroad Commission, said: "If we had this problem at the beginning, and were not attacking it in the middle, we would have no difficulty in agreeing with the holder of capital upon this subject, for he would quite readily agree to take the cost of doing the business plus an earning upon the money actually invested comparable to the earning offered in other available investments. Therefore the cost of doing the business, plus a return upon the capital necessarily invested in the business, which return shall be as great as is offered in other businesses of similar hazard, is all that ought to be accorded for the future, and it is all that will be accorded, if the public has any business sense. And if more is asked by the private owner, then he may expect no sympathy when he finds the public his competitor and his earning power impaired."

No case involving the fixing of rates by a commission has ever come to this court from New England. The only case involving in any way the validity of rates is Interstate Consolidated Street Ry. Co. v. Massachusetts, 207 U. S. 79, 28 S. Ct. 26, 52 L. Ed. 111, 12 Ann. Cas. 555 (1907).

See, also, Re Cripple Creek Water Co. (Colo.) P. U. R. 1916C, 788, 799, 800; Butler v. Lewiston, Augusta & Waterville St. Ry. (Me.) P. U. R. 1916D, 25, 35.

[63] Engineers testifying in recent rate cases have assumed that there will be a new plateau of prices. In Galveston Electric Co. v. Galveston, 258 U. S. 388, 42 S. Ct. 351, 66 L. Ed. 678 (1922), the company contended that a plateau 70 per cent. above the price level of 1914 should be accepted,

have already been made at high costs since 1914, and of those which will be made before prices and costs can fall heavily, may soon exceed by far the depreciated value of all the public utility investments made theretofore at relatively low cost. For it must be borne in mind that depreciation is an annual charge. That accrued on plants constructed in the long years prior to 1914 is much larger than that accruing on the properties installed in the shorter period since.[64]

That part of the rule of Smyth v. Ames which fixes the rate of return deemed fair, at the percentage customarily paid on similar investments at the time of the rate hearing, also exposes the investor and the public to danger of serious injustice. If the replacement cost measure of value and the prevailing rate measure of fairness of return should be applied, a company which raised, in 1920, for additions to plant, $1,000,000 on a 9 per cent. basis, by a stock issue, or by

and a plateau 33⅓ per cent. above was found probable by the master and assumed to be such by the lower court. In Bluefield Waterworks & Improvement Co. v. Public Service Commission, 262 U. S. 679, 43 S. Ct. 675, 67 L. Ed. 1176 (No. 256, October term, 1922), one 50 per cent. above the 1914 level was contended for; in the case at bar a plateau 25 per cent. above. But for the assumption that there will be a plateau there is no basis in American experience. The course of prices for the last 112 years indicates, on the contrary, that there may be a practically continuous decline for nearly a generation, that the present price level may fall to that of 1914 within a decade, and that, later, it may fall much lower. Prices rose steadily (with but slight and short recessions) for the 20 years before the United States entered the World War. From the low level of 1897 they rose 21 per cent. to 1900; then rose further (with minor fluctuations, representing times of good business or bad) and reached in 1914 a point 50 per cent. above the 1897 level. Then the great rise incident to the war set in. "Wholesale Prices, 1890 to 1921," U. S. Department of Labor, Bureau of Labor Statistics, Bulletin No. 320, pp. 9–26. These are averages of the wholesale prices of all commodities. In the Bureau chart the 1913 prices are taken as the datum line (100). As compared with them the 1897 level was 67, the 1900 level 81. The chart on page 10 of the pamphlet, entitled "Price Changes and Business Prospects," published by the Cleveland Trust Company, gives price fluctuations for the 110 years prior to 1921. It shows three abrupt rises in the price level, by reason of war, and some less abrupt falls, by reason of financial panic. These may be called abnormal. But the normal has never been a plateau. The chart shows that the peak price levels were practically the same during the War of 1812, the Civil War, and the World War, and it shows that practically continuous declines, for about 30 years, followed the first two wars. The experience after the third may be similar.

64 The new enterprises undertaken at the present high level, or projected, are many, among them, development and long-distance transmission of hydro-electric power, and of electric power generated at the coal mines. Moreover, nearly every utility now existing must make expenditures upon its plant to provide improvements, additions, or extensions. The growth of our communities, and increase in the demands of the individual, constantly compel enlargement of a utility's facilities. The present annual investment in public utility enterprises is much greater in amount than at any time in the past. Some of the construction done during the war was at prices for labor and materials 120 per cent. above those prevailing in 1914. Recent construction was at prices 70 per cent. higher. If replacement cost should become the measure of the rate base, the return on enterprises entered upon after 1914 would, obviously, be imperilled. And a serious decline of the price level would subject the return on many utilities established earlier to like dangers. A collapse of public utility values might result. And the impairment of public utility credit might be followed by the cessation of extensions and new undertakings.

long-term bond issue, may find a decade later that the value of the plant (disregarding depreciation) is only $600,000, and that the fair return on money then invested in such enterprise is only 6 per cent. Under the test of a compensatory rate, urged in reliance upon Smyth v. Ames, a prescribed rate would not be confiscatory, if it appeared that the utility could earn under it $36,000 a year; whereas $90,000 would be required to earn the capital charges. On the other hand, if a plant had been built in times of low costs, at $1,000,000 and the capital had been raised to the extent of $750,000 by an issue at par of 5 per cent. 30-year bonds and to the extent of $250,000 by stock at par, and 10 years later the price level was 75 per cent. higher and the interest rates 8 per cent. it would be a fantastic result to hold that a rate was confiscatory, unless it yielded 8 per cent. on the then reproduction cost of $1,750,000; for that would yield an income of $140,000, which would give the bondholders $37,500, and to the holders of the $250,000 stock $102,500, a return of 41 per cent. per annum. Money required to establish in 1920 many necessary plants has cost the utility 10 per cent. on 30-year bonds. These long-time securities, issued to raise needed capital, will in 1930 and thereafter continue to bear the extra high rates of interest, which it was necessary to offer in 1920 in order to secure the required capital. The prevailing rate for such investments may in 1930 be only 7 per cent., or indeed 6 per cent., as it was found to be in 1904, in Stanislaus County v. San Joaquin Co., 192 U. S. 201, 24 S. Ct. 241, 48 L. Ed. 406; in 1909 in Knoxville v. Knoxville Water Co., 212 U. S. 1, 29 S. Ct. 148, 53 L. Ed. 371; and in 1912, in Cedar Rapids Gas Co. v. Cedar Rapids, 223 U. S. 655, 670, 32 S. Ct. 389, 56 L. Ed. 594. A rule which limits the guaranteed rate of return on utility investments to that which may prevail at the time of the rate hearing may fall far short of the capital charge then resting upon the company.

In essence, there is no difference between the capital charge and operating expenses, depreciation, and taxes. Each is a part of the current cost of supplying the service, and each should be met from current income. When the capital charges are for interest on the floating debt paid at the current rate, this is readily seen. But it is no less true of a legal obligation to pay interest on long-term bonds, entered into years before the rate hearing and to continue for years thereafter; and it is true, also, of the economic obligation to pay dividends on stock, preferred or common. The necessary cost, and hence the capital charge, of the money embarked recently in utilities, and of that which may be invested in the near future, may be more, as it may be less, than the prevailing rate of return required to induce capital to enter upon like enterprises at the time of a rate hearing ten years hence. To fix the return by the rate which happens to prevail at such future day, opens the door to great hardships. Where the financing has been proper, the cost to the utility of the capital, required

to construct, equip, and operate its plant, should measure the rate of return which the Constitution guarantees opportunity to earn.[65]

The adoption of the amount prudently invested as the rate base and the amount of the capital charge as the measure of the rate of return would give definiteness to these two factors involved in rate controversies which are now shifting and treacherous, and which render the proceedings peculiarly burdensome and largely futile. Such measures offer a basis for decision which is certain and stable. The rate base would be ascertained as a fact, not determined as matter of opinion. It would not fluctuate with the market price of labor, or materials, or money. It would not change with hard times or shifting populations. It would not be distorted by the fickle and varying judgments of appraisers, commissions, or courts. It would, when once made in respect to any utility, be fixed, for all time, subject only to increases to represent additions to plant, after allowance for the depreciation included in the annual operating charges. The wild uncertainties of the present method of fixing the rate base under the so-called rule of Smyth v. Ames would be avoided, and likewise the fluctuations which introduce into the enterprise unnecessary elements of speculation, create useless expense, and impose upon the public a heavy, unnecessary burden.

In speculative enterprises the capital cost of money is always high —partly because the risks involved must be covered; partly because speculative enterprises appeal only to the relatively small number of investors who are unwilling to accept a low return on their capital. It is to the interest both of the utility and of the community that the capital be obtained at as low a cost as possible. About 75 per cent. of the capital invested in utilities is represented by bonds. He who buys bonds seeks primarily safety. If he can obtain it, he is content with a low rate of interest. Through a fluctuating rate base the bondholder can only lose. He can receive no benefit from a rule which increases the rate base as the price level rises; for his return, expressed in dollars, would be the same, whatever the income of the company.[66] That the stockholder does not in fact receive an increased return in time of rapidly rising prices under the rule of Smyth v. Ames, as applied, the financial record of the last six years demonstrates. But the burden upon the community is heavy, because the risk makes the capital cost high.

65 The community may, of course, demand, in respect to financing, as in respect to operation, that the right to earn a fair return be limited by the requirement that reasonable efficiency be exercised.

66 Of course, any one who chances to have money to invest, when money rates are high, gets the advantage incident to investing in a favorable market. If he invests in utility bonds, the higher agreed return upon his capital would be provided for by a rule which measures fair return by capital charges, as suggested above. If he elects to invest in the stock, he would, under the rule suggested, have the opportunity of earning a return commensurate with the value of the capital at the time it was embarked as stock in the enterprise.

The expense and loss now incident to recurrent rate controversies is also very large. The most serious vice of the present rule for fixing the rate base is not the existing uncertainty, but that the method does not lead to certainty. Under it, the value for rate-making purposes must ever be an unstable factor. Instability is a standing menace of renewed controversy. The direct expense to the utility of maintaining an army of experts and of counsel is appalling. The indirect cost is far greater. The attention of officials high and low is, necessarily, diverted from the constructive tasks of efficient operation and of development. The public relations of the utility to the community are apt to become more and more strained, and a victory for the utility may in the end prove more disastrous than defeat would have been. The community defeated, but unconvinced, remembers, and may refuse aid when the company has occasion later to require its consent or co-operation in the conduct and development of its enterprise. Controversy with utilities is obviously injurious, also, to the public interest. The prime needs of the community are that facilities be ample and that rates be as low and as stable as possible. The community can get cheap service from private companies, only through cheap capital. It can get efficient service only if managers of the utility are free to devote themselves to problems of operation and of development. It can get ample service through private companies only if investors may be assured of receiving continuously a fair return upon the investment.

What is now termed the prudent investment is, in essence, the same thing as that which the court has always sought to protect in using the term present value.[67] Twenty-five years ago, when Smyth v. Ames was decided, it was impossible to ascertain with accuracy, in respect to most of the utilities, in most of the states in which rate controversies arose, what it cost in money to establish the utility; or what the money cost with which the utility was established; or what income had been earned by it; or how the income had been expended. It was, therefore, not feasible, then, to adopt, as the rate base, the amount properly invested or, as the rate of fair return, the amount of the capital charge. Now the situation is fundamentally different. These amounts are, now, readily ascertainable in respect to a large, and rapidly increasing, proportion of the utilities. The change in this respect is due to the enlargement, meanwhile, of the powers and functions of state utility commissions. The issue of securities is now, and for many years has been, under the control of commissions, in the

[67] Compare Mr. Justice Field in Railroad Commission Cases, 116 U. S. 307, 343, 344, 6 S. Ct. 334, 388, 1191, 29 L. Ed. 636 (1886), Mr. Justice Harlan, 116 U. S. 341, 6 S. Ct. 388, 29 L. Ed. 636 (1886), Dow v. Beidelman, 125 U. S. 680, 690, 691, 8 S. Ct. 1028, 31 L. Ed. 841 (1888), and Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 409, 412, 14 S. Ct. 1047, 38 L. Ed. 1014 (1894), where the necessity of limiting the broad power of regulation enunciated in Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77 (1876), was first given expression. See, also, "Public Utilities, Their Cost New and Depreciation," by H. V. Hayes, pp. 255, 256.

leading states. Hence the amount of capital raised (since the conferring of these powers) and its cost are definitely known, through current supervision and prescribed accounts, supplemented by inspection of the commission's engineering force. Like knowledge concerning the investment of that part of the capital raised and expended before these broad functions were exercised by the utility commissions has been secured, in many cases, through investigations undertaken later, in connection with the issue of new securities or the regulation of rates. The amount and disposition of current earnings of all the companies are also known. It is, therefore, feasible now to adopt as the measure of a compensatory rate—the annual cost, or charge, of the capital prudently invested in the utility.[68] And, hence, it should be done.

Value is a word of many meanings. That with which commissions and courts in these proceedings are concerned, in so-called confiscation cases, is a special value for rate-making purposes, not exchange value. This is illustrated by our decisions which deal with the elements to be included in fixing the rate base. In Cedar Rapids Gas Co. v. Cedar Rapids, 223 U. S. 655, 669, 32 S. Ct. 389, 56 L. Ed. 594, and Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 165, 35 S. Ct. 811, 59 L. Ed. 1244, good will and franchise value were excluded from the rate base in determining whether the prescribed charges of the public utility were confiscatory. In Galveston Electric Co. v. Galveston, 258 U. S. 388, 42 S. Ct. 351, 66 L. Ed. 678, the cost of developing the business as a financially successful concern was excluded from the rate base. In Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 171, 35 S. Ct. 811, 59 L. Ed. 1244, the fact that the street had been paved (and hence the reproduction cost of laying gas mains greatly increased) was not allowed as an element of value. But, ob-

68 In 1898, when Smyth v. Ames was decided, only one state—Massachusetts—had control by commission of the issue of securities by all public utility companies. (New Hampshire controlled security issues of railroads and street railways; Maine and New York controlled increase of capital stock by railroads; and Connecticut, the issue of bonds by railroads.) In 1923 at least 24 states and the District of Columbia controlled through commissions the issue of securities of public utility companies. Legislation for 1923 and 1922 (in part) has not been available. Other states may have legislated on the subject in 1923 or 1922.

In 1898 no state had control by commission of the accounting of all public utilities. Massachusetts controlled the accounting of gas, electric light, street railway, and railroad companies; Iowa, of railways and carriers; New York, Texas, and Vermont, of railroads only. In 1923 at least 36 states and the District of Columbia controlled through commissions the accounting of public utility companies.

In 1898, only one state—Massachusetts—exercised through a commission control of all public utilities. In 1923 such control is exercised in at least 39 states and the District of Columbia. This does not include those states exercising commission control over railroads and related utilities, such as street railways, express companies, and telephone and telegraph companies. These states number 47. The number of states having commission control of railroads in 1898 was 27. In 1922 every state except Delaware had commission control of railroads.

viously, good will and franchise value are important elements when exchange value is involved; and where the community acquires a public utility by purchase or condemnation, compensation must be made for its good will and earning power, at least under some circumstances. Omaha v. Omaha Water Co., 218 U. S. 180, 202, 203, 30 S. Ct. 615, 54 L. Ed. 991, 48 L. R. A. (N. S.) 1084; National Waterworks Co. v. Kansas City, 62 F. 853, 865, 10 C. C. A. 653, 27 L. R. A. 827. Likewise, as between buyer and seller, the good will and earning power due to effective organization are often more important elements than tangible property. These cases would seem to require rejection of a rule which measured the rate base by cost of reproduction or by value in its ordinary sense.

The rule by which the utilities are seeking to measure the return is, in essence, reproduction cost of the utility or prudent investment, whichever is the higher. This is indicated by the instructions contained in the Special Report on Valuation of Public Utilities, made to the American Society of Civil Engineers, October 28, 1916, Proceedings, vol. 42:

"So long as the company owner keeps a sum equivalent to the total investment at work for the public, either as property serving the public, or funds held in reserve for such property, no policy should be followed in estimating depreciation that will reduce the property to a value less than the investment. * * *" Page 1726.

"Estimates of the cost of reproduction should be based on the assumption that the identical property is to be reproduced, rather than a substitute property" (page 1719), "although such a substitute property, much less costly than the existing plant, might furnish equal or better service, it is not reproduction of service, but of property, that is under consideration; and clearly the estimate should be of existing property created with public approval, rather than of a substituted property" (page 1772).

If the aim were to ascertain the value (in its ordinary sense) of the utility property, the enquiry would be, not what it would cost to reproduce the identical property, but what it would cost to establish a plant which could render the service, or in other words, at what cost could an equally efficient substitute be then produced. Surely the cost of an equally efficient substitute must be the maximum of the rate base, if prudent investment be rejected as the measure. The utilities seem to claim that the constitutional protection against confiscation guarantees them a return both upon unearned increment and upon the cost of property rendered valueness by obsolescence.[69]

[69] Powerful arguments in favor of actual prudent cost as the rate base can be found in the dissenting opinion of Commissioner Eastman in San Pedro, Los Angeles & Salt Lake R. R. Co., 75 Interst. Com. Com'n R. 463 (1923); his principal arguments based on policy are on pages 536, 537, 546–550, and 561–563; also in John Bauer's "Effective Regulation of Public Utilities" (Macmillan, 1925), and I. L. Sharfman's "The American Railroad Problem" (Century Co. 1921). See, also, the opinion of the Washington Commission,

V. Constitutional Status of Actual Prudent Cost as a Rate Base

ROBERT L. HALE, COMMENTS ON JOHN BAUER, "RECENT DECISIONS BY THE SUPREME COURT OF THE UNITED STATES ON VALUATION AND RATE MAKING." [70]

The only important point with which I disagree in Dr. Bauer's article is his prediction that the Supreme Court "will not declare rates confiscatory if there has been a fair return on actual investment, even if on the reproduction-cost basis they would yield an obviously inadequate return." This prediction, to my mind, is too optimistic and shows too much confidence in the court's predilection for logical consistency. It is quite true, as Dr. Bauer points out, that such a result would be logically consistent with the actual decisions (as distinct from the dicta) in the Southwestern Bell [262 U. S. 276, 43 S. Ct. 544, 67 L. Ed. 981, 31 A. L. R. 807 (1923)], the Bluefield [262 U. S. 679, 43 S. Ct. 675, 67 L. Ed. 1176 (1923)], and the Atlanta cases [Georgia Ry. & Power Co. v. Railroad Commission, 262 U. S. 625, 43 S. Ct. 680, 67 L. Ed. 1144 (1923)]. It is also true that in ordinary fields of law the safest way to predict the court's future actions is perhaps to find some hypothesis that will reconcile the decisions, even though there is no hypothesis that will reconcile all the dicta. This is because in ordinary branches of the law the judges have been trained to exercise a certain amount of logical thought, and to avoid professing allegiance to two doctrines whose implications contradict each other. When it comes to rate regulation, however, the court has either to profess some self-contradictory principle or else to deny the validity of certain conventional canons; for there are two conventional canons which come into conflict in rate cases.

These are (1) the canon that the law may in some cases be changed so as to deprive a public service company of the advantage it is taking of the consumers if its rates be found "extortionate," and (2) the canon that in no case shall the rates be so changed by law as to take from the company any part of the exchange value of its property. It is obviously impossible to give full effect in practice to both canons—for to take away part of the advantage which the company previously enjoyed must inevitably reduce the exchange value of its property (if the "property" includes the "intangible" as well as the "tangible" elements). The court cannot possibly give full effect to both canons in

rendered by Chairman Reynolds, adopting the company's contention in favor of actual prudent cost. Public Service Commission v. Pacific Tel. & Tel. Co., P. U. R. 1916D, 947 (1916).—[Editor's footnote.]

[70] Reprinted, by permission, from the American Economic Review, vol. 14, pp. 264–267 (June, 1924). Dr. Bauer's article is on pages 254–263 of the same issue. Portions of the comments are omitted.

practice; but it can and does *profess* to give full effect to both, closing its eyes to the breach which it is actually making in the second every time it gives effect to the first. As long as the reduced rates yield a fair return on some figure which, with plausibility, can be asserted to be the value, the court does not see that property is being taken (in the only sense in which it can ever be taken in a rate case—namely, in the sense of being reduced in value). It is more in accord with the mental habits and training of a majority of the Supreme Court Justices to blink in this way than to admit even to themselves that the reduced earnings cannot possibly constitute a fair return on the old value any more than the reduced circumference of a circle can constitute 3.1416 times the unreduced diameter, however easy it may be to make a "finding" to the contrary by permitting some inaccuracy to creep into the measurement. It is easier for the judges to overlook this fact than to face it, because if they faced it and faced all its logical implications without flinching, they would find themselves passing judgment on the question how far it is true that the income derived from ownership is justifiable on grounds of public policy.

Not only is any such inquiry foreign to the training and capacity of a judge, but it starts with a denial of a pre-supposition to which a judge's training causes him to cling with moral fervor—the pre-supposition that whatever one can acquire without fraud through the exercise of property rights is lawfully and morally his. Trained as they have been, and with no more leisure than they have for the consideration of such matters in any but a superficial manner, it is small wonder that the judges are suspicious of the validity of any doctrine which denies this axiom. This is particularly true since it is an axiom which may be entertained without forcing an illogical answer to most of the legal questions which a judge is called upon to decide. When it is indulged in a rate case, however, it cannot be reconciled with the power to weaken an advantage possessed by a utility company, except by the profession of some self-contradictory principle. Since two self-contradictory implications cannot both be effectuated, the court must in practice sacrifice the one or the other. Moreover, since the court is psychologically incapable of admitting that it is sacrificing either, it cannot lay down a rule which will inform us which of the self-contradictory canons it will in fact immolate in a given case. Hence, in my opinion, it is idle to predict that the Supreme Court majority will make its decisions conform to any logical pattern.

It seems to me much more probable that it will continue to profess to protect the entire exchange value of the property from impairment, and will accordingly insist that the reduced rates yield a fair return on a figure which can plausibly (though not actually) be reconciled with exchange value. A figure which is reached after "considering" reproduction cost can be made more plausibly to seem to be the value than a figure reached without considering it. This is because in unregulated competitive businesses the earnings are apt, in a rough sort of

way, to conform to a fair return on reproduction cost less depreciation, and the value of the property therefore (being a capitalization of the probable earnings) to equal this depreciated reproduction cost. Yet even in unregulated competitive business the conformity between depreciated reproduction cost and exchange value is seldom exact, owing to the slowness or inexact operation of the "long-run" forces which are supposed to bring the earnings to their "normal" level. Hence, when a business man or engineer values a competitive plant, although he considers reproduction cost, he does not base his estimate of value conclusively upon it. This seems to me to explain why the court, which supposes (erroneously) that it is going to permit reductions only to the point where the rates still yield a fair return upon exchange value, has insisted that the commission and the lower courts, in "ascertaining" that "value" must not ignore reproduction cost (Southwestern Bell and Bluefield Cases), but need not find a "value" equal to the reproduction cost (Atlanta Case). The Atlanta Case is inconsistent with the major premise that the exchange value of the property must be left intact after regulation; every decision sustaining a reduction is inconsistent with that premise. But the Atlanta Case is not inconsistent with the conclusion which the court draws in the other cases from that major premise, namely, that reproduction cost must be "considered." * * * Hence the decisions of the Atlanta and the Bell Cases can be reconciled with each other, and that fact will most likely satisfy the court, without forcing it to call into question its dicta favorable to "consideration" of reproduction cost. It will not be troubled, in my opinion, by the fact that those dicta cannot be reconciled with the major premise from which they purport to be derived.

If I am correct, it will not be safe to count on a reduction which leaves a fair return on actual but not on reproduction cost meeting the approval of the Supreme Court. That will depend on whether the commission has gone through the formality of "considering" reproduction cost, and whether in the court's opinion the "consideration" thereof by the commission has been a "real" consideration. The criterion for answering this last question must remain uncertain, since none but an arbitrary consideration is possible unless the purpose is to reach the actual exchange value, and if that purpose is effectuated in each case in fact as well as in theory, there can be no reductions, and there will therefore be no occasion for making a "valuation" at all. Whether any particular "consideration" by a commission will be held to be adequate seems more likely to depend on what other cases have been decided that same day by the court, and what the judges' immediate temper may be. Of the present membership of the court, Justice Brandeis is strongly in favor of abandoning "value" for actual prudent investment, Justice McKenna is strongly opposed thereto, and Justice Butler, from his practice as a railroad valuation lawyer who doubtless believed sincerely in the theories he then advocated, is strongly in favor of some basis to which he gives the name "value." The rest of the

justices show evidence of being bored by the whole discussion. Hence when they have supported Justice Butler in rejecting a reduction as "confiscatory" on grounds not entirely clear or definite, they naturally feel a sense of virtuous impartiality in joining Justice Brandeis in sustaining a reduction in another case—even Justice Butler joining in.

Such at least is my hypothesis for explaining how in fact they did come to hold that the "consideration" given by the commission in the Atlanta Case was adequate. It is an hypothesis that cannot be put to the test of experiment, and one which posits too human a theory of the behavior of judges to be acceptable to the bar. If it is true, however, the prospect is not very satisfactory for developing a working theory for the regulation of utilities. Yet if some compromise can be made for an initial rate base, as Dr. Bauer suggests, and no additions made thereto except such as correspond to subsequent additional investments, there is nothing in the decisions to indicate that the Supreme Court will invalidate the scheme, provided only the initial rate base is made sufficiently high to satisfy its indefinite requirements. All the decisions requiring the "consideration" of reproduction cost have been in cases where it has been proposed to cut down the value which the company's property has already attained; the court has never indicated that it will hold "confiscatory" regulations which prevent the value of a company's property from increasing in the future.[71] To hold this would seem to imply that it is "confiscatory" to prevent a new person from entering the utility field at all; or to take property for a public use on payment of the present value without anything for future increment. Yet the constitutional validity of both of these things is well settled. The main features of Dr. Bauer's proposed legislation would thus seem to have a good chance of surviving judicial scrutiny. Nothing in this paper is meant to detract from the emphasis which should be placed on its merits as a constructive solution of the problem.[72]

[71] This statement was made inadvertently. The commission action held invalid in the Bluefield Case was not a reduction of rates, but a refusal to authorize an increase. It may have been true, however, that an increase of rates was essential, not merely to allow the exchange value to increase, but to prevent if from diminishing. The distinction was apparently not brought to the court's attention.

[72] In 1897 Judge Van Fleet of the California Supreme Court argued for the constitutionality of actual prudent cost as the rate base, on the analogy of eminent domain, the "taking" of the property by the public being conceived as occurring at the time when the money was first invested. San Diego Water Co. v. San Diego, 118 Cal. 556, 50 P. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261 (1897). This opinion was concurred in by only two of the other judges, although three more concurred in the result reached, and one dissented. It did not therefore represent the opinion of the majority of the court.

The Washington Supreme Court, in 1924, expressed the opinion that the Southwestern Bell and the Bluefield Cases did not apply where a statute prescribed the actual prudent cost rule. Pacific Coast Elevator Co. v. Department of Public Utilities, 130 Wash. 620, 228 P. 1022 (1924). In 1925 the Massachusetts Department of Public Works spoke of the "Massachusetts rule," that "it is the money honestly and prudently invested and devoted to the public service that is entitled to earn a fair return," and distinguished this rule from the "federal rule." "It may also be argued," it said, "that

VI. Effect on Rate Base of Previous Deficiencies, Surpluses, and Investments from Earnings *

PAYNE et al. v. WISCONSIN TELEPHONE CO.[73]

(Railroad Commission of Wisconsin, 1909. 4 Wis. R. C. R. 1.)

* * * In the testimony going value was defined as that value which is added to the physical value of a plant by virtue of the successful and harmonious operation of the whole, and the co-ordination of the various parts. This might, with propriety, be termed a definition of the value of a going concern as distinguished from going value or the uncompensated cost incurred in building up the business. The value of a going concern is generally greater than the sum of the values of the separate physical parts of the plant. The seller of such a plant is in a position to exact more, and the purchaser would generally be willing to pay more, than for a plant which has no established business. In expropriation proceedings, likewise, the owner or owners of a plant which is a going concern would doubtless be awarded a larger amount of damages than the owner or owners of a plant which has not yet been placed upon a going basis. But this "more" in the value of a plant in the case of purchase and sale, or expropriation, is not a matter in which the public is interested in proceedings of this kind. This "more" is not property used and useful for the convenience of the public within the meaning of the statute. On the other hand, if property is devoted to the public use, and reasonable care has been exercised in all the phases of its management, but the owners have not received a fair return during the earlier years of the operation of the plant in which the property is used for the convenience of the public, the deficit thus incurred must be made up out of later earnings, in so far as this is commercially possible and expedient. In other words, every effort honestly put forth, every dollar properly expended, and every obligation legitimately incurred in the establishment of an efficient public utility business must be taken into consideration in the making of rates for such business. Collectively the elements just referred to may be designated by the term "going value," and in this sense there can be no question regarding the propriety and justice of admitting going value as a consideration in the determination of rates. Whether

when a public utility enters in business in Massachusetts it consents, as a matter of law, to have its rates here fixed by the rule which then obtained and has obtained for a long time in the commonwealth." Re New England Tel. & Tel. Co., P. U. R. 1925E, 739, 744, 745 (1925).

* For certain other phases of "going value" see supra, section 2, II (B).

[73] Portions of the opinion are omitted. The portion here printed appears on pages 60, 61 of the report.

this going value should be made a part of the permanent capitalization of the plant, or provided for by means of a sinking or other fund, is a matter to be decided on the facts in each particular case.[74] * * *

GALVESTON ELECTRIC CO. v. CITY OF GALVESTON et al.

(Supreme Court of the United States, 1922. 258 U. S. 388, 42 S. Ct. 351, 66 L. Ed. 678.)

Appeal from the District Court of the United States for the Southern District of Texas.

Suit by the Galveston Electric Company against the City of Galveston and others to restrain the enforcement of an ordinance fixing street car fares. From a decree dismissing the bill without prejudice (272 F. 147), complainant appeals. Affirmed.

Mr. Justice BRANDEIS delivered the opinion of the Court.[75] * * * The master, who heard the case in October, 1920, and filed his report in November, made findings in which he advised that the fare was confiscatory. The District Judge, who heard the case in January, 1921, found a much smaller base value and much larger net revenues; stated that he did not deem it necessary to determine whether the ordinance "will produce exactly 8 per cent. or a little more or a little short of it"; declared that he was "not satisfied that the ordinance produces a return so plainly inadequate as to justify this court in interfering with the action of the municipality in the exercise of its rate-making function"; and in March, 1921, entered a decree dismissing the bill without prejudice. In April he denied a petition for rehearing. 272

[74] For a contention in favor of amortizing the development costs over a term of years rather than adding them permanently to the rate base, see Shaw, Commissioner, dissenting, in Re Southern Illinois Gas Co. (Illinois Public Utilities Commission), P. U. R. 1916C, 704, 719–721 (1916). The point is made that "the establishment of reliable utility service in a community is more or less a boom for the district served. Property values have a tendency to advance. * * * The effect is probably most marked during the three or four years following the inception of the utility service—the development period. Should not these early consumers, who receive the most benefit of the newly established service, bear a little the larger share of the cost of such development?"

The Wisconsin commission seems inclined to add to the rate base deficits incurred only during the developmental period. See City of Marinette v. City Water Co. of Marinette, 8 Wis. R. C. R. 334, 345, 346 (1911). Yet there seems no reason, on the actual prudent cost theory, for confining the treatment to that period. The failure to add later losses as well may be owing to confusion in the application to this procedure of the unfortunate appellation, "going value." As to the likelihood of deficits in later periods, whenever a new extension has been added to the plant to take care of expanding demand, see City of Beloit v. Beloit Water, Gas & El. Co., 7 Wis. R. C. R. 187, 288, 289 (1911). In the case of In re Valparaiso Telephone Co., P. U. R. 1915E, 578, 581 (1915), the Nebraska Commission, in computing "the amount of money actually invested in the property by the stockholders," appears to include deficits in the later as well as in the earlier years.

[75] Portions of the opinion are omitted.

F. 147. The case comes here on appeal under section 238 of the Judicial Code (Comp. St. § 1215). * * *

But to fix base value the master added, and the court disallowed, items aggregating nearly $600,000, which must now be considered.

The most important of these items is $520,000 for "development cost." The item is called by the master also "going concern value or values of plant in successful operation." He could not have meant by this to cover the cost of establishing the system as a physically going concern, for the cost of converting the inert railway plant into an operating system is covered in the agreed historical value by items aggregating $202,000. These included, besides engineering, supervision, interest, taxes, law expenses, injuries and damages during construction, the sum of $73,281 for the expenses of organization and business management. The going concern value for which the master makes allowance is the cost of developing the operating railway system into a financially successful concern. The only evidence offered, or relied upon, to support his finding is a capitalization of the net balance of alleged past deficits in accordance with what was said to be the Wisconsin rule.[76] The experts calculated this sum in various ways. One estimate placed the development cost at $2,000,000; a more moderate estimate by the company's expert was $575,300; and the city's expert made a calculation by which he estimated this so-called cost at $212,452.

If the rule were that a prescribed rate is to be held confiscatory in case net earnings are not sufficient to yield 8 per cent. on the amount prudently invested in the business, there might be propriety in counting as part of the investment such amount, if any, as was necessarily expended at the start in overcoming initial difficulties incident to operation and in securing patronage. But no evidence of any such expenditure was introduced; and the claim of the company does not proceed upon that basis. What was presented by the witnesses are studies, on various theories, of what past deficiencies in net income would aggregate, if 4 per cent. were allowed as a depreciation annuity and 8 per cent. compound interest were charged annually on the value of the property used. These calculations covered, on one basis, the period of 39 years since the original horse car line was built; on another, the period of 15 years since the appellant purchased the property as a going concern. If net deficits so estimated were made a factor in the rate base, recognition of 8 per cent. as a fair return on the continuing investment would imply substantially a guarantee by the community that the investor will net on his investment ultimately a return of 8 per cent. yearly, with interest compounded on deferred payments; provided only

[76] Hill v. Antigo Water Co., 3 Wis. R. R. Com. Reports, 623, 705–723 (1909). But see Cunningham v. Chippewa Falls Waterworks & L. Co., 5 Wis. R. R. Com. Reports, 302, 315 (1910); Appleton v. Appleton Waterworks Co., 5 Wis. R. R. Com. Reports, 215, 277 (1910); In re Purchase Racine Waterworks Plant, 19 Wis. R. R. Com. Reports, 83, 140 (1917).—[Court's footnote.]

that the traffic will in course of time bear a rate high enough to produce that amount.[77]

The fact that a utility may reach financial success only in time or not at all, is a reason for allowing a liberal return on the money invested in the enterprise; but it does not make past losses an element to be considered in deciding what the base value is and whether the rate is confiscatory. A company which has failed to secure from year to year sufficient earnings to keep the investment unimpaired and to pay a fair return, whether its failure was the result of imprudence in engaging in the enterprise or of errors in management, or of omission to exact proper prices for its output, cannot erect out of past deficits a legal basis for holding confiscatory for the future, rates which would, on the basis of present reproduction value, otherwise be compensatory. Knoxville v. Knoxville Water Co., 212 U. S. 1, 14, 29 S. Ct. 148, 53 L. Ed. 371.

Nor is there evidence in the record to justify the master's finding that a business brought to successful operation "should have a going concern value at least equal to one-third of its physical properties." Past losses obviously do not tend to prove present values. The fact that a some time losing business becomes profitable eventually through growth of the community or more efficient management, tends to prove merely that the adventure was not wholly misconceived. It is doubtless true, as the master indicated, that a prospective purchaser of the Galveston system would be willing to pay more for it with a record of annual losses overcome, than he would if the losses had continued. But would not the property be, at least, as valuable if the past had presented a record of continuous successes? And shall the base value be deemed less in law if there was no development cost, because success was instant and continuous? Or, if the success had been so great that, besides paying an annual return at the rate of 8 per cent., a large surplus had been accumulated, could the city insist that the base value be reduced by the amount of the surplus? Compare Newton v. Consolidated Gas Co., decided March 6, 1922, 258 U. S. 165, 42 S. Ct. 264, 66 L. Ed. 538.

In determining the value of a business as between buyer and seller, the good will and earning power due to effective organization are often more important elements than tangible property. Where the public acquires the business, compensation must be made for these, at least under some circumstances. Omaha v. Omaha Water Co., 218 U. S. 180, 202, 203, 30 S. Ct. 615, 54 L. Ed. 991, 48 L. R. A. (N. S.) 1084;

[77] On the other hand, if what is to be considered in determining the net deficit is not the result of operations from the beginning of the enterprise, but the result of operations since the present owner acquired it—in other words, the return on its investment—we are left without the data necessary to determine the fact. For the record does not disclose what the present company paid when it purchased the property in 1905 as a going concern. For aught that appears, appellant has received full 8 per cent. annually on that amount and later additions to capital.—[Court's footnote.]

National Waterworks Co. v. Kansas City, 62 F. 853, 865, 10 C. C. A. 653, 27 L. R. A. 827. And they, like past losses, should be considered in determining whether a rate charged by a public utility is reasonable. Compare Venner v. Urbana Waterworks (C. C.) 174 F. 348, 352. But in determining whether a rate is confiscatory, good will and franchise value were excluded from the base value in Cedar Rapids Gas Co. v. Cedar Rapids, 223 U. S. 655, 669, 32 S. Ct. 389, 56 L. Ed. 594, and Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 169, 35 S. Ct. 811, 59 L. Ed. 1244; and the expressions in Denver v. Denver Union Water Co., 246 U. S. 178, 184, 191, 38 S. Ct. 278, 62 L. Ed. 649, and in Lincoln Gas Co. v. Lincoln, 250 U. S. 256, 267, 39 S. Ct. 454, 63 L. Ed. 968, are not to be taken as modifying in any respect the rule there declared. Going concern value and development cost, in the sense in which the master used these terms are not to be included in the base value for the purpose of determining whether a rate is confiscatory.[78] * * *

In re RATES OF PUBLIC SERVICE GAS CO. FOR GAS (PASSAIC DIVISION).[79]

(Board of Public Utility Commissioners of New Jersey, 1912. 1 P. U. C. [N. J.] 433.)

* * * Under No. 304, "Other Intangible Gas Capital," we shall discuss "Going Value" or "Going Concern Value." * * *

At the very outset two questions arise that require answers: First, Can a public utility have any excess in value over and above the value of its tangible belongings? This query, moreover, presupposes that the excess value, if any, is wholly distinct from any capitalized earning power predicated on a future setting of rates higher than required to afford a just return.[80]

Second, In case it transpires that such excess value, known as "going concern value," exists, and in case the costs involved in the acqui-

78 Commissioner Potter, concurring in part in San Pedro, Los Angeles & Salt Lake R. R. Co., 75 Interst. Com. Com'n R. 463, 578–580 (1923), distinguished the Galveston Case from that of a railroad. "There," he said, referring to the Galveston Case, "justice could be accomplished by allowing a liberal rate on the money invested. Here that means is not available. Under the Transportation Act a liberal rate for a particular carrier because of losses during the development period is impossible. The only way to accomplish for a railway that just allowance which the Galveston Case recognizes as due is to take the deficits into consideration in fixing the rate base. * * * In the case before us, when the carrier shall have received, because of the increased rate base, recoupment for the early deficits, the rate base can be reduced so that earnings thereon would be no longer permitted."—[Editor's footnote.]

79 Portions of the opinion are omitted. The portion here printed appears on pages 468–475 of the report.

80 If the exchange value of the property is dependent on capitalized earning power, it will be noted that much of the ensuing reasoning involves a discussion of capitalized earning power, and whether that earning power is "predicated on a future setting of rates higher than required to afford a just return" is the very question at issue.

sition of such value have been met out of rates exacted from consumers, should such excess value, known as "going concern value," enter into the base upon which public utilities are entitled to earn a fair return?

Our answer to the first query is in the affirmative. There is such a thing as "going concern value." Mr. Forstall testified (Evidence, pp. 98 to 104):

"A plant with business attached has a value greater than the value of the mere plant without the business attached. * * * Now you don't get the business by simply putting in a physical plant. The getting of the business is entirely a separate thing. You have got to either spend actual money, or lose interest on your investment for a long time. There is no gas business that ever started new that made money right away."

The "going concern value" will then be largely represented by the cost of developing the business as distinct from the cost of securing the physical structure. This going concern value may include the cost of soliciting business, cost of advertising, cost of inducing consumers to take service, cost of exhibiting appliances, cost of occasional free installation, and also the dearth of adequate returns during the early developmental years of the company. Depreciation unearned in this period may also sometimes be included in "going concern value." Indeed the term "going concern value" or "going value" may be employed to cover the total value of a company's property over and above structural value. * * *

The second query raised asks whether such "going concern value" should be included in the base on which public utilities are entitled to a fair return, in case the costs involved in developing such going concern value have been met out of rates exacted from consumers. To this our answer also is in the affirmative, so far as it does not appear that the rates exacted from consumers were legally challenged. If, in the past, this gas company, out of the rates exacted from consumers, had met its operating expenses and depreciation, and in addition thereto had obtained enough to pay returns to investors, and to build an actual structure used in the business, would this structure aforesaid be the lawful property of the company? The answer, it seems to us, must be in the affirmative. If the company had paid out, in addition to other payments to investors, dividends equal to the cost of building this structure, and then had issued additional stock in value, equal to the cost of this structure, in order to repossess itself of the money required to build it, there can be no doubt that the structure built out of the proceeds of the additional securities thus sold would be the lawful property of the company. It would be none the less the company's lawful property if built out of current earnings without the issue of additional securities.

Under the present regulation by the Commission, it is doubtless true that net additions to a company's plant must be charged to capital account. Under the present régime of regulation of rates and regula-

tion of accounts, it would be grossly improper first to charge new construction up to operating expenses, and defray its cost therefrom, and thereafter to capitalize such net additions, and include them in the base on which a company is entitled to earn a fair return, but we see no escape from the necessity of recognizing the intangible property designated as "going concern value," as well as actual physical structures similarly obtained as constituting part of the present lawful possessions of a public utility, even though both these tangible and intangible values were built up in the past out of rates exacted from consumers. * * *

If we find it impossible to accept the maximum estimate of going concern value as embodied in the figures of Humphreys and Miller, we find it also impossible to accept the minimum estimate of Professor Bemis of $171,000 as a "possible allowance for preliminary and development expenses."

Professor Bemis has built this estimate upon the assumption that any "preliminary development expenses or early overhead charges" would surely be confined to the first million dollars of investment and to sales of the first two billion feet of gas in the first twenty or thirty years of life of the companies in the Passaic District" (Prof. Bemis' Valuation, p. 15). He allows, accordingly, 12 per cent. on the first $1,000,000 of investment, or $120,000, and also for new business expense at $2.55 per M on the first 2,000,000,000 feet of sales, or $51,000. His total accordingly is $171,000.

There is no evidence to show that in this case, or in cases generally, preliminary development expenses or early overhead charges would be confined to the first million dollars of investment. Why limit such charges to the first million of investment; or indeed why extend them beyond the first hundred thousand dollars of investment? Such an assumption is purely arbitrary, and unsupported by evidence. It must therefore be rejected. If there be an intangible value, such as going concern value, legally a part of the company's property, it seems to us more reasonable to appraise it, in the absence of evidence to the contrary, as some proportion of the present investment of the company than as a proportion of the investment of twenty years ago. If it be argued that preliminary and overhead charges appertain more specifically to the early years of a company's operation, the rejoinder is not wholly unwarranted that similar charges are not impossible or improbable in later years, especially when these later years have witnessed combinations of earlier properties and great extensions of their operations. Moreover, the fact that approximately 40 per cent. of the company's send-out represents business acquired within the past decade would indicate that the cost of acquiring new business must have been relatively heavier than in the earlier years of the production of gas in this district. It is true that the cost of new business in this last decade has been charged to operation and paid out of rates. But, as we have indicated above, the business thus acquired must be regarded

as a legitimate part of the property of the company. We cannot equitably project back into the unregulated past a norm of prices that might to-day be regarded as fair and adequate, and assume that actual rates exacted in the past, in so far as they exceed what are now deemed fair, have not lawfully become the property of the company. If these high rates in the past have been employed by the company to acquire an intangible property in the shape of extensive patronage, that expectation of patronage is theirs, and on its fair value the company is entitled to a return. It may or may not be a subject of regret that regulation was so long deferred; but deferred regulation is no excuse for refusing at present to allow a fair return upon what is the lawful property of the company.[81] * * *

DES MOINES GAS CO. v. CITY OF DES MOINES.

(Supreme Court of the United States, 1915. 238 U. S. 153, 35 S. Ct. 811, 59 L. Ed. 1244.)

Mr. Justice DAY delivered the opinion of the court.[82] * * * Included in going value as usually reckoned is the investment necessary to organizing and establishing the business which is not embraced in the value of its actual physical property. In this case, what may be called the inception cost of the enterprise entering into the establishing of a going concern had long since been incurred. The present company and its predecessors had long carried on business in the city of Des Moines, under other ordinances, and at higher rates than the ordinance in question established. For aught that appears in this record, these expenses may have been already compensated in rates charged and collected under former ordinances. As we have said, every presumption is in favor of the legitimate exercise of the rate-making power, and it is not to be presumed, without proof, that a company is under the necessity of making up losses and expenditures incidental to the experimental stage of its business. * * *

[81] For proposals dealing with this difficulty, see section 2, IX, infra.

[82] Portions of the opinion are omitted. The portion here printed appears on pages 155, 156 of 238 U. S. (35 S. Ct. 815).

NEWTON v. CONSOLIDATED GAS CO. OF NEW YORK.

(Supreme Court of the United States, 1922. 258 U. S. 165, 42 S. Ct. 264, 66 L. Ed. 538.)

Mr. Justice McREYNOLDS delivered the opinion of the court.[83] * * * Since 1907 the Gas Company has been subject to supervision by a commission empowered to prohibit unreasonable rates, and the presumption is that any profits from its business were lawfully acquired. Municipal Gas Co. v. Public Service Commission, 225 N. Y. 89, 99, 121 N. E. 772. Mere past success could not support a demand that it continue to operate indefinitely at a loss. The public has no such right in respect of private property although dedicated to public use. When it became clear that the prescribed rate had yielded no fair return for more than a year, and that this condition would almost certainly continue for many months, the company was clearly entitled to relief. * * *

COMMON COUNCIL OF CITY OF GREEN BAY v. GREEN BAY WATER CO.[84]

(Railroad Commission of Wisconsin, 1913. 11 Wis. R. C. R. 236.)

* * * Going Value. The argument of petitioner is that no allowance should be made for going value. Some confusion seems to exist in petitioner's brief between going value and good will, or, in other words, between the cost of building up a business and the value which accrues to a business because of the patronage given to it by customers who are free to patronize a competing business. It has been repeatedly held that the cost of building up the business of a public utility is an element to be considered in connection with the adjustment of rates. The methods to be followed in fixing the allowance which should be made for this element have not been very definitely fixed. In general, however, it may be said that there are two methods which have been used to a considerable extent, which methods are:

1. The determination of the extent to which losses have actually been incurred in building up the business in question.

2. The cost of reproduction of the business.

On behalf of the respondent there was introduced a computation of going value by John W. Alvord. After the hearing a revised computation was presented, which showed a total going value of $94,082. Methods followed by Mr. Alvord in determining the going value differ so materially from those which have been frequently used by the

[83] Portions of the opinion are omitted. The portion here printed appears on page 175 of 258 U. S. (42 S. Ct. 267).

[84] Portions of the opinion are omitted. The portion here printed appears on pages 243, 244 of the report.

Commission that it may be well to call attention to some of the points of difference.

The method which has generally been followed by the Commission aims to determine, as far as possible, what the actual cost of developing the business in question has been, and to what extent, if at all, such losses have been recovered in later years of operation.[85] There are

[85] While, as here, the commission appears (at times) inclined to deduct surpluses from the losses which would otherwise be added to the rate base, it fails to carry out the logic of this principle and to deduct such surpluses as indicate a repayment to the stockholders of part of the costs of *constructing* the plant as well as the cost of developing the business; or at least it only subtracts these surpluses if they can be brought under the head of "depreciation reserve."

And because, under this practice, the surpluses might have been distributed to the stockholders without crediting the rate payers with a partial repayment of capital, therefore, if they were not so distributed but reinvested in the plant, the company is held entitled to a return on the additional property bought therewith. In re Appl. Pewaukee-Sussex Telephone Co., 7 Wis. R. C. R. 465, 466, 467 (1911); City of Milwaukee v. Milwaukee E. R. & L. Co., 10 Wis. R. C. R. I. 104 (1912); Charlesworth v. Omro El. Lt. Co., 16 Wis. R. C. R. 23, 27 (1915). This is probably another consequence of the unfortunate use of the term "going value" to describe the deficits added to the rate base. If the deficits exceed the surpluses, the difference is added and called a "going value." If the two are equal, nothing is added and nothing subtracted, and it is said that there is no "going value." If the surpluses exceed the deficits, and if they were not collected specifically for depreciation, nothing is added *and nothing subtracted.* This is because a "negative going value" sounds absurd in the case of a prosperous plant. But it sounds absurd only because it suggests exchange value, whereas the thing which is added by the above method under the name "going value" is not exchange value at all, but a cost, as the Wisconsin Commission has more than once pointed out. While "negative going value" (in the sense of exchange value) is absurd in a prosperous concern, there is nothing absurd in the conception of "amortized costs." When the surpluses were collected for depreciation, however, and not used for that purpose, the Wisconsin Commission finds less difficulty in subtracting them from the rate base. "Since depreciation," it says, "in a sense, is intended to keep the investment intact, it necessarily follows that by turning it over to the stockholders, a part of their capital is in reality returned to them, and that this, in turn, is reducing their investment in the plant. Since their investment is thus reduced, it would also seem that there should be corresponding reductions in the amount upon which the rates paid by the consumers are based." Hill v. Antigo Water Co., 3 Wis. R. C. R. 623, 641 (1909). See cases in VII, infra.

When the Commission fixes a rate, it is almost inevitable that the company will earn either somewhat more or somewhat less than the amount which the commission intended it to earn. In the former event, the public gets no credit for having paid more than the amount intended, if surpluses are not deducted. On the other hand, if the earnings turn out to be less than intended, the company seems to have no constitutional claim to be reimbursed for past deficiencies in earnings, according to the ruling in the Galveston Case, supra. Cf., however, Re City of South Haven (P. U. R. 1923E, 694 [1923]), where the Michigan Commission compared the actual cost per M sold with the Commission's previous estimate of the cost, on which it based its rates of Oct. 31, 1922 (P. U. R. 1923A, 711 [1922]). It found a difference of $.2938 per M, but of this, $.1670 was due to causes within the company's control. "Deducting the amount of $.1670 from the total increased cost of $.2938 leaves $.1268 per M as the increased cost due to the overestimating of the gas sales and other causes such as increased cost of certain operating expenses over those estimated by the Commission." On page 699 of P. U. R. 1923E, the Commission says:

a number of difficulties in determining, by this method, what the cost of building up a business has been, among which may be mentioned:

1. Entire or partial lack of records covering the developmental period.

2. Difficulty of finding original cost of physical plant.

3. Difficulty of eliminating from reported operating expenses amounts which are the results of extravagance, inefficiency, or other causes which tended to keep the costs above a normal figure.

Where it is possible to secure needed information concerning the growth of the plant and business, however, the method upon which the Commission has at various times computed going value gives the extent of developmental costs which were occasioned in building up the business and the extent to which, at any time subsequent to what may be termed the developmental period, such developmental costs have been returned to investors. In other words, this method, where it can be applied to its full extent, enables the investigator to determine what it has actually cost the utility in question to build up its business. This sum, added to the actual investment in the physical plant, gives the total amount which the plant and business of the utility have actually cost. In applying this method of arriving at the cost of plant and business the difficulties which interfere with the accurate determination of the cost of the business, or of that portion of the cost which has not been returned to investors, also interfere very seriously with the determination of the actual investment in the physical plant, and not infrequently render it altogether impossible to ascertain the amount of such investment. Where it is impracticable to determine what the actual cost of the physical property has been, the only method of arriving at the value of that property is to ascertain the cost of reproduction. * * *

"As to the item of $.1268 per M, the Commission is of the opinion that it was incurred by causes not under the control of the company and should be made the basis of amortization through an increase of the rates about to be established. After due consideration, the Commission is of the opinion that the amount of $.05 per M sold should be added to the present reasonable cost of gas for the purpose of amortizing any increased cost of operation up to April 30, 1923. In making this allowance of $.05 per M, the Commission does not specify any definite amount of money to be amortized over any definite period of time, but will in future take into consideration the company's operating performance from the date as of which the Commission assumed jurisdiction forthwith, in this connection."

This one-sided correction of errors in the estimates of earnings meets the approval of Mr. A. H. Ryall, in "The Principle of Reparation Applied to Rate Regulation," read before the Michigan Bar Association in September, 1924, and appearing in 23 Mich. Law Rev. 223 (January, 1925).

In re SCOTIA INDEPENDENT TELEPHONE CO.[86]

(Railway Commission of Nebraska, 1919. P. U. R. 1919E, 217.)

According to the principle frequently laid down by this Commission, public utilities subject to the Commission's rate-making power will not be permitted to earn a return on accumulations of property made from excessive rates, but, where the rates have been insufficient to provide a reasonable return to the investors, or where this reasonable return has been invested in property rather than taken as dividends, such company in a readjustment case will be authorized to earn on such investment or will be given opportunity to capitalize the dividends due and unpaid.

In re SAN PEDRO, LOS ANGELES & S. L. R. R. CO.

(Interstate Commerce Commission, 1923. 75 Interst. Com. Com'n R. 463.)

EASTMAN, Commissioner (dissenting).[87] * * * *Property Acquired from Surplus Earnings.*—An actual and concrete illustration will help, I think, in the consideration of this question, which does not arise in this proceeding. Public regulation through a commission, of rates charged by gas and electric companies began in Massachusetts at a very early date, namely, 1885. Coupled with this regulation, almost from the start, went public supervision over security issues. The policy of the Board of Gas and Electric Light Commissioners, the regulating body, was to permit rates which would yield earnings sufficient to pay regular dividends at a liberal rate and also to provide a margin of surplus over and above such dividends. In explicit terms the board stated repeatedly in its reports that this surplus was permitted upon the theory that it should never be capitalized, but should, instead, be used for the joint benefit of the stockholder and the consumer. Benefit to the stockholder would accrue from the protection which the surplus would afford by stabilizing his investment and the return upon it.

Many of the gas and electric companies accumulated and invested in their property surplus earnings of very considerable amount. Following the decisions in Smyth v. Ames [169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819] and subsequent valuation cases, they awoke to the fact, not theretofore realized, that they might, perhaps, be entitled to claim a 6 per cent. return upon a value figured for all their property upon cost of reproduction less depreciation plus the "present value" of land. Estimating value in this way, certain companies, which had for years been paying regular dividends of 8, 10, or 12 per cent. upon their

[86] This portion of the opinion is all that is reported in P. U. R. 1919E, in the course of an annotation.

[87] The majority opinion, the other minority opinions, and portions of Commissioner Eastman's opinion are omitted. The portions here printed appear on pages 558–561 of the report.

stock, and which experienced no difficulty in attracting new capital, were able to show that on this value they were earning less than 4 per cent. In other words, their property was being "confiscated." But they have apparently never been courageous enough to press this claim to final test in the courts.[88]

In the case of the railroads, the carriers have again and again told us that sound policy demands that rates be high enough to permit, not only the payment of reasonable dividends, but the accumulation of substantial surplus reserves. Some have reduced this to the rule that for every dollar paid in dividends a dollar from earnings should be invested in the property. Financiers have been equally emphatic in favoring such a policy. Summarizing the arguments, we have been told that stockholders are interested quite as much in regularity and dependability of dividends as in their amount; that surplus reserves are necessary to maintain such regularity, and to protect against inevitable and wide fluctuations of earnings and financial disturbances; that they are needed for improvements which will not immediately yield revenue, or which will never do so but are required to enable the company to keep abreast of the times and furnish the best of service; and that they are equally necessary to enhance credit and enable financing upon favorable terms without disproportionate increase in funded debt.

On the other hand, shippers have urged that when such earnings, over and above reasonable dividends, are invested in carrier property, the public, having provided the funds, has an interest in that property and can not fairly be asked to pay the same return upon it as upon property representing actual sacrifice by the investors. They deem it unjust to ask the public to provide both capital and return. While such a surplus may be the property of the carrier, the claim is that the circumstances attending its accumulation impose a duty upon the carrier at least to share its advantages with the public, and that this duty may be considered in valuation for rate-making purposes.

Nowhere, perhaps, has this view been more emphatically expressed than by Senator Cummins in his minority report of February 11, 1918, at the time of the consideration of the Federal Control Act:

"The truth is that the railway properties of the United States have been, to a very considerable degree, constructed or acquired out of excessively high rates exacted from the public. The railway theory has been that the public ought to contribute, through rates for transportation, sums that are not only sufficient to make return upon the capital invested but sufficient to build up and increase the properties, and the outcome of the theory is that the public, having contributed the capital, must again pay for the use of the property so acquired.

"The time has come to repudiate a theory so destructive and unjust,

[88] See, however, Fall River Gas Works Co. v. Board of Gas & Electric Light Commissioners, 214 Mass. 529, 102 N. E. 475 (1913), a capitalization case.

and to establish permanently the principle that the public shall not be required to pay interest upon that part of the value of railway property which is constructed or acquired through the surplus earnings after the outside or independent capital is fully compensated."

It is not a sufficient answer to this doctrine to say that property acquired from surplus earnings is *owned* by the carrier, for, as I have already shown, the rights of ownership are not absolute, but are limited and qualified by the dedication of the property to the public use and the circumstances of such dedication. Nor is it enough to say that the surplus might have been distributed to the stockholders at the time it was earned, for the public might well have declined to acquiesce in rates producing excess income, if that income had not been used for the improvement of the property. The question has many aspects. It would be a curious anomaly, for instance, to accept the theory that rates should be high enough to permit the investment of income in non-revenue-producing improvements, so that the issue of revenue-consuming securities may be avoided, and then hold that a company may exact a return upon such property so provided. It is equally anomalous to urge that a company should be permitted to collect from the public surplus revenue in order that the regularity of its dividends may be protected, and then hold that its property is "confiscated" if it is not permitted to earn 6 per cent upon such surplus. Obviously, if such arguments are accepted, the only safe course for the public to pursue will be to permit no surplus accumulations.

I am loath to believe a doctrine sound that would lead to the conclusion that the property of companies with such a record of prosperity as the Massachusetts gas companies have enjoyed has been "confiscated," and that would discourage the accumulation of surplus reserves which, I am firmly persuaded, can be made, if given a status less tinctured with greed, beneficial both to investors and to the public. In my judgment, when surplus dollars have been invested in a railroad property, after its stockholders have clearly received a fair return and adequate reserves have been set up for depreciation, such surplus dollars should be treated, in determining the rate base, as an investment by the public rather than as an investment by the owners of the property. I have less hesitation in reaching this conclusion because, as I have shown above, the Supreme Court, in all its decisions in valuation cases, has shown a disposition to be guided by equitable considerations, to do what is "just and right," and to avoid what is "manifestly unfair to the public." I am influenced, also, by the fact that stockholders will not, by such treatment of surplus accumulations, lose benefit from them but will, on the contrary, continue to reap all the advantages which financiers have urged in support of such accumulations.

In the practical application of this method of treatment doubts should be resolved in favor of the carriers, and it should be applied only where it clearly appears that the surplus has been accumulated after the payment of a return ample to attract capital to the enterprise.

But I direct attention again to the fact that if surplus reserves are not so treated, they must be taken into account in determining the actual profits to the owners of the property.[89] * * *

VII. Depreciation *

In re BLUE HILL STREET RY. CO.

(Public Service Commission of Massachusetts, 1915. P. U. R. 1915E, 370.)

By the Commission:[90] * * * The property has depreciated in value. The question raised by this fact is not easy of determination. In a long line of decisions the United States Supreme Court has held that a public service corporation is entitled to a reasonable return upon the "fair value" of the property used for the convenience of the public. This expression "fair value," as used by the court, however, has no fixed and narrow meaning. * * *

The ruling of the Commission in the Middlesex & Boston Rate Case [2 Mass. P. S. C. R. p. 105], it may be said, amounts simply to a determination that in this commonwealth, at least, "fair value" may justly be measured by the amount of "capital honestly and prudently invested," rather than by the cost of reproducing the property.

In connection with the doctrine of "fair value," the question of accrued depreciation has been considered by the court. In the Knoxville Water Case, 212 U. S. 1, 29 S. Ct. 148, 53 L. Ed. 371, its conclusion was summed up as follows (pages 13, 14):

"Before coming to the question of profit at all the company is entitled to earn a sufficient sum annually to provide not only for current repairs, but for making good the depreciation and replacing the parts of the property when they come to the end of their life. The company is not bound to see its property gradually waste, without making provision out of earnings for its replacement. It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that at the end of any given term of years the original investment remains as it was at the beginning. It is not only the right of the company to make such a provision, but it is its duty to its bond and stockholders, and, in the case of a public service corporation at least,

[89] See Prouty, Commissioner, in City of Spokane v. Northern Pacific Ry. Co., 15 Interst. Com. Com'n R. 376, 415ff (1909).

The treatment of the problem of investments made from past excessive earnings may at times make a great difference in the practical outcome of a case. Note the facts brought out by the Indiana Public Service Commission, in Re Lebanon Telephone Co., P. U. R. 1925B, 114.

* The bearing of depreciation on the fact of physical value is discussed supra, section 2, II (C). For another phase of depreciation, see supra, p. 1046, note 85.

[90] Portions of the opinion are omitted. The portion here printed appears on pages 395–399 of P. U. R. 1915E.

its plain duty to the public. If a different course were pursued, the only method of providing for replacement of property which has ceased to be useful would be the investment of new capital and the issue of new bonds or stocks. This course would lead to a constantly increasing variance between the present value and bond and stock capitalization—a tendency which would inevitably lead to disaster either to the stockholders or to the public, or both. If, however, a company fails to perform this plain duty and to exact sufficient returns to keep the investment unimpaired, whether this is the result of unwarranted dividends upon over issues of securities, or of omission to exact proper prices for the output, the fault is its own. When, therefore, a public regulation of its prices comes under question, the true value of the property then employed for the purpose of earning a return cannot be enhanced by a consideration of the errors in management which have been committed in the past."

This case, therefore, apparently enunciates the principle that an obligation rests upon the company to keep the value of its property unimpaired, and, if it has for any reason failed to do so, that no return should be allowed on property values which have disappeared through depreciation. The same principle is restated in the Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, p. 458, 33 S. Ct. 729, 57 L. Ed. 1511, 1565, 48 L. R. A. (N. S.) 1151. In both cases, however, the court was dealing with the cost of reproducing the property. The real import of these decisions, so far as they relate to depreciation, is indicated by the following extracts:

"The cost of reproduction is one way of ascertaining the present value of a plant like that of a water company, but that test would lead to obviously incorrect results if the cost of reproduction is not diminished by the depreciation which has come from age and use." Knoxville Water Case, p. 9.

"It is also to be noted that the depreciation in question is not that which has been overcome by repairs and replacements, but is the actual existing depreciation in the plant as compared with the new one. * * * And when an estimate of value is made on the basis of reproduction new, the extent of existing depreciation should be shown and deducted." Minnesota Rate Cases, p. 457.

The extent to which deduction should be made for accrued depreciation must, to some degree at least, be determined by the method employed in ascertaining the gross amount from which such deduction is to be made. Because a method of dealing with depreciation may be sound where such gross amount represents the cost of reproduction new, it by no means follows that the same rule can be rigidly applied where the gross amount represents honest and prudent investment. Under the reproduction cost theory, credit is given to the company for appreciation on items entering into the estimate of cost, and often for what is known as "going concern value," and it is entirely consistent with the theory to make a deduction to the extent of existing deprecia-

tion on other items. On the other hand, if a fair return is to be measured by the "capital honestly and prudently invested," and if no credit is allowed for appreciation of the property through an increase in land values or higher unit costs of material and labor, it would hardly seem just to deduct the full amount of the accrued depreciation under all the circumstances and without reference to the causes of the failure of the company to make due provision for it.

The ruling of the Commission in the Middlesex & Boston Rate Case was accompanied by the express stipulation "that, if there is mismanagement causing loss, such loss must be charged against the stockholders legally responsible for the mismanagement." In other words, the company is held to the same standard of honesty and prudence in the management and maintenance as in the original acquisition of its properties. It must, so far at least as it reasonably can, keep its investment good. If through some fault of its own it has failed to make due provision for depreciation, it cannot reasonably expect the public to pay a return upon that portion of the investment which it has neglected to preserve. But under a consistent application of the investment theory, it would seem in general that deduction should be made for the depreciation which comes from age and use in so far only as the failure to make provision for it is due to the payment of unwarranted dividends, or is otherwise attributable to mismanagement.

In this case, the stockholders have received no dividends whatever. In view of the low earnings, the character of the territory in which the company operates, and its past and present efforts to increase its revenues, and after a careful consideration of its history, the Commission is of the opinion that the failure to make provision for depreciation and the virtual loss of invested capital caused thereby cannot justly be ascribed to mismanagement. To sum the matter up, the property has depreciated in value in the public service, and the stockholders have had no dividends. On the other hand, the public served has been receiving transportation at less than real cost, and has, in effect, used up a portion of the property without giving an equivalent in return. As stated in the Middlesex & Boston Rate Case, to hold under these circumstances that the accrued depreciation should be deducted would amount to saying "that money lost during the earlier stages of a public service enterprise is irretrievably lost by the stockholders; that if, perchance, rates have been fixed so low that the ratepayer has, for a period of years, obtained a service at less than cost, this is the permanent misfortune of the stockholders—and that the public should never at any time and under any circumstances be called upon to make up the deficit thus incurred." 2 Mass. P. S. C. R. 108 (1914).

Under the circumstances of the case, then, we rule that, in determining the revenues to which this company is fairly entitled, allowance should be made for an amount equal to a fair return upon all the "cap-

ital honestly and prudently invested," without deducting accrued depreciation. In ruling to this effect, however, we must not be understood as deciding that the company can, if it earns the amount to which it is entitled, properly pay dividends to its stockholders before the depreciation and other deficits from past operation have been made good. That is a question which it is unnecessary to decide at this time. * * *

RAILROAD COMMISSION OF LOUISIANA v. CUMBERLAND TELEPHONE & TELEGRAPH CO.

(Supreme Court of the United States, 1909. 212 U. S. 414, 29 S. Ct. 357, 53 L. Ed. 577.)

This case comes here upon appeal by the Railroad Commission, which was defendant below, from a decree of the Circuit Court of the United States for the Eastern District of Louisiana, enjoining the enforcement of certain rates prescribed by the Railroad Commission of that State, for use by the appellee telephone company therein. * * *

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the court.[91] * * *

In the course of the opinion of the Circuit Court the following was said: "It is urged by the Commission that included in the Louisiana investment of complainant is a sum earned from Louisiana business, set aside in the reserve fund and then used in extending the system in Louisiana, and now treated as a part of the Louisiana investment by the stockholders. This may be so to some extent—it is certainly possible. But it is impossible for me to determine, from the figures in the record, to what extent, if at all, it is a fact. Counsel for defendant have not themselves undertaken to indicate what, even in round figures, they consider is the sum thus earned in the business and reinvested in the business, without having been distributed to the shareholders in dividends. It will be time to consider the legal results from such a state of facts when it shall have been shown to exist in a definite sum and not in a purely conjectural amount." And again: "Counsel for the Commission argued that the complainant's property in Louisiana was not all paid for with complainant's capital, but was partly paid for out of a surplus or reserve, or depreciation fund, which was accumulated by complainant from the receipts of its Louisiana business, and was then reinvested, not in repairs and maintenance, but in extensions and additions to the property. This may be a fact, but it is not shown to be a fact. The Commission has power, if it wishes to do so, to direct the books of complainant to be so kept as to show such use of receipts. In the present state of the books this seems to be impossible.

[91] The statement of facts is abbreviated, and portions of the opinion are omitted.

And the floating debt of the complainant would seem to be much greater than any sum which could possibly have been used from the reserve, or surplus, or depreciation fund for extensions and additions, after paying for maintenance and repairs."

If the onus rested upon the Commission to show these facts it is evident that the obligation has not been fulfilled, but it is just here that the difficulty lies. It was obligatory upon the complainant to show that no part of the money raised to pay for depreciation was added to capital, upon which a return was to be made to stockholders in the way of dividends for the future. It cannot be left to conjecture, but the burden rests with the complainant to show it. It certainly was not proper for the complainant to take the money, or any portion of it, which it received as a result of the rates under which it was operating, and so to use it, or any part of it, as to permit the company to add it to its capital account, upon which it was paying dividends to shareholders. If that were allowable, it would be collecting money to pay for depreciation of the property, and, having collected it, to use it in another way, upon which the complainant would obtain a return and distribute it to its stockholders. That it was right to raise more money to pay for depreciation than was actually disbursed for the particular year there can be no doubt, for a reserve is necessary in any business of this kind, and so it might accumulate, but to raise more than money enough for the purpose and place the balance to the credit of capital upon which to pay dividends cannot be proper treatment. The court below said it was impossible to find out from the books how much of this had been done, and it treated the fact as one to be explained by the Commission and not by the complainant. In other words, while this fact was a material one the onus was placed upon the Commission, and not the complainant, to show it. We think, on the contrary, that the obligation was upon the complainant. Now, although the books, it is said, do not show how much money collected for depreciation has been, in fact, used to increase the capital of the complainant upon which dividends were paid to stockholders, yet still, even if the books do not show accurately, or even at all, what disposition was made of these moneys, at any rate the officers of the complainant must be able to make up some reasonable approximation of the amount, even if it be impossible to state it with entire accuracy, and this duty rests with the complainant. * * * It may be that the sum, if any, thus used was not enough to affect the claim that the rates under discussion were unreasonably low. The evidence is insufficient to show clearly that which complainant is under obligations to show. Knoxville v. Water Co., 212 U. S. 1, 29 S. Ct. 148, 53 L. Ed. 371; Willcox v. Consolidated Gas Co. of New York, 212 U. S. 19, 29 S. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034. We are not considering the case where there are surplus earnings after providing for a depre-

ciation fund, and the surplus is invested in extensions and additions. We can deal with such a case when it arises. * * *

We, therefore, reverse the decree and direct a new trial.

Reversed.

Mr. Justice WHITE, not having heard the argument, did not take part in the decision of the case.

BOARD OF PUBLIC UTILITY COMMISSIONERS et al. v. NEW YORK TELEPHONE CO.

(Supreme Court of the United States, 1926. 270 U. S. —, 46 S. Ct. 363, 70 L. Ed. —.)

Mr. Justice BUTLER delivered the opinion of the Court.[92]

This is an appeal from a decree of the District Court—three judges sitting; section 266, Judicial Code (Comp. St. § 1243)—which granted a temporary injunction restraining the enforcement of certain telephone rates. * * *

For about 10 years prior to the commencement of this suit the rates in New Jersey remained at substantially the same level. March 6, 1924, the company filed with the Board of Public Utility Commissioners, to take effect April 1, 1924, a schedule providing for an increase of rates for exchange service in New Jersey. The board suspended the proposed rates pending an investigation as to their reasonableness. December 31, 1924, the increase was disallowed, and the company was required to continue to serve at the existing rates. The board found that the value of the company's property in New Jersey, as of June 30, 1924, was $76,370,000; that a rate of return of 7.53 per cent., producing from $5,750,000 to $6,000,000, would be a fair return for that year; that the amount charged by the company in 1924 for depreciation, $3,452,000, was excessive, and that $2,678,000 was sufficient. And the board found that net earnings in 1924 would be $4,449,000, less than the fair return by at least $1,300,000.

The company's accounts are kept according to the uniform system of accounts for telephone companies prescribed by the Interstate Commerce Commission. Charges are made to cover the depreciation in the elements of the plant which for one cause or another will go out of use. These charges are made month by month against depreciation in the operating expense accounts and corresponding credits are entered in the depreciation reserve account. When a unit or element of the property is retired, there is no charge to operating expense, but its original cost, less salvage, is charged to the reserve account. December 31, 1923, the company's books showed a credit balance in depreciation reserve accounts of $16,902,530. This was not set aside or kept in a separate fund, but was invested in the company's telephone plant. The board prescribed a rule for the determination of depreciation expenses to be charged by the

[92] Portions of the opinion are omitted.

company in 1925 and subsequent years. It declared that the credit balance was more than required for the maintenance of the property, and directed that $4,750,000 of that amount be used by the company to make up deficits in any year when earnings are less than a reasonable return as found by the board. And it said:

"But, having made such charges in the past, future charges, beginning January 1, 1925, may be deducted from the normal charge, until such time as at least $4,750,000 of the excess is absorbed as hereinafter provided."

The effect of the order is to require that, if total operating expenses deducted from revenues leaves less than a reasonable return in 1925 or a subsequent year, there shall be deducted from the expense of depreciation in that year, and added to the net earnings, a sum sufficient to make up the deficiency; then, by appropriate book entries, the resulting shortage in depreciation expense is to be made good out of the balance in the reserve account built up in prior years.

On the application for a temporary injunction, the company attacked the findings of the board as to rate of return, property value, and expense of depreciation, and it contended that the charges on account of depreciation in earlier years were not excessive, and that in any event the company could not be compelled to make up deficits in future net earnings out of the depreciation reserves accumulated in the past.

The record shows that the rates in effect prior to the temporary injunction were not sufficient to produce revenue enough to pay necessary operating expenses and a just rate of return on the value of the property. * * *

The effect of the order is to deduct $2,631,286 from operating expenses found by the board properly chargeable for depreciation in 1925. This deduction is made at the expense of the property of the company paid for out of depreciation reserves built up in prior years, and it has the same effect on net earnings as would the addition of the same amount of revenue received for service. On the basis of the company's estimate of depreciation expense, the return is 4.12 per cent.; on the board's estimate it is 4.93 per cent.; and by increasing net earnings $2,631,286, as directed by the order, it is made 7.53 per cent. It is conceded that, unless, as directed by the board, depreciation expense is reduced below what the board itself found necessary and net earnings are correspondingly increased, the rates cannot be sustained against attack on the ground that they are unreasonably low and confiscatory. * * *

It may be assumed, as found by the board, that in prior years the company charged excessive amounts to depreciation expense and so created in the reserve account balances greater than required adequately to maintain the property. It remains to be considered whether the company may be compelled to apply any part of the property or money represented by such balances to overcome deficits in present or future earnings and to sustain rates which otherwise could not be sustained.

The just compensation safeguarded to the utility by the Fourteenth Amendment is a reasonable return on the value of the property used at the time that it is being used for the public service, and rates not sufficient to yield that return are confiscatory. Willcox v. Consolidated Gas Co., 29 S. Ct. 192, 212 U. S. 19, 41, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034; Bluefield Co. v. Public Service Commission, 43 S. Ct. 675, 262 U. S. 679, 692, 67 L. Ed. 1176. Constitutional protection against confiscation does not depend on the source of the money used to purchase the property. It is enough that it is used to render the service. San Joaquin Co. v. Stanislaus County, 34 S. Ct. 652, 233 U. S. 454, 459, 58 L. Ed. 1041; Gaslight Co. v. Cedar Rapids, 120 N. W. 966, 144 Iowa, 426, 434, 48 L. R. A. (N. S.) 1025, 138 Am. St. Rep. 299, affirmed 32 S. Ct. 389, 223 U. S. 655, 56 L. Ed. 594; Consolidated Gas Co. v. New York (C. C.) 157 F. 849, 858, affirmed 29 S. Ct. 192, 212 U. S. 19, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034; Ames v. Union Pacific Railway Co. (C. C.) 64 F. 165, 176. The customers are entitled to demand service and the company must comply. The company is entitled to just compensation and, to have the service, the customers must pay for it. The relation between the company and its customers is not that of partners, agent and principal, or trustee and beneficiary. Cf. Fall River Gas Works v. Gas & Electric Light Com'rs, 102 N. E. 475, 214 Mass. 529, 538. The revenue paid by the customers for service belongs to the company. The amount, if any, remaining after paying taxes and operating expenses including the expense of depreciation is the company's compensation for the use of its property. If there is no return, or if the amount is less than a reasonable return, the company must bear the loss. Past losses cannot be used to enhance the value of the property or to support a claim that rates for the future are confiscatory. Galveston Electric Co. v. Galveston, 42 S. Ct. 351, 258 U. S. 388, 395, 66 L. Ed. 678; Georgia Ry. v. R. R. Comm., 43 S. Ct. 680, 262 U. S. 625, 632, 67 L. Ed. 1144. And the law does not require the company to give up for the benefit of future subscribers any part of its accumulations from past operations. Profits of the past cannot be used to sustain confiscatory rates for the future. Newton v. Consolidated Gas Co., 42 S. Ct. 264, 258 U. S. 165, 175, 66 L. Ed. 538; Galveston Electric Co. v. Galveston, supra, 396 (42 S. Ct. 351); Monroe Gaslight & Fuel Co. v. Michigan Public Utilities Commission (D. C.) 292 F. 139, 147; City of Minneapolis v. Rand (C. C. A.) 285 F. 818, 823; Georgia Ry. & Power Co. v. Railroad Commission (D. C.) 278 F. 242, 247, affirmed 43 S. Ct. 680, 262 U. S. 625, 67 L. Ed. 1144; Chicago Rys. Co. v. Illinois Commerce Commission (D. C.) 277 F. 970, 980; Garden City v. Telephone Co., 236 F. 693, 696, 150 C. C. A. 25.

Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for

their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company just as does that purchased out of proceeds of its bonds and stock. It is conceded that the exchange rates complained of are not sufficient to yield a just return after paying taxes and operating expenses, including a proper allowance for current depreciation. The property or money of the company represented by the credit balance in the reserve for depreciation cannot be used to make up the deficiency.

Decree affirmed.

Mr. Justice STONE took no part in the consideration of this case.†

"SHOULD PUBLIC SERVICE PROPERTIES BE DEPRECIATED TO OBTAIN FAIR VALUE IN RATE OR REGULATION CASES?"

Report by James E. Allison, Commissioner and Chief Engineer.[93]
(St. Louis Public Service Commission, 1912.)

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Part V.—Conclusions.

Parts III and IV bring out three provable theorems as true of theoretical value based upon estimated life.

Theorem One: In Theoretical Depreciation there is a Normal Value toward which a large property is constantly tending, and which, if the life of the equipment is correctly estimated, will represent that condition at which the property will give good service at least cost, considering investment charges, depreciation charges and operation charges.

Theorem Two: If a Theoretical Depreciation charge has been set aside from the beginning of the property, the amount in the fund at any time will equal the amount of the depreciation, and the sum of the fund and the remaining theoretical value will equal the original investment.

Theorem Three: In a property where items of similar life have been installed at different periods, there can never be a need for all of the fund which has been accumulated from Theoretical Depreciation charges made from the installation of the property; i. e., a part of the fund will be useless, so far as renewals are concerned.

The most important fact, however, which develops as a corollary to

†See Chesapeake & Potomac Telephone Co. v. Whitman (D. C.) 3 F.(2d) 938, 951–953 (1925); Monroe Gaslight & Fuel Co. v. Michigan Public Utilities Commission (D. C.) 292 F. 139 (1923); New York Tel. Co. v. Prendergast (D. C.) 300 F. 822 (1924); In re Lebanon Tel. Co. (Indiana Public Service Commission) P. U. R. 1925B, 114 (1924); (same case on rehearing, P. U. R. 1925B, 225 [1924]); and In re Duluth Street Ry. Co. (Wisconsin Railroad Commission) P. U. R. 1923D, 705, 736–738 (1923).

93 Portions of the report are omitted.

Theorem One is that, if we assume, as we ought, that the life of a piece of equipment ends when it begins to give poor service to the public, then we see that the owners of the property have absolutely no way of raising the theoretical value of their property much above the Normal Value, or about 50 per cent. of their investment unless they throw away property which is giving satisfactory service to them and to the public. And in the further discussion of the problem it must be held in mind that the service rendered to the public by the property represented by the horizontal portion of the value curve, i. e., Normal Value, is assumed to be practically as good as when the property was new. * * *

No one can be so foolish as to assume that investors can construct or maintain a plant and equipment which will remain new and therefore free from depreciation in Market Value, but they can maintain it so as to give a service practically as good as from a new plant. The fact is that they really pay their full investment in plant for the normal state of the plant at which it will continue to give good service; i. e., the investment is the real cost of a normal plant, and the theoretical depreciation, if deducted from the cost of the plant, might well be called a cost of establishing business, and therefore a legitimate part of Fair Value.

The whole question, so far as justice is concerned, is: Has the public paid back to the investors in excess of reasonable returns, a part of their investment equal to the estimated Theoretical Depreciation, and, if so, has the public the legal and moral right to reclaim such excess profits once the company has been legally allowed to earn them, and provided the property is in good serviceable condition?

If in the past there has been a law or legal regulation limiting profits or establishing a depreciation fund on determined charges, then there could be no question that excess profits or the amount of the depreciation fund should be justly deducted from Gross Value in determining the Just Amount to be earned on, and it will in any case *be perfectly proper to make such deduction in the future,* after depreciation charges are established. But if we grant that there has been no such law or regulation, and that the owners of the property could, with reason, assume that their profits were not limited and that they were not legally bound to provide a depreciation fund beyond their needs (Theorem Three), then the justice of penalizing them by an ex post facto regulation for acts not contrary to their rights, would seem of doubtful morality, to say the least. * * *

The generally accepted idea that the property in the service of the public must necessarily be depreciated from its cost in order to arrive at a "Fair Value" in a rate case seems to arise from the perhaps unconscious obtrusion of the idea of Market Value into the mental working of those officials who are really charged with the task, not of determining Market Value, but with the higher duty of administering justice. The question, What is the property worth? is apt to have a

powerful effect until one differentiates between Just Amount and Market Value, but once this differentiation is made it should be clear that Market Value is not the standard to use in deciding the amount upon which a public service company is entitled to earn reasonable returns.

If for any purpose a Market Value is required there may be a question that Gross Value or cost should be depreciated to arrive at present value, for it is plain that the Market Value of property whose life is partly gone is less than that of similar new property under the same conditions as to gross income. But, if we are seeking a Just Amount upon which to base the returns of a public service company, there are conditions where a deduction from Gross Value for estimated depreciation will result in practical confiscation of capital invested in good faith in the public service, and this is true whether the depreciation is calculated by the Average Life or by Observation or by any other method.

A review of this report would show that in dealing with a property giving good service, the Just Amount to be earned on should include the cost or Gross Value of the property efficiently serving the public at the time of the valuation, unless it can be shown that the public has reimbursed the owners of the property for the amount of the proposed depreciation.

In most valuations of public utilities we are dealing with a situation where there has been in the past no regulation of rates based upon a reasonable return, and where there has been no legal requirement of a depreciation fund.

It can be shown, in the larger properties at least, that the accumulation of a depreciation fund on the basis of estimated life would have been a useless charge upon the consumer or upon the investor as the case may be. So, to assume arbitrarily that this theoretical fund should exist is equivalent to regulating the past profits of a company. It seems hardly probable, if the case were presented to any court, as an ex post facto regulation of profits, that such regulation would be permitted. But, after depreciation charges have been established by legal regulation and are paid by the consumer, then for the future, any accumulation which is or should be in the depreciation fund as the result of these charges is a repayment of investment by the consumer and should be deducted from Gross Value to determine the Just Amount upon which to base reasonable returns.[94] * * *

[94] See Allyn A. Young, "Depreciation and Rate Control" (1914) 28 Quarterly Journal of Economics, 630, and James C. Bonbright, "Depreciation and Rate Control. A Further Discussion" (1916) 30 Quarterly Journal of Economics, 546.

PACIFIC GAS & ELECTRIC CO. v. CITY AND COUNTY OF SAN FRANCISCO.

(Supreme Court of the United States, 1924. 265 U. S. 403, 44 S. Ct. 537, 68 L. Ed. 1075.)

Mr. Justice McReynolds delivered the opinion of the court.[95]

Since 1905 appellant has been the sole producer and general distributor of heating and illuminating gas in the San Francisco district. By three separate ordinances passed in June of 1913, 1914, and 1915, the board of supervisors directed it to supply such gas during the fiscal year commencing July 1st thereafter at not more than 75 cents per 1,000 feet. Claiming that the rate so prescribed would not yield fair return, appellant brought suits in July, 1913, 1914, and 1915, to prevent enforcement of the respective ordinances. Restraining orders issued upon condition that monthly statements should show each consumer's account, and bond should be given to secure proper repayments, with interest. The maximum rate in the schedule thereafter maintained was 85 cents per 1,000.

December 15, 1916, the causes were consolidated and referred to a master. After taking much testimony he presented an elaborate report, March 2, 1920, which recommended dismissal of the bills and repayment of whatever had been collected above the prescribed rate. The District Court affirmed the report and directed an appropriate decree.

The master found that not less than 7 per centum net upon the value of the property devoted to public use was necessary for a fair return; also that, if observed, the prescribed rate would have yielded more than 7 per centum—for 1913–14, an excess of $21,402.95; for 1914–15, $89,446.12; and for 1915–16, $171,464.48.

We think the evidence supports the finding that a net return of 7 per centum was necessary in order to avoid confiscation.

The inventory of the many items making up appellant's manufacturing and distributing plant with their reproduction cost new was agreed upon by the parties. In order to determine accrued depreciation and ascertain true values during the years 1913–1916, the master applied the "modified sinking fund method." Concerning this he said:

It involves "an estimate of the lives of the different structural units, and an annual allowance set aside from the rates received as a reserve for future replacement on a 5 per cent. compound interest curve, the capital basis of return to the owner being depreciated each year in an amount exactly corresponding with yearly additions to the reserve. It is assumed that loss of plant units by obsolescence and inadequacy, as well as by physical decay, can be forecast with substantial accuracy and provided for in advance of abandonment and replacement."

[95] Portions of the majority and of the dissenting opinion (including the footnotes of the latter) are omitted.

Appellant objects to the application of this method and insists that depreciation should have been ascertained upon full consideration of the definite testimony given by competent experts who examined the structural units, spoke concerning observed conditions and made estimates therefrom. As these examinations were made subsequent to the alleged depreciation for the definite purpose of ascertaining existing facts, we think the criticism is not without merit. Facts shown by reliable evidence were preferable to averages based upon assumed probabilities. When a plant has been conducted with unusual skill, the owner may justly claim the consequent benefits. The problem was to ascertain the probable result of the specified rate, if applied under well-known past conditions, not to forecast the probable outcome of a proposed rate under unknown future conditions.

Counsel do not insist that the estimated accrued depreciation is "grossly excessive," if confined to the result of physical causes. But they do maintain that the master should have ascertained and stated what depreciation was due to such causes and how much followed obsolescence resulting from the introduction of certain patented inventions, and we think such a finding should have been made unless some undisclosed reason prevented. The claim is that, in order to lower cost of production, it became necessary to abandon certain valuable property under conditions not reasonably susceptible of anticipation. The material and relevant facts ought to be disclosed.

The objection to the report most seriously urged is that in his estimate of total value the master failed properly to appraise certain patent rights through which manufacturing costs had been greatly reduced; also that he failed to make proper allowances for the successful use of such rights. This objection is well taken. The following excerpts from the master's long and rather involved report disclose the contested points with the relevant facts and indicate his conclusions:

[The lengthy quotation from the master's report is omitted.]

Obviously, under the theory accepted below, appellant worsened its situation for rate-making purposes when it reduced the cost of manufacturing gas. Introduction of successful patented inventions enabled the public authorities to lower the rate base and gather all the benefits. The operating plant, made capable of producing gas at smaller cost, was declared less valuable than before. The result indicates error somewhere, either in theory or application of principle.

Obsolescence of one or more stations and perhaps other property theretofore of great value (possibly $800,000) followed installation of the patents, but the remaining plant plus the patents gave better results. As an operating unit the new combination had greater value than the old; but the court below disregarded the demonstrated worth of the element which wrought this change.

The obsolescence in question did not result from ordinary use and wear. Certainly it could not have been long anticipated—the patents were of recent conception; to provide for it out of previous revenues

was not imperative, if possible. Former consumers were not beneficiaries; only subsequent ones could be advantaged.

Our concern is with confiscation. Rate making is no function of the courts; their duty is to inquire concerning results and uphold the guaranties which inhibit the taking of private property for public use without just compensation under any guise. We may not, therefore, relegate appellant's claim for past services to the future consideration of the state commission, as the master suggests. After adopting the reduced costs of manufacture for estimating net returns, the court gave no proper valuation to the inventions which caused the reduction, and thereby permitted property to be taken without just compensation. The amount of money actually paid to the inventors was not the proper measure of worth. Experience had demonstrated a much higher one; and to obtain the benefit of their use appellant sacrificed much.

Installation of the inventions necessitated new outlay of money and abandonment of property theretofore valuable—both were necessary in order that the cost of manufacture might be reduced. If appellant's permissible profits depend upon the lowered costs and it is denied adequate return upon property which made the reduction possible, or recompense for the obsolescence, successful efforts to improve the service will prove extremely disadvantageous to it.

Whether, under the peculiar circumstances here presented, the rate base should be fixed by adding to the agreed inventory some fair valuation of the patent rights, or whether prompt recoupment should be allowed for the obsolescence caused by their introduction, or whether appellant should be saved from actual ultimate loss by some other feasible method, we will not undertake to determine upon the present record. To the end that the issues may be reconsidered in view of this opinion, the decree below is reversed and the cause remanded for such further proceedings as the circumstances require, including another reference to the master if deemed advisable.

Reversed.

Mr. Justice BRANDEIS (dissenting). These cases were tried together. Each challenges as confiscatory an ordinance of the city of San Francisco fixing, for a single year, the price to be charged for gas. The rule of Smyth v. Ames, 169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819, was applied. The evidence, in condensed form, comes before us in a record of 943 pages. The master's original and supplemental reports occupy 131 pages. The master and the court found the rates to be compensatory. Three errors are assigned by the company which relate to depreciation. The facts applicable to the several years differ in part; but the same questions are presented in each. It will tend to clarity to discuss these with reference to the facts of No. 34, which involves the rate for the year beginning July 1, 1913.

First. The depreciation charge allowed for that year, for the plant as a whole, was $348,853. The company does not complain that this allowance is too small, if treated as an allowance for merely physical

observed depreciation. Its claim is that an improved process, which had been introduced at the San Francisco works in 1912, resulted in a saving, during the year 1913–14, of $103,530 in oil and labor; that in 1913 it had become certain that this process would later render obsolete certain parts of the plant (called stations) which were in use throughout that year; and that, for the purpose of meeting this expected loss in capital through later abandonment of stations, the savings effected by the new process should have been charged against the earnings, and credited to a special depreciation reserve. * * *

This alleged error does not present any question of law. Whether more of the savings of the year 1913–14 due to the introduction of the new process should have been allowed as a special depreciation charge for the obsolescence then known to be accruing, is clearly a question of fact. * * * I cannot say that the master and the court erred in their conclusion of fact that, all things considered, the depreciation charge allowed was adequate. The same is true of the depreciation charges allowed for the years 1914 and 1915.

Second. As an alternative to allowing a larger depreciation charge out of the year's savings through the improved process and apparatus, the company urges that the rate base should have been increased, by adding thereto the value of the right to use the new process at the San Francisco works. The court apparently adopted this view of the law. It ruled that the company was entitled to a return upon the then value (as part of the rate base) of the right to use the inventions. It differed from the company only in the estimate of the value. * * * I cannot say that the master and the District Court erred in the finding of fact by which they valued this item for that year, or in the value assigned to the right in fixing the rate base for either of the two following years. This alternative contention of the company presents, obviously, no question of law.

Third. The reproduction cost new of the manufacturing and distributing plant, other than land, was found to be $12,794,008; the accrued depreciation, $1,518,390 (as of June 30, 1914). Thus, the property was found to be worth 88.1 per cent. of its then reproduction cost. The company contends that the accrued depreciation should have been set at $828,916.41; so that the plant was worth 93.7 per cent. of its then reproduction cost. The master employed the "compound interest" or "modified sinking fund" method of estimating accrued depreciation. The plant is in part very old. The depreciation found is but a small percentage of the reproduction cost. The evidence bearing upon the amount to be deducted for accrued depreciation occupies 232 pages of the record. The discussion thereof in the master's report occupies 39 pages. There was a conflict of evidence.

No question of law is presented by this assignment of error. The company's objection is not to the particular method selected, but that, in applying it, the master included as depreciation what is called theoretical inadequacy and obsolescence. Whether he did is a question of

fact. The city denies that the reduction in value made by the master on account of accrued depreciation includes any sum representing expected loss through future abandonment of the stations. It is clear that, if any deduction was made on account of the probable abandonment of the stations, the obsolescence thus provided for was not theoretical. The new process had been introduced 2 years before the date as of which the valuation was made. On the facts then known, it was expected that the stations would have to be abandoned in the near future. Because it was to be expected (and was not theoretical) the company contended that to offset it more of the year's savings should have been charged against the income of that year. I cannot say that the master and the court erred in their findings of fact as to the amount of accrued depreciation.

This litigation has already extended over 11 years. The record discloses that the cases were presented below by competent counsel with the aid of competent experts, and that they received careful consideration by an able master and an able trial judge. Counsel, master, and court have throughout endeavored to apply the rule of Smyth v. Ames, 169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819. It was not shown that the rule has, in any respect, been departed from. This court harbors a doubt whether, in applying it, some injustice may not have been done to the company. Is it probable that a nearer approach to justice, as between the parties, will be attained by a continuation of the effort to apply the same rule? To me it seems that the doubt is inherent in the rule itself. It can be overcome only by substituting some other rule for that found to be unworkable. Such other lies near at hand, and it is consistent with the Constitution.

It was settled by Knoxville v. Knoxville Water Co., 212 U. S. 1, 29 S. Ct. 148, 53 L. Ed. 371, that every public utility must, at its peril, provide an adequate amount to cover depreciation. A depreciation charge resembles a life insurance premium. The depreciation reserve, to which it is credited, supplies insurance for the plant against its inevitable decadence, as the life insurance reserve supplies the fund to meet the agreed value of the lost human life. To determine what the amount of the annual life insurance premium should be is a much simpler task than to determine the proper depreciation charge. For life insurance is a co-operative undertaking. The premium to be fixed is not that required by the probable duration of the life of a single insured individual, but that required by the average expectancy of life of men or women of the given age. Moreover, for human lives, mortality tables have been constructed which embody the results of large experience and long study. By their use the required premium may be fixed with an approximation to accuracy. But, despite the relative simplicity of the problem, it was found that the variables leave so wide a margin for error that premiums fixed in accordance with mortality tables work serious injustice either to the insurer or to the insured. Although the purpose was to charge only the appropriate premium, the

transaction resulted sometimes in bankruptcy of the insurer; sometimes in his securing profits which seemed extortionate; and, rarely, in his receiving only the intended fair compensation for the service rendered. Because every attempt to approximate more nearly the amount of the required premium proved futile, justice was sought by another route. Ultimately, strictly mutual insurance was adopted. Under it, the premium charged is made clearly ample, and the part thereof which proves not to have been needed inures in some form to the benefit of him who paid it. Compare Penn Mutual Life Insurance Co. v. Lederer, 252 U. S. 523, 524, 525, 40 S. Ct. 397, 64 L. Ed. 698.

Legal science can solve the problem of the just depreciation charge for public utilities in a similar manner. Under the rule which fixes the rate base at the amount prudently invested, the inevitable errors incident to fixing the year's depreciation charge do not result in injustice either to the utility or to the community. If, when plant must be replaced, the amount set aside for depreciation proves to have been inadequate, and investment of new capital is required, the utility is permitted to earn the annual cost of the new capital. If, on the other hand, the amount set aside for depreciation proves to have been excessive, the income from the surplus reserve operates as a credit to reduce the current capital charge which the rates must earn. If a new device is adopted which involves additional investment (to buy a new plant or a patent right) the company's investment, on which the return must be paid, is increased by that amount. If the new device does not involve new investment, but the innovation involves increased current payments (like royalties for use of a process) the additional disbursement is borne by the community as an operating expense. The cost of a scrapped plant is carried as part of the investment on which a return must be paid unless and until it has been retired, that is fully paid for, out of the depreciation reserve. Thus justice both to the owners of the utility and to the public is assured.

Mr. Justice HOLMES. I am of opinion that the decree should be affirmed on the main point for reasons that will be stated by my Brother BRANDEIS.[96]

96 Excellent discussions of this topic are to be found in Fuhrmann v. Cataract Power & Conduit Co., 3 P. S. C. (2d D. N. Y.) 656, 714–726, and 734–735 (1913), by Stevens, Chairman; and Re Chesapeake & Potomac Tel. Co. (Maryland Public Service Commission) P. U. R. 1916C, 925, 957–978 (1916), by Towers, Chairman. See, also, page 1046, note 85, supra.

VIII. Security Issues as a Rate Base

CITY OF MILWAUKEE v. MILWAUKEE ELECTRIC RY. & LIGHT CO.[97]

(Railroad Commission of Wisconsin, 1912. 10 Wis. R. C. R. 1.)

* * * It is well known from experience that public utilities are mostly overcapitalized, and that the par value of their outstanding securities usually exceeds the actual investment in the property that is used and useful in connection with the services they render to the public. In fact, the bonds alone often amount to more than the cost value of this property. The reasons for this are easily explained. They are found in the fact that in capitalizing the plants, whether for the purposes of consolidation or otherwise, securities are often issued, not only against actual and other costs, but against estimated monopoly profits, future increases in the business, estimated savings in expenses and many other elements of this nature. Not only this, but investigators of such matters feel that the greater proportions of the consolidation of business interests during the past three decades have had their sources in the opportunities for private gains that were offered to insiders in connection therewith, through unlimited security issues and the rigging of the markets by which these securities were unloaded upon the public at prices that netted such insiders large profits. In the public utility field, where monopolistic conditions largely obtain, the opportunities for such practices have been relatively large. That security issues, based on such conditions, cannot often fairly measure either actual investments in, or fair value of, the property they represent, is rather obvious. It is equally clear that excessive capital issues of this sort cannot ordinarily constitute a fair and equitable basis for the valuation upon which the rates charged for the services rendered to the public should be fixed. * * *

In re NORTHAMPTON GAS PETITION.

(Board of Gas and Electric Light Commissioners of Massachusetts. 1915. P. U. R. 1915A, 618.)

Weed, Chairman.[98] * * * The testimony in this case, which has been briefly and, as the Board believes, fairly described, exhibits the usual irreconcilable results reached by experts valuing property by the reproductive method in rate cases, and who of necessity realize the

[97] Portions of the opinion are omitted. The portion here printed appears on page 84 of the report.

[98] Portions of the opinion are omitted. The portion here printed appears on pages 625–628 of P. U. R. 1915A.

importance of the result to their respective employers. But if a valuation was made free from all bias, it too would have to be based upon premises and experiences open to wide range of debate. Even then its only purposes would be to ascertain a figure upon which a return might be computed, with only such aid in dealing with the rate of such return as is afforded by the demands of investors with respect to securities which, in their turn, have little or no relation to such valuation of the property which they represent.

There is broader, and the Board believes firmer, ground upon which the disposition of this case may properly rest. Throughout the history of this company, the laws, deliberately adopted and consistently pursued, have provided a definite scheme for the regulation of the gas companies. Its foremost characteristic has been and still is a purpose to restrict the original issue of capital stock to the actual investment made by the stockholders, to prohibit stock dividends, and to limit additional stock or bonds to such amounts only as are reasonably necessary for the purpose for which the same are authorized, and, in the case of stock, are required to realize the requisite amount of money in view of market conditions—all with a view to keeping down the dividend burden which the public must meet in the rates charged. It cannot be successfully claimed that these laws are in themselves confiscatory, or operate to deprive the companies to which they apply of their property without due process of law or of the equal protection of the laws. Neither, in the opinion of the Board, can any sound judgment be reached of the fair return to be allowed upon a property acquired under a franchise granted and exercised under such restrictions and limitations, if their beneficial purpose is to be utterly ignored. This would be to observe one rule during the development of a company's capacity to provide adequate service at reasonable rates, and to test its effect by another and quite inconsistent rule. And yet obviously this may be the result if valuations are relied on as the sole, primary, and determining factor in rate cases.

A reasonable return under a policy so clearly declared and long continued is not perhaps susceptible of an absolute determination, and may be such an amount to be realized from the conduct of the business as, after providing for all other necessary and proper corporate requirements, will permit a reasonable dividend to the stockholders. The reasonableness of such return is to be related, not merely to what may be regarded as the value of the property, but to the legitimate capital stock outstanding and representing such property, whose value is usually appreciably greater or less than the par value of the capital stock, but rarely, if ever, identical with it. Where it appears to be greater it will be found to be due either to investment in plant out of income, or to some unearned increment of value in the plant from causes arising outside of the corporation itself. The manner in which such value has been created, the policy pursued in the issue of securities, the intelligence, honesty, and prudence of the management—all have

an important bearing on the amount of the return divisible among the stockholders, and of necessity will lead to apparently different results in different companies and in the same company at different times. This is the only policy, having due regard to a proper reward for efficiency, which seems to the Board to afford an effective stimulus to a recognition by managements of the common interests of both stockholders and consumers.

It is true that courts have decided rate cases in which little or no evidence was offered save with respect to the values of the properties involved, based upon their reproductive costs. But they have not yet said that this is the only test, or even that the trial court or the public board, whose action is questioned, must reach and state a definite finding as to value. Other elements have been expressly enumerated as "matters of consideration * * * to be given such weight as may be just and right in each case." A price is to be held confiscatory, if at all, because it may fairly be expected in its effect upon future business to operate to deprive the company of the reasonable earning power of its property. It is illogical to capitalize earning power as a test of value when the basis of earning power, the rate or price, is itself in question. But it is equally fallacious to assert broadly that cost of reproduction is the sole controlling test of earning power, especially when the price yields all that the capital employed under the restrictions and limitations, which have been described, has ever required. In this proceeding the issue is the price to be hereafter charged by this company, and the value or original cost of its property, the market value of its stock, or any of the other factors which have been considered, are important only so far as together they aid to a correct conclusion as to a price which shall be fair alike to the company and the public. Of necessity this conclusion must rest until vindicated by experience, not in a mathematical demonstration, but in the exercise of a sound judgment.[99] * * *

[99] Cf. the following statement of the same Board, in Petition of the Greenfield Electric Light & Power Co., P. U. R. 1915F, 795, 796 (1915):

"At the hearing, in discussing the price at which the new shares shall be offered to the stockholders, it was urged that the commonwealth is or should be responsible to investors for the maintenance of the value of stock issued at a premium. The Board feels that this may be an opportune time to declare for the information of all concerned that the approval of stock carries with it no actual or implied guaranty as to the maintenance of dividends."

In re BLUE HILL STREET RY. CO.

(Public Service Commission of Massachusetts, 1915. P. U. R. 1915E, 370.)

By the COMMISSION.[1] * * * The records show that all of the stock and all of the bonds were issued under the supervision and with the specific approval of the Board of Railroad Commissioners, as follows:

$150,000 original stock—Approved on December 18, 1900.
120,000 additional stock—Approved on August 5, 1903.
30,000 additional stock—Approved on August 6, 1903, for the purchase of the property and franchises of the Milton Street Railway Company.
200,000 mortgage bonds—Approved on November 30, 1903.
50,000 mortgage bonds—Approved on May 4, 1914.

$550,000 total stock and bonds approved.

The statutes under which these stocks and bonds were issued (Stat. 1894, c. 462; Stat. 1902, c. 370; Rev. Laws, c. 109, § 24) made it necessary for the Board of Railroad Commissioners to find that the issues were "reasonably requisite" or "reasonably necessary" for lawful corporate purposes, before it could give its approval. In like manner, the statutes under which the property and franchises of the Milton Street Railway Company were purchased (Rev. Laws, c. 112, § 86, and c. 111, § 278) made it impossible for the purchase to take effect until its terms had been approved by the Board. The approval of these issues by the Board, coupled with its approval of the terms of the Milton purchase, must therefore be regarded as conclusive evidence, so far as the commonwealth and this Commission are concerned, that the stocks and bonds so issued represented legitimate investment, not excessive for the purpose, and as strong presumptive evidence that the investment was "prudently" made within the meaning of the rule laid down in the Middlesex & Boston Rate Case [2 Mass. P. S. C. R. 105 et seq.].

It does not follow necessarily that the company is fairly entitled to earnings which will enable it to pay dividends upon its stock, or, indeed, interest upon its bonds. The commonwealth has not guaranteed these securities, nor undertaken to protect stockholders or creditors against the consequences of mismanagement. If the company has wastefully or imprudently expended corporate funds obtained from other sources, or has in any other way been improperly managed, and if such mismanagement is the cause of a failure to earn dividends or interest, the company is the author of its own misfortunes, and the public cannot justly be taxed through the payment of higher fares to relieve its embarrassment.

This must particularly be borne in mind in the consideration of float-

[1] Portions of the opinion are omitted. The portion here printed appears on pages 380–382 of P. U. R. 1915E.

ing indebtedness. Street railway companies under our laws (see Stat. 1906, c. 463, pt. 3, § 107) are prohibited from issuing "stock and bonds, coupon notes, or other evidences of indebtedness payable at periods of more than twelve months after the date thereof" without the consent and approval of the Public Service Commission (formerly the Board of Railroad Commissioners). There is no such prohibition, however, in the case of evidence of indebtedness payable at periods of twelve months or less after the date thereof. It was doubtless assumed, when the "antistock watering" laws were enacted, that the danger inherent in liabilities of this kind would in itself sufficiently limit the incurring of debt so evidenced; but such has not proved to be the case. "Notes payable" are usually a large and important item in the balance sheets of Massachusetts railroad and street railway companies, sometimes exceeding the funded debt in volume.

It appears that the Blue Hill Company on May 31, 1915, had "loans and notes payable" and "accounts payable" amounting in all to $160,601.84 (equal to 64.2 per cent. of the outstanding funded debt), and that it paid out $8,313.75 in interest on such indebtedness during the year ended on that date. Incurred, as it is, at the will of the company and without public regulation, the existence of a large indebtedness of this nature, apart from other considerations, makes it essential in a case like this, where an increased tax upon the public is proposed, to scrutinize the capital expenditures with great care, even though all the outstanding bonds and stock have been issued under public supervision.[2] * * *

In re PENNSYLVANIA R. CO.

(Interstate Commerce Commission, 1926. 111 Interst. Com. Com'n R. 241.)

By the COMMISSION:‡

The applicant states that arrangements have been made to sell the certificates to Kuhn, Loeb & Company at 97 per cent. of par and accrued dividends. It appears that the proposed price is somewhat below that of recent issues, and we will authorize the sale of the certificates at not less

[2] Shaw, Commissioner, dissenting in Re Southern Illinois Gas Co. (Illinois Public Utilities Commission), P. U. R. 1916C, 704, 735–743 (1916), makes a powerful argument against authorizing the issue of securities to an amount in excess of the amount upon which net earnings should be allowed in a rate case. As to the relation between the amount of authorized security issues and the rate base, see further the dissenting opinion of Hall, Commissioner, in the case before the Nebraska State Railway Commission of In re People's Telephone Co., P. U. R. 1915D, 171 (1915), quoted by Commissioner Shaw. See, also, In re Robert J. Dunham, 3 Mo. P. S. C. 593, P. U. R. 1916E, 544, 596–611 (1915); In re Southern Nebraska Power Co. (Browne, Chairman, Nebraska State Railway Commission), P. U. R. 1925B, 278, 280, 281 (1924). Perhaps the most valuable discussion of the whole topic of regulating security issues is to be found in J. C. Bonbright, "Railroad Capitalization" (Columbia University Press, N. Y., 1920).

‡ Portions of the concurring and the dissenting opinions are omitted.

than 97.20 per cent. of par and accrued dividends, on which basis the average annual cost to the applicant will be approximately 4.90.

We find that the assumption of obligation and liability by the applicant as aforesaid (a) is for a lawful object within its corporate purposes, and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by it of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

An appropriate order will be entered.

WOODLOCK, Commissioner (concurring). In passing upon security issues by railroads, I conceive our main duty to be that of securing the lowest possible cost of capital to the issuing company. Whatever method of security sales will produce that result is, I take it, the method which should be approved by us. It is no part of our business under the law from which we derive our powers and responsibilities to undertake to regulate the distribution of railroad business among banking firms in the financial districts, save in so far as such regulation may be clearly necessary to the main purpose in view.

If there is any business in the world more highly competitive than the banking business in New York, I am unable at this moment to think of it. It is the essence of competition that somebody is successful as against somebody else. It is inevitably the result of competition that some are more continuously successful and upon a larger scale than others. * * *

Whenever it shall clearly appear that competition is unfairly restricted in such a way as to involve a greater cost of money to the carriers issuing securities, or whenever it shall clearly appear that better results to the carriers will come from imposition of a radical change upon issuing methods, then it will be our duty to give effect so far as lies in our power to the necessary changes.

It is because I am not convinced that, taking the investment market as a whole, with all its fluctuations and changes in conditions of supply and demand, a radical change in methods would give cheaper money to the carriers, that I am opposed to any attempts to impose such change at the present time.

EASTMAN, Chairman (dissenting). In previous cases I have had occasion to refer to prevailing practices in the marketing of railroad securities. In the purchase of equipment the usual practice of railroad companies is to secure competitive prices from car and locomotive companies of recognized standing, and the same practice is ordinarily followed in the purchase of supplies and other items of property. There are exceptions, but that is the general rule.

When it comes to the sale of their own securities, however, railroad companies follow quite a different policy. They throw competition into the discard and grant monopolies to particular banking houses. Ordi-

narily this monopoly is conferred upon either Kuhn, Loeb & Company or J. P. Morgan & Company. There are exceptions, but they prove the rule.

These banking houses are largely jobbers rather than retailers of securities, and in general they sell to other banking houses, which in turn distribute to investors. A considerable degree of power over these other banking houses is inherent in the situation. Because of this fact it is difficult to secure a full, frank and public discussion of prevailing practices in the marketing of railroad securities by those who are well equipped for such discussion. It is easy to secure a defense of these practices, but difficult, if not impossible, to obtain a proper public presentation of the other side. * * *

Such study and thought as I have been able to give to the question, utilizing various sources of information, have brought me to the conclusion that prevailing practices in the marketing of railroad securities are in many respects unsound and unhealthy. I am tempted to say that the preference of monopoly to competition is un-American, but refrain because of the widespread abuse of that word.

I have been willing, however, that the change to better practices should be a process of evolution rather than revolution, and therefore have been content for the present to advocate a resort to some form of competition, in place of monopoly, only in the case of such comparatively standardized forms of railroad securities of assured investment standing as equipment trust notes and certain classes of guaranteed terminal bonds. There is, in my judgment, clearly no good reason why the marketing of such securities, at least, should be monopolized.

I am further aware that recent prices obtained by railroad companies for such securities, even in the case of monopolistic sales, are apparently not open to a great deal of criticism. It is probable that the discussion of prevailing practices has had something to do with this; and certainly our own supervision has played a part. There have been several cases where the activity of our Bureau of Finance has resulted in a better price than was at first offered. But this, to my mind, is not an answer to the fundamental question at issue.

We are entitled, and the public is entitled, to the best evidence that can be presented that maximum prices are being obtained, and that evidence is not being produced. Such evidence will only be before us when we know the prices that more than one, and preferably several, possible purchasers of recognized standing are willing to pay.

In such cases I believe that we are fully justified in presenting these alternatives to the applicant: (1) Sale to its chosen purchaser at a minimum price closely approximating the market level; or (2) if applicant is unwilling to adopt such an alternative, sale to the highest qualified bidder after competitive bids have been publicly advertised for and received. See my dissenting opinion in New York Central Lines Equipment Trust of 1925, 99 I. C. C. 121, 124.

S.& D.P.UTIL.

Some contend that we are without power to pursue this course, but I know of no better way of finding out than by putting it to the test.

For the above reasons, I am unable to accept the conclusions reached in this case by the majority.

In re WESTERN MARYLAND RY. CO.†

(Interstate Commerce Commission, Division 4, Meyer, Eastman and Woodlock, Commissioners, 1926. 111 Interst. Com. Com'n R. ——.)

The applicant notified various banks of its desire to sell these certificates, inviting tenders therefor, and eight bids were received from bankers located in New York City and Baltimore, Md. They were sold to Kean, Taylor & Company and Roosevelt & Son, of New York City, and Brinkmann & Company, Inc., of Baltimore, Md., the highest bidders, at 100.886 per cent. of par and accrued dividends.

On that basis the average annual cost to the applicants will be approximately 4.833 per cent. The action of the applicant in resorting to this method for the sale of the certificates is commendable.

Recent experience in connection with the sale of equipment-trust certificates leads us to believe that conditions in the investment market are, and for at least some time to come, are likely to be such that railroad companies raising capital in this way may now profitably adopt a policy of offering such securities to public competitive bidding after the manner in which state, county and municipal securities are commonly sold.

The reasons which lead us to this belief may be summarized as follows:

1. These securities are of virtually uniform character, they enjoy a high degree of safety as to payment of principal and interest, and the prices that they bring are very largely determined by interest rates current for the best class of security. The relative financial strength of the issuing carriers has ceased to be an important factor in determination of price;

2. While it is probably true that in former days equipment-trust securities were largely taken by investment institutions (such as insurance companies, savings banks, etc.), it is evident that they are now growing in favor with individual investors who have at times, of late, been willing to pay more for them than these institutions;

3. The investment market as a whole has grown very greatly in size in the years following the war. It now absorbs annually some billions of securities other than those of railroads. While it is true that industries other than railroads have taken and are taking by far the largest part of the new capital, it is also true that there is an ever growing demand for securities of the best class, in which railroad equipment trusts occupy a prominent place. It seems to us that the sale of these by public com-

† Portions of the opinion are omitted.

petitive bidding will tend to widen their market and thus produce capital more cheaply for the issuing railroads.

It is because of this probable result that we favor such a method at this time. We propose for the present no change of selling methods in the case of other railroad securities and are fully mindful of the considerations so frequently and forcefully urged in favor of the ordinary existing relation of banker and railroad, and of the advantages to the latter which many believe result from a proper conduct of that relation by both parties thereto.

We are concerned with the sale and distribution of railroad securities from the point of view of economy in the cost of capital to the railroads, to the end that the total burden of transportation shall be no larger than is absolutely necessary. It is our opinion, however, that the sale of equipment-trust certificates by public competitive bidding will be effective in so widening the market for these securities as to assist in the effective and economic financing of railroads by means of other securities such as may from time to time become necessary.

Whether in the course of time it may come about that classes of railroad securities other than equipment trusts shall be susceptible of the same methods of sale with economical results is a question that need not now be considered. * * *

IX. Differential Treatment of Investments Made Before Announcement of a Definite Valuation Policy and Investments Made Thereafter

JOHN BAUER, "THE SUPREME COURT AND REPRODUCTION VALUE IN RATE MAKING"[3]

* * * In the opinion of the writer, the confusion on valuation is due much less to court decisions than to the lack of clear legislative policy in rate regulation. If ten or fifteen years ago, when active regulation was begun and before the higher price level was a serious factor, clear and definite methods of public rate making had been adopted, the valuation chaos would have been avoided and regulation would probably have been reasonably effective.

For the future, there is no real hope for effective regulation until the Legislatures and Commissions provide a comprehensive policy and a workable machinery for regulation. This must be based upon definite figures on which the investors will have a right to a return and which the public must pay, as shown by exact accounting.

[3] Reprinted, by permission, from the National Municipal Review, September, 1923, vol. 12, p. 529. Portions of the article are omitted.

For such a permanent program of regulation the actual investment appears not only as the fair basis for existing properties, but it must be used for subsequent additions and improvements. Judge Brandeis' opinion in the Southwestern Bell Case [262 U. S. 276, 43 S. Ct. 544, 67 L. Ed. 981, 31 A. L. R. 807] furnishes a clear and brilliant presentation of this view. Effective rate regulation is all but impossible under a fluctuating basis of return, such as reproduction cost of the properties, whose determination would depend at any time upon estimates affected with personal interest.

If the Legislature provided directly for such a definite policy and machinery for rate regulation, there is no doubt that future additions and improvements could be limited to a return on actual investment. There is reason to believe, moreover, that in connection with a comprehensive policy, the court would sustain also the initial valuation of existing properties on the basis of actual investment.

But, even if some increment for greater reproduction cost must be allowed in establishing a comprehensive policy, this could be limited so as not to create a prohibitive burden upon the public. An adjustment, for example, might be restricted to the part of the investment represented by capital stock. Since the bondholders in any event are limited to a definite return in dollars, there is no reason for allowing an increment to their investment, for they would get no benefit from the adjustment. If the entire investment were fully brought up to reproduction cost, the stockholders would get the benefit of adjustment for higher price level, not only on their own direct investment but also on the bondholders'. But no scheme with such results can be seriously urged upon equitable grounds. Adjustment, therefore, should be limited, in any event, to stockholders' investment.

If this view were accepted by public authorities, allowing an adjustment for higher prices on stockholders' investment but not on bondholders', there would be no serious public burden if for the purposes of a permanent rate base the valuation of existing properties were to such extent based on reproduction cost. Such an increment could be fairly justified. In most cases, however, the bulk of the investment is bondholders'; the stockholders' seldom exceeds 25 per cent. of the total. An adjustment on this relatively small element of the total investment would not be burdensome, and the public could well afford to pay the slight additional return for the sake of definiteness of rate regulation for the future.

To illustrate, assume that the actual investment in a given case is $1,000,000, contributed 75 per cent. by bondholders and 25 per cent. by stockholders. Assume that on broad equitable grounds we agree to an adjustment in the stockholders' investment because of a present 60 per cent. higher price level than when the investment was made. This amounts to an increment of 60 per cent. on 25 per cent.; only 15 per cent. on the total investment. With this increase, the company would receive a return on $1,150,000 instead of $1,000,000 actual investment.

Such an adjustment for higher price level would manifestly not be burdensome to consumers, would treat the investors fairly in face of the greatly increased price level, and would undoubtedly be approved by the Supreme Court even under the Southwestern Bell decision. If the existing properties were appraised on this basis and the results taken as a permanent rate base, to be increased only with future net additional investment, everybody would be treated fairly, and regulation would cease to be clogged by litigation. The reciprocal rights and duties of the investors and the public would be maintained by exact accounting, no longer affected by vague phrases, rhetoric and prejudiced opinion.[4]

[4] For a similar proposal regarding the railroads, see I. L. Sharfman, "The American Railroad Problem" (Century Co., 1921), pp. 301–305. See, also, J. C. Bonbright, "Progress and Poverty in Current Literature on Valuation," 40 Quarterly Journal of Economics, 295, 297–302 (Feb. 1926). The difficulty of applying to the unregulated past a rate base that might be satisfactory enough as applied to investments made by persons who had notice of it before they invested was pointed out in the opinions in the cases of In re Rates of Public Service Gas Co., supra, page 1041, In re Chesapeake & Potomac Tel. Co. (Maryland Public Service Commission), P. U. R. 1916C, 925, 957–978 (1916), and in Commissioner Allison's discussion of depreciation, supra, page 1059. To meet this difficulty, Commissioner Eastman, dissenting in the San Pedro Case, 75 Interst. Com. Com'n R. 463, 563–567 (1923), expressed the opinion that "the rate base *as of to-day*" should be determined by adding to the "valuation" of June 30, 1914, the cost of net additions and betterments since that date. Commissioner Meyer, in his concurring opinion, seemed to agree. Pages 589–591. Stathers, Chairman of the West Virginia Commission, made the following statement in Re United Fuel Gas Co., P. U. R. 1925B, 705, 747 (1925):

"* * * As we have seen, during the period from 1916 to December 31, 1923, this company earned more than the fair return and amortization and depreciation allowances made by the Commission in the cases cited. For this excess, the writer deferring to the majority of the Commission, the gas company has not been required to account, and no part of the excess has been applied to the amortization of the property. In the future and until all of the property has been amortized, but to that time only, any earnings of this gas company in excess of the allowances herein specifically made shall be applied to the amortization of its property."

To this statement Divine, Commissioner, took exception. Pages 758, 759.

To differentiate the past from the future, the Wisconsin Commission has sometimes adopted the "split inventory" basis of valuation. "This method of determining property value consists in applying pre-war normal prices to property installed before the war and investment cost on all property installed since." City of Tomahawk v. Tomahawk Light, Telephone & Improvement Co., P. U. R. 1922A, 259, 262, 263 (1921). A valuation made on this basis was sustained by the state Supreme Court in Waukesha Gas & Electric Co. v. Railroad Commission, 181 Wis. 281, 184 N. W. 846 (1923), but a similar one was rejected by the United States District Court for the Western District of Wisconsin in Ashland Water Co. v. Railroad Commission, 7 F. (2d) 924 (1925), on the ground that in adopting this basis the Commission had failed to give to the cost of reproduction the consideration required by the United States Supreme Court. Both decisions were by divided courts.

An excellent and constructive discussion of the subject of fair value and fair return, in all its important aspects, is to be found in John Maurice Clark, "Social Control of Business," chapters XXII and XXIII (University of Chicago Press, 1926).

SECTION 3.—FAIR RATE OF RETURN

I. The Attraction of Capital

BOGART et al. v. WISCONSIN TELEPHONE CO. (In re TELEPHONE RATES, RULES, ETC., IN CITY OF MILWAUKEE.)[5]

(Railroad Commission of Wisconsin, 1916. 17 Wis. R. C. R. 524, P. U. R. 1916C, 1020.)

* * * Returns upon the investment in this case cover the cost of the capital necessary, the compensation for certain risks such as are not covered in the interest charges and the cost of such managerial expenses as are not included in the operating expenses proper. These costs are in a sense as much a part of the cost of the service as the operating expenses.

The cost at which capital can be had depends upon the market rate for money in similar undertakings. In the telephone field the risks are, on the whole, regarded as somewhat greater than in most other utilities and the rates of return on the capital employed therein may also have to be somewhat greater. During the past decade the cost of capital and of the other elements mentioned for public utilities generally which are operating under conditions that may be regarded as normal has ranged from about 7 per cent. to more than 9 per cent. on the fair value of the plants and their business. On the bonds, when based on a mortgage covering the entire value and when these bonds amount to about two-thirds of the value, and when the net earnings available for returns have amounted to at least twice as much as the interest charges on the bonds, the cost of obtaining the money has not often been less than about 6.5 per cent. When that part of the capital which is thus comparatively well secured costs as much as this, it is rather obvious that the balance of the capital over and above that part which is thus represented by the bonds must cost a great deal more. In fact, experience shows that for the latter part the cost is often from two to three times as great as for the former part. This is certainly true when the investment is based on commercial considerations alone.

The cost of the capital needed is a part of the cost of the service that in the long run must be borne by the consumer if the service is to be furnished. This cost, like most other costs, is fixed in the open market by economic forces over which individuals and companies have little or no control. The market price for all the capital that

5 Portions of the opinion are omitted. The portion here printed appears on pages 595, 596, of 17 Wis. R. C. R.

is needed for the service by telephone companies as thus determined, when certain risks and managerial services are also included therein, is seldom less than 8 per cent. on the fair value of the plant and the business.[6] * * *

GALVESTON ELECTRIC CO. v. CITY OF GALVESTON.

(Supreme Court of the United States, 1922. 258 U. S. 388, 42 S. Ct. 351, 66 L. Ed. 678.)

Mr. Justice BRANDEIS delivered the opinion of the court.[7]

* * * In calculating whether the 5-cent fare will yield a proper return, it is necessary to deduct from gross revenue the expenses and charges; and all taxes which would be payable if a fair return were earned are appropriate deductions. There is no difference in this respect between state and federal taxes or between income taxes and others. But the fact that it is the federal corporate income tax for which deduction is made must be taken into consideration in determining what rate of return shall be deemed fair. For under section 216 (U. S. Comp. St. Ann. Supp. 1919, § 6336⅛h) the stockholder does not include in the income on which the normal federal tax is payable dividends received from the corporation. This tax exemption is therefore, in effect, part of the return on the investment.[8] * * *

[6] For an excellent constructive treatment of the problem of the fair rate of return, from the point of view of attracting the necessary capital, the reader is referred to chapter X of John Bauer, "Effective Regulation of Public Utilities" (Macmillan, 1925). The bearing of the return on the market values is made particularly clear. Statements bearing on the rate of return are to be found in the course of some of the cases dealing primarily with valuation in this volume. See particularly Brandeis, J., concurring, in State ex rel. Southwestern Bell Tel. Co. v. Public Service Commission, supra, page 1018. The point that a correct judgment concerning the rate of return depends on the method of valuation is made by G. C. Henderson, "Railway Valuation and the Courts" (1920), 33 Harv. Law Rev. 902.

[7] Portions of the opinion are omitted. See supra, page 1038. The portion here printed appears on pages 399, 400, of 258 U. S., and on page 356 of 42 S. Ct.

[8] A similar statement is made by Justice Brandeis in Georgia Ry. & Power Co. v. Railroad Commission, 262 U. S. 625, 633, 43 S. Ct. 680, 682, 67 L. Ed. 1144 (1923).

II. The Encouragement of Efficiency

BOGART et al. v. WISCONSIN TELEPHONE CO. (In re TELEPHONE RATES, ETC., IN CITY OF MILWAUKEE).[9]

(Railroad Commission of Wisconsin, 1916. 17 Wis. R. C. R. 524, P. U. R. 1916C, 1020.)

* * * As we have already stated in the analysis of comparative costs which we have made, interest to the extent of 7½ per cent. upon the cost new of the physical property has been included. The full cost of the service will not be disclosed, unless we add to this interest upon the difference between the fair value as determined in this case and the cost new of the physical property, and enough in addition to 7½ per cent. to constitute a reasonable return. In many of its decisions where the conditions were normal the Commission has found the reasonable rate of return to which utilities should be entitled to be from 7 to 8 per cent. of the fair value of the property and business. We believe that in the present case, as for other telephone utilities similarly situated, the latter rate of return is fully justified, not only by the facts which we have mentioned, but by other conditions. We cannot escape notice of the fact that the Milwaukee exchange of the Wisconsin Telephone Company has been and is managed with an exceedingly high degree of efficiency. The efficiency obtained in the Milwaukee exchange is shown both by the fact that the investment in Milwaukee is very low for an exchange of its size and nature, and that the operating expenses appear to be very conservative. This efficiency, it seems, is a result both of the efforts of the officials of the Wisconsin Telephone Company and of the relation between the Wisconsin Telephone Company and the American Telephone & Telegraph Company. It may be argued that every public utility is expected to conduct its business in a reasonably efficient manner, and this, of course, is true, but we are dealing in the present case with what seems to be an instance of unusual efficiency, manifested, not only in the degree of economy obtained in the construction, operation, and maintenance of the plant, but in the relations which the company has established and maintained with the public. As far as we can determine, the officials of the Milwaukee exchange and of the company have been continually on the alert to discover means of conducting the business economically and of maintaining desirable relations with the public.

The importance of giving consideration to the character of the management in fixing upon the fair rate of return is stated by the

[9] Portions of the opinion are omitted. The portion here printed appears on pages 596, 597, of 17 Wis. R. C. R.

Supreme Court of Wisconsin in Duluth Street Railway Co. v. Railroad Commission, 161 Wis. 245, 261, 152 N. W. 887, as follows:

"The amount of this return should be governed to some extent by the character of the management. A company that is on the alert to practice economies should have some part of the saving, else there would be no inducement to reduce the cost of the service."[10] * * *

In re CHESAPEAKE & POTOMAC TELEPHONE CO.

(Public Service Commission of Maryland, 1916. P. U. R. 1916C, 925.)

TOWERS, Chairman.[11] * * *

For the reasons above stated, this Commission still feels that a maximum permissible return of 8 per cent. in the case of this company would be fair and reasonable.

But by this conclusion we are not to be taken as determining that the respondent company is to be permitted to raise its existing rates to the point at which they will yield an 8 per cent. return upon its investment. We simply determine that so long as the company's earnings under its published schedules, taken as a whole, do not yield a return upon the fair value of its entire property in this state in excess of 8 per cent. said schedules as a whole will not be reduced.[12] As hereinbefore stated, under the Public Service Commission law of this state, by which our powers are governed, we must reserve, and could not surrender if we would, the power at any time to reduce any specific charges for service which subject any particular person or locality to any unfair prejudice or disadvantage, or which are in any other respect unfair, unreasonable, or discriminatory. * * *

[10] See, also, the statement by the Idaho Public Utilities Commission in City of Sandpoint v. Sandpoint W. & L. Co., Limited, P. U. R. 1915F, 445, 466 (1915); Shaw, Commissioner, in Springfield v. Springfield G. & E. Co. (Illinois), P. U. R. 1916C, 281, 379–383; and the elaborate and suggestive discussion of interest and profits and the distinction between them in State Journal Printing Co. v. Madison Gas & Electric Co., 4 Wis. R. C. R. 501, 633–649 (1910).

[11] Portions of the opinion are omitted. The portion here printed appears on pages 1019, 1020, of P. U. R. 1916C.

[12] In Harris v. South Side Gas & Electric Co., P. U. R. 1915F, 747 (1915), the Arizona Corporation Commission, after adopting a valuation of $124,000 (page 757), stated on pages 759, 760:

"We conclude, from a most careful analysis of the situation before us, that an annual net allowance of $10,000 is sufficient to constitute a fair and equitable return, and we so order. To promote efficiency in operation and to insure stability in rates, we will not deem necessary a readjustment of rates looking to a decrease in the net revenue until such time as such return shall become 10 per cent. of the then present value of the electric properties."

CHARLES S. MORGAN, "REGULATION AND THE MANAGEMENT OF PUBLIC UTILITIES."*

(Houghton Mifflin Company [1923] pp. 316–319.)

* * * There are certain practical administrative difficulties which militate against giving a reward for efficiency to capital. These difficulties have been touched upon before. There is first of all the difficulty that any increased return to capital as a reward for efficiency is at once "capitalized." As soon as this process has taken place, the stimulus to increased effort is gone. If, to continue the incentive to efficiency, successive stimuli, in the form of repeated increments in the return to capital, are resorted to, just as stimulants in increasing quantities are given to keep up the heart action of a failing person, these also will be successively capitalized, and in any event so to increase the stimuli would work no advantage to the public.

The word "capitalization," while expressing a simple business practice, is used in a somewhat technical sense, and may therefore require further explanation. A utility company, being operated, in a given year, with only an average degree of efficiency, is allowed, let us say, a return of 6 per cent. on a Commission's valuation of its property of $12,000,000. The return on the investment, over and above all operating expenses, is therefore reckoned at $720,000 per annum. If, to simplify the example, it is assumed that the utility has only capital stock outstanding and this of $15,000,000 par value, and that the market rate of return of this type of investment is 5 per cent., the utility's stock would be worth, other things being equal, $720,000 capitalized at 5 per cent., or $14,400,000.

If, however, by some demonstration of superior efficiency in a later year, this company's rate of return is increased by the Commission from 6 to 7 per cent., its actual return on its valuation, a constant, would be, not $720,000, but $840,000 per annum. If the market rate of return continues to be 5 per cent. on this class of investment, the utility's capital stock would immediately be considered to be worth $840,000 capitalized at 5 per cent., or $16,800,000. The enhancement of its market value, in the amount of $2,400,000, represents, therefore, the capitalization of the 1 per cent. increment in return.[13] The effect of this process of capitalization, so far as it takes place in practice, would be to reduce the *actual* return to new investors to the market rate of return, and, even in so far as the

* This passage is reprinted by permission of the author and the publishers. The book is one of the series of Hart, Schaffner & Marx Prize Essays.

13 As a matter of fact the full 7 per cent. might not be used by all potential investors as the basis of determining the market value of the securities, since the added 1 per cent. might be discounted slightly as a protection against the contingency of a reduction of the return upon the reduction of efficiency. But such discounting would tend to be rather slight.—[Footnote quoted from the author.]

process is merely a mental one of the original investors, who still hold the utility's securities, there is something of the same effect, since there is a tendency to appraise one's assets at their highest marketable figure and to consider this added value as permanent. Once the increased valuation of the securities has been made, there is a desire and in fact a determination to retain it against all odds and all changes of circumstances. In either case, then, whether the process of capitalization results in an actual transfer of securities at an increased price or is merely a writing up of one's assets, there develops a situation in which the return to capital is, or is considered to be, merely the market rate of return on such investments.[14] Under such circumstances the only incentive to the maintenance of even the present level of efficiency is the fear of a reduction of the return earned. This fear is not, however, as real as this theoretical discussion of the problem implies.

Another point developed by this example is the fact that the increment of return as a reward for superior efficiency may be smaller, in absolute amount, when it goes to management than when it goes to capital. The 1 per cent. increment used in this illustration is possibly high, although some Commissions have used that figure. The added $120,000 in annual return to investors is, for a company of this size, no small amount. If the management is rewarded, half that amount might suffice to reward both the management and such of the employees as the management desired to share this reward with. No attempt has been made in this essay to study the specific increments of reward which are necessary to produce the best results. A study of this detailed problem awaits upon further discussion of the general problem of rewarding efficiency. It is to be borne in mind, however, that the actual amount of the reward, while important, is possibly not so important as that there should be an opportunity for management to produce results and to be given recognition for so doing.

Returning to the main line of this argument, in the event of the regulating agency determining, after an interval, that a reduction in efficiency has taken place, and that therefore a reduction of the return

[14] Note the following from the per curiam opinion of the New Jersey Court of Errors and Appeals in City of Passaic v. Board of Public Utility Commissioners, 87 N. J. L. 705, 708, 95 A. 127, 128 (1915):

"An additional point was raised at the reargument, to wit, that as the commission allowed the company a return of 8 per cent. on a valuation of approximately $5,000,000, and it appeared that the public markets would capitalize this income at 5 per cent. in dealing with the securities, the real value set by the commission is $8,000,000. But the evidence relating to 5 per cent. capitalization, as counsel admit, is based on an unregulated rate and not a regulated one, and is therefore of little or no value in an inquiry of this character."

If the earnings would be capitalized at 5 per cent. while the uncertainty of the regulatory proceedings prevailed, it is difficult to see how they could be capitalized at a greater rate, once that uncertainty is removed.—[Footnote by the editor.]

on the investment should follow if the public is not to pay for something which it no longer receives, it would be confronted with the very serious problem of having to destroy in a wholesale manner that part of the capitalization of utilities which represents the capitalization of the reward for efficiency. In so far as this capitalization had come to represent bona fide investments of persons who had acquired a utility's securities subsequent to the increase in the rate of return, to destroy it would, from the investors' point of view, be tantamount to confiscation of property, for it is impossible, apparently, to keep apart the two elements which would make up the capital value in the instant case, the normal return on the investment and the added return allowed as a reward for efficiency.

This particular difficulty, the importance of which detracts greatly from the probability of the success of such devices as the sliding scale and certain of the special devices for rewarding efficiency which were contained in some of the service-at-cost franchises, and which requires a thoroughgoing change in the way in which the regulating commissions should reward efficiency, is disposed of in an eminently satisfactory manner when the reward for efficiency goes to management. As a medium through which the energizing force of special reward for special efficiency is transmitted to all the lower strata of labor, management, which is itself a form of labor, creates no vested interests. Each day is a new day with new beginnings and possibly strange endings. If an average efficiency is adequately compensated for, the removal of the reward for unusual efficiency upon the reduction of actual efficiency to only the average, would work no hardship to management, on the assumption, of course, that management was responsible for the reduction of efficiency. It is in fact this very directness, immediacy of the connection between effort and reward which recommends the suggestion here made for favorable consideration.[15]

[15] For a discussion of one method of rewarding management, as distinct from the security holders, for efficiency, see Re Southern California Edison Co., infra, page 1090.

SECTION 4.—CURRENT EXPENSES

I. The Question of the Propriety of Certain Expenses

CHICAGO & GRAND TRUNK RY. CO. v. WELLMAN.

(Supreme Court of the United States, 1892. 143 U. S. 339, 12 S. Ct. 400, 36 L. Ed. 176.)

In 1889 the Legislature of the state of Michigan passed an act [regulating passenger fares on railroads] Pub. Acts 1889, No. 202. Prior thereto the regular fare charged on plaintiff in error's road from Port Huron to Battle Creek was $4.80. * * * On the very day on which the law took effect, to wit, October 2, 1889, the defendant in error, plaintiff below, went to the defendant's office in Port Huron, and tendered $3.20 for a ticket from that place to Battle Creek, which was refused. Thereupon he brought this action in damages, to which the railroad company promptly answered; and on November 22, 1889, less than two months from the time the law went into effect, the case was tried and a verdict and a judgment entered in favor of the defendant in error for the sum of $101, an amount sufficient to take the case to the higher court. [On the trial certain statements as to earnings and expenses were agreed to, and two witnesses testified that it was impossible to increase the freight rates because of competition.] Upon such agreed statement and testimony, and that alone, the railroad company asked an instruction that the Act of 1889, referred to, was unconstitutional. The court refused this instruction, and an exception to the refusal to give this instruction was the solitary one taken on the trial. The court proceeded to charge the jury that the act in question was valid, and that the plaintiff was entitled to a verdict and judgment by reason of the failure of the defendant to comply with its provisions. To this charge no exceptions were taken, and the case went to the Supreme Court of the state on the single exception above stated. That court sustained the ruling of the trial court, and affirmed its judgment (83 Mich. 592, 47 N. W. 489), to reverse which judgment, the railroad company sued out a writ of error from this court.

Mr. Justice Brewer delivered the opinion of the court:[16]

The single question presented on the record is, whether the trial court, on the facts presented, erred in refusing to instruct, as a matter of law, that the act of 1889 was unconstitutional. * * *

It never was the thought that, by means of a friendly suit, a party

[16] The statement of facts is condensed, and portions of the opinion are omitted.

beaten in the Legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.

These observations are pertinent here. On the very day the act went into force the application for a ticket is made, a suit commenced, and within two months a judgment obtained in the trial court; a judgment rendered, not upon the presentation of all the facts from the lips of witnesses, and a full inquiry into them, but upon an agreed statement which precludes inquiry into many things which necessarily largely enter into the determination of the matter in controversy. A single suggestion in this direction: It is agreed that the defendant's operating expenses for 1888 were $2,404,516.54. Of what do these operating expenses consist? Are they made up partially of extravagant salaries; fifty to one hundred thousand dollars to the president, and in like proportions to subordinate officers? Surely, before the courts are called upon to adjudge an act of the Legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company; for, if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable dividends. While the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call "operating expenses."

We do not mean to insinuate aught against the actual management of the affairs of this company. The silence of the record gives us no information, and we have no knowledge outside thereof, and no suspicion of wrong. Our suggestion is only to indicate how easily courts may be misled into doing grievous wrong to the public, and how careful they should be to not declare legislative acts unconstitutional upon agreed and general statements, and without the fullest disclosure of all material facts.

Judgment affirmed.[17]

[17] In a recent case involving the federal tax on corporate net earnings, the Circuit Court of Appeals for the Second Circuit (Rogers, Hough, and Manton, Circuit Judges) held that it was proper to submit to the jury the question of fact whether a "salary" voted by the directors to the president, and fixed at 85 per cent. of the net profits, was in fact salary, or whether it was in part profits. The jury had found the latter to be the case, and had made findings as to the reasonable value of the president's services. Becker Bros. v. United States, 7 F. (2d) 3 (1925).

STATE ex rel. SOUTHWESTERN BELL TELEPHONE CO. v. PUBLIC SERVICE COMMISSION.

(Supreme Court of the United States, 1923. 262 U. S. 276, 43 S. Ct. 544, 67 L. Ed. 981, 31 A. L. R. 807.)

Mr. Justice McREYNOLDS delivered the opinion of the court.[18] * *

The important item of expense disallowed by the commission—$174,048.60—is 55 per cent. of the 4½ per cent. of gross revenues paid by plaintiff in error to the American Telephone & Telegraph Company as rents for receivers, transmitters, induction coils, etc., and for licenses and services under the customary form of contract between the latter company and its subsidiaries. Four and one-half per cent. is the ordinary charge paid voluntarily by local companies of the general system. There is nothing to indicate bad faith. So far as appears, plaintiff in error's board of directors has exercised a proper discretion about this matter requiring business judgment. It must never be forgotten that, while the state may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership. The applicable general rule is well expressed in States Public Utilities Commission ex rel. Springfield v. Springfield Gas & Electric Co., 291 Ill. 209, 234, 125 N. E. 891, 901:

"The commission is not the financial manager of the corporation, and it is not empowered to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses, unless there is an abuse of discretion in that regard by the corporate officers."

See Interstate Commerce Commission v. Chicago Great Western Railway Co., 209 U. S. 108, 28 S. Ct. 493, 52 L. Ed. 705; Chicago, Milwaukee & St. Paul Railroad Co. v. Wisconsin, 238 U. S. 491, 35 S. Ct. 869, 59 L. Ed. 1423, L. R. A. 1916A, 1133; People ex rel. v. Stevens, 197 N. Y. 1, 90 N. E. 60.[19] * * *

[18] Portions of the opinion and the entire minority opinion of Mr. Justice Brandeis are omitted. See page 1018, supra. The portion here printed appears on pages 288, 289, of 262 U. S., and pages 546, 547, of 43 S. Ct.

[19] To the same effect, see Houston v. Southwestern Bell Tel. Co., 259 U. S. 318, 42 S. Ct. 486, 66 L. Ed. 961 (1922).

MICHIGAN PUBLIC UTILITIES COMMISSION v. MICHIGAN STATE TELEPHONE COMPANY.

(Supreme Court of Michigan, 1924. 228 Mich. 658, 200 N. W. 749, P. U. R. 1925C, 158.)

WIEST, J. (dissenting).[20] * * * The American Telephone & Telegraph Company owns all of the common stock, and nearly all of the preferred stock, of the Michigan State Telephone Company. No court has yet held that a rate must be established to care for the 4½ per cent. contract, regardless of the value of services rendered by the American Telephone & Telegraph Company. Suppose the contract called for 50 per cent. of the gross revenues of the Michigan State Telephone Company? Except as intensified, the question would be the same. In considering this contract, the distinction must be kept in mind between mere contract cost and the value of services actually rendered. Corporate management, and not courts, make contracts, but courts, and not corporate management, determine, in a rate case, what return will cover the services rendered under a contract, and will not say a return fully compensatory for actual services rendered is unreasonable, and, therefore, confiscatory, because less than such a contract as we have here stipulates.

We find a hand reaching for rate returns, the fingers of which are those of the local company, but the manipulating arm is that of the American Telephone & Telegraph Company, which owns the local company. As blind old Isaac said: "The voice is Jacob's voice, but the hands are the hands of Esau."

The possible vice in this contract is not met by saying that the relation between the companies demands strict scrutiny of the dealings, but the contract is valid, and management of the utility must be left to the owners. What purpose does strict scrutiny serve if the result thereof may not, in any event, affect contract stipulations?

The rate payers must compensate for the services rendered. Tangible property and intangible property rights enter into the measure of service rendered. What service is rendered rate payers under the American Telephone & Telegraph contract? The Commission measured what they considered the actual services rendered. Defendant

[20] The majority opinion was rendered by Clark, C. J. On another point Bird, J., dissented. Sharpe, Steere, Fellows, and Moore, JJ., concurred with Clark, C. J. McDonald, J., concurred in the result. The majority opinion and portions of the dissenting opinion are omitted. The portion here printed appears on pages 691, 692, of 228 Mich., pages 760, 761, of 200 N. W., and pages 185, 186, of P. U. R. 1925C.

company stands upon its contract with its owner. The Commission planted decision upon actual services rendered. * * *

I approve of the findings of the Commission.[21] * * *

In re SOUTHERN CALIFORNIA EDISON CO.

(Railroad Commission of California, 1921. P. U. R. 1921D, 65.)

By the COMMISSION.[22] * * * The third proposal of Edison Company as to rewards for efficiency may be divided into two parts: It is first proposed that one-quarter of the surplus of $1,059,000, which it considers should be allowed, will be paid by the company to its employees as a stimulant to further efficiencies and as a reward for the efficiency which the company contends exists at the present time. The Public Utilities Act, in the following language, clearly

[21] The Wisconsin Commission, in allowing an increase in rates, refused to allow as an operating expense the increased payment which the local company, under the 4½ per cent. license contract, would have to pay to the American Telephone & Telegraph Company by reason of the very increase granted. It said:

"We understand from certain rulings of various courts that the Commission cannot declare the contract between the Wisconsin Telephone Company and the American Telephone & Telegraph Company invalid or unreasonable without assuming the burden of proof to show that it is so. It is of course impossible for the Commission to assume this burden of proof, for the reason that it probably cannot require any information from the records of the American Telephone & Telegraph Company nor from other sources as to what it cost that company to furnish the service. On the other hand, it seems equally logical to us that the American Telephone & Telegraph Company should assume the burden of proof of showing to this Commission that there is some reason why, accompanying an increase in rates of the Wisconsin Telephone Company, there should be an increase in payment to the parent company. No proof whatsoever has ever been introduced before this Commission to show that the cost to the American Telephone & Telegraph Company or any other reasonable basis of measuring the value of its service changes with changes in the rates of the Wisconsin Telephone Company." In re Wisconsin Telephone Co., P. U. R. 1925D, 661, 674, 675 (1925).

For a very interesting history of the 4½ per cent. telephone contract, see the opinion of the New Jersey Public Utilities Board in 1924. Re New York Telephone Co., P. U. R. 1925C, 767, 817–825 (1924). See, also, the opinion of the Indiana Public Service Commission in Re Indiana Bell Telephone Co., P. U. R. 1924A, 1, 29–33 (1923).

A more favorable view of this contract was taken by the Massachusetts Department of Public Utilities in 1925. Re New England Tel. & Tel. Co., P. U. R. 1925E, 739, 746–748 (1925).

A contract between a natural gas company and an affiliated corporation, whereby the latter agreed to pay to the former, for the privilege of extracting gasoline from the gas, a price which the court thought inadequate, was disregarded by the court, and the natural gas company credited with a return which the court deemed proper, in Charleston v. Public Service Commission, 95 W. Va. 91, 119–127, 120 S. E. 398, 408–412, P. U. R. 1924B, 601, 628–636 (1923). Meredith, J., in his very interesting opinion, distinguishes the case from the telephone contract.

[22] Portions of the opinion are omitted. The portion here printed appears on pages 82–84 of P. U. R. 1921D.

authorizes this Commission to approve a plan for permitting a utility to share in the savings due to efficiencies or economies it may effect:

"Nothing in this act shall be taken to prohibit any public utility from itself profiting, to the extent permitted by the Commission, from any economies, efficiencies or improvements which it may make, and from distributing by way of dividends, or otherwise disposing of, the profits to which it may be so entitled, and the Commission is authorized to make or permit such arrangement or arrangements with any public utility as it may deem wise for the purpose of encouraging economies, efficiencies or improvements and securing to the public utility making the same such portion, if any, of the profits thereof as the Commission may determine."

We believe that utilities, which are largely monopolies and, therefore, not subject to the same active competition as most industries, have less incentive to maintain high efficiency, and we, therefore, welcome a sound and logical plan whereby utilities and the public may share in the savings from efficiencies and economies in operation. Such a plan, to be effective, as pointed out by former President Edgerton, must contemplate a reward to employees as well, and should in its application result in improved service and reduced rates to consumers.

Regarding the proposal of applicant that an allowance be made at this time, in addition to the estimated cost of operation, as a reward for present efficiency, it must be pointed out that the estimated costs for 1921 are based largely upon conditions existing in 1920, when, without question, there was a tendency to reduced efficiency in all lines of endeavor. It must be assumed that employees up to the present time have been adequately compensated by the utility for services rendered, and, further, the evidence does not show that the company at this time is any more than reasonably efficient. The testimony of Mr. R. H. Ballard, general manager of the company, that great efficiencies could be obtained by the adopting of the plan, recognizes that the present efficiency is not perfect. The Commission, therefore, concludes that after allowing operating costs, including the total regular pay roll, a sufficient margin exists for the company to practice and put into effect efficiencies and economies in operation. No bonus should be required at this time to be paid by consumers in order to urge the company and its employees to effect all possible efficiencies.

The second part of applicant's plan is, as far as we can determine, a proposal that increased profits from any cause be shared on the basis of 50 per cent. to consumers, 25 per cent. to the stockholders and 25 per cent. to employees. It must be pointed out, however, that the Public Utilities Act does not contemplate a division of increased profits due to reductions in price of labor, materials and supplies, increased earnings due to reductions in the level of economic conditions, possible reductions in the price of oil or reduced cost of

development of power resulting from conditions not under the control of the company.

The Commission is of the opinion that a workable plan for the division of the savings due to efficiencies and economies on the part of the company or its employees is desirable, and, while approval cannot be given the company's proposal in its present form, we invite a definite and specific plan providing for the determination of the savings properly due to increased efficiency and for their division between the company, its employees and its consumers. If such a plan is carefully developed, promptly submitted and finally approved, there is apparently no reason to prevent its application to any savings effected during the current year.[23] * * *

II. Expenses Alterable by Government

FRANK HAIGH DIXON, "RAILROADS AND GOVERNMENT." †

(Scribner's [1922] pp. 332–334.)

One question which the act [the Transportation Act of 1920; U. S. Comp. St. Ann. Supp. 1923, § 10071¼ et seq.] does not settle is that of the relation of wages to rates, specifically the relation of the Labor Board to the Interstate Commerce Commission. It has frequently been asserted, and with some measure of justification, that the body that makes the rates should have control of the expenses, and particularly of that largest single item, the wage bill. The Commission is instructed to see that the railroads are honestly and efficiently managed, but its only direct connection with the wage situation is in the

[23] Inducing efficiency by allowing a rate of return higher than that needed to attract capital is discussed supra, pages 1081–1085.

A valuable discussion of the entire problem of efficiency in public utilities is contained in Charles Stillman Morgan's "Regulation and the Management of Public Utilities" (Houghton Mifflin Co., 1923), and in J. M. Clark, "Social Control of Business," chapter XXIV (University of Chicago Press, 1926).

An attempt of another sort to induce efficiency is to be found in the following, from the California Railroad Commission in the case of In re West Side Gas Co., P. U. R. 1916A, 276, 281 (1915):

"While we shall grant applicant part of the increase it has asked for, we want it to understand that we are by no means satisfied with the manner in which it is running its plant. Other companies are furnishing natural gas under more or less similar conditions at much lower rates than those herein established, and we wish to warn applicant that if any such company should apply for a certificate of public convenience and necessity to enter the territory now served by applicant, and should offer to furnish gas at a material reduction, and should show that it could make a reasonable profit in so doing, we could not deny the application."

† From RAILROADS AND GOVERNMENT, by Frank Haigh Dixon, copyright, 1922, by Charles Scribner's Sons, by permission of the publishers.

requirement that the Labor Board shall keep it informed by transmitting its decisions. To what extent does the Labor Board recognize the rate situation or the financial condition of the carriers in making its wage decisions? When the abolition of national agreements was demanded by the carriers, they made much of their serious financial condition. The board recognized that while its authority was limited to fixing wages and working rules, it could not overlook the fact that rules affected operating expenditures, and that unreasonable rules imposed an undue burden on carrier and public. Nevertheless, it said that the general financial condition of the roads was a matter for the Commission and not for the board. This can only mean that the board, while necessarily taking cognizance of the general financial situation, will decline to accept testimony specifically demonstrating the financial condition of the carriers. Yet, in both the law itself and in its interpretation by the board, there is a recognition of the inseparability of rates and wages. Reference has already been made to the circumstances or conditions which the law says must be taken into account by the board in adjusting wages, such, for example, as skill, hazard, and responsibility. The statute requires the board to take these factors into account "among other relevant circumstances." In its second wage decision the board declared that "other relevant circumstances" included "the relation of railroad wages to the aggregate of transportation costs and requirements for betterments, together with the burden on the entire people of railroad transportation charges." Again, the statute provides that the Labor Board may suspend any decision on an individual road if it is "of the opinion that the decision involves such an increase in wages or salaries as will be likely to necessitate a substantial readjustment of the rates of any carrier," and shall hear and decide the case promptly.

It is evident, therefore, that the Labor Board cannot and does not decide wage questions without regard to their effect upon railroad revenue. But neither can the Commission fix rates regardless of the wage decisions of the Labor Board, for it is its duty to prescribe rates that under honest and efficient management will produce in net operating income certain results definitely specified by statute. These results cannot be attained if expenses, of which wages are the largest factor, are not fully taken into account. The close practical relationship of rates and wages necessarily prevails. The present situation is a travesty on justice, in which two federal agencies control essential factors in railroad income and expense, and in which neither is under statutory compulsion to take account of the rulings of the other. * * *

But an assumption of authority by the Commission over both rates and wages would not get rid of the difficulty of determining which should have prior consideration. It would merely get rid of the public scandal of having two official bodies at loggerheads. From the standpoint of economic theory there is no question but that wages must come first. There may be temporary emergencies, such as the

present one created by a world-wide upheaval of industrial conditions, in which some compromise with fundamental conditions is necessary, when a deficit must be divided as equitably as possible between carrier, employer [employee?], and the public. But under normal conditions communities cannot expect to obtain railroad service unless they pay for it. Among the costs of furnishing this service, labor is the largest element. Labor must be paid the going rate for similar service outside if the railroads are to compete effectively with other capital in the labor market. The Interstate Commerce Commission must accept the determination of the Labor Board as one of the controlling elements in the fixing of rates. And, if the situation requires it, this must be made clear by a legislative mandate.

In re APPLICATION COLUMBUS WATER AND LIGHT COMMISSION.[24]

(Railroad Commission of Wisconsin, 1913. 11 Wis. R. C. R. 449.)

* * * There is a certain relation of equity existing between consumers and taxpayers which demands that one be not benefited at the expense of the other. If a municipally owned utility does not pay taxes to the city just as a privately owned plant would, it means that taxes must be higher and that what the consumers of the utility do not pay through rates the taxpayers must. If all the taxpayers were consumers, this inequity would be considerably lessened, but, as they are not, it seems only reasonable and fair that in this instance, at least, taxes at the rate of about 1 per cent. on the present value should be included as a component part of a reasonable rate.[25] * * *

[24] Portions of the opinion are omitted. The portion here printed appears on pages 456, 457, of the report.

[25] Taxes on railroads and public utilities are of course part of the expenses, and are paid by the consumers, if the rates, in the absence of the taxes, would be reduced. These taxes frequently depend in part on the rates and earnings of the companies, as when they are based on gross or net earnings or the value of franchises or of railroad roadbed. But the rates are supposedly made to depend in part on the taxes, as one of the expenses. There is no necessarily circular reasoning in this, however. If the law states the basis on which the taxes are to be calculated, the rate-making body can, if the other factors are known, estimate what the gross earnings must amount to in order to yield the requisite fair return over and above the expenses inclusive of taxes. Thus, for simplicity, suppose that there is a 10 per cent. tax on net earnings. The tax authorities base the 10 per cent. on the amount of earnings that would be "net" were it not for the deduction of the tax. Let us assume that the rate body considers that the company ought to be allowed to distribute to its security holders $900,000. By reason of the 10 per cent. tax, it will only be able to distribute 90 per cent. of what it collects over and above its expenses exclusive of the tax. If rates are fixed which will yield $1,000,000 over and above other expenses, this will be the amount which the state will tax 10 per cent. After paying the $100,000 tax, there will be left the requisite $900,000 for distribution. A tax might conceivably be fixed so as not to influence the action of the rate-making body. If the latter conceives a certain return to be fair,

COMMONWEALTH ex rel. VIRGINIA RAILWAY & POWER CO. v. CITY OF PORTSMOUTH.[26]

(Corporation Commission of Virginia, 1923. P. U. R. 1924B, 130.)

Petition by a street railway company for relief from certain paving and repaving obligations imposed by franchise; petition granted.

By the Commission: The questions here presented for determination arise out of a demurrer by the city of Portsmouth to a petition filed with the State Corporation Commission by the Virginia Railway & Power Company. * * *

This Commission being of opinion, therefore, that there is no valid contract obligation on the company in respect to the alleged duty of paving, and that, even if there were such a contract, the state has the power with the consent of the company and against the protest of the city to suspend such duty, and that it has invested this Commission with such power of suspension, the demurrer of the city of Portsmouth should be overruled.

Having disposed of the question of jurisdiction raised by the demurrer we now pass to the consideration of the propriety of granting the request of the Virginia Railway & Power Company relative to the suspension of the duty of paving. It appears from the record of the testimony adduced in this case, special reference being here made to the testimony of W. H. Kehley, general auditor of the Virginia Railway & Power Company that the power company has for some time been operating its Portsmouth system at considerable financial loss. For the twelve months of the calendar year 1922, the operation resulted in a deficit of $83,970. The taxes for that year were $14,679. Thus, for operating expenses and taxes there is a deficit of $98,649. For the first seven months of the current year the operation of the railway division in Portsmouth, including taxes, showed a deficit of approximately $17,434. It appears that the cost of the paving in question would be an amount approximating $175,000. To impose this heavy burden on the power company under present conditions would be unjust and unfortunate; unjust to the power company and unfortunate to the public whose needs it is designed to serve.

but for other reasons of policy fixes rates which yield a surplus above that return, or if it fixes rates which it supposes will yield the exact fair return but which turn out to yield more, a very heavy tax might be levied on the surplus. This tax will not cause the Commission to fix rates higher than they otherwise would be, for they still yield all that the Commission thinks the company should get. In the case of this sort of tax there is no reciprocal dependence of the two governmental bodies; the rate-making body acts independently and the taxing body follows. Note the cases, infra, pages 1173 ff, concerning the "recapture clause" of the Transportation Act of 1920 (U. S. Comp. St. Ann. Supp. 1923, § 10071¼ et seq.).

[26] Portions of the opinion are omitted.

The suggestion that the power company might be enabled to carry such a burden by raising its rates is unworthy of consideration because an attempt to do so would raise the rates to a point beyond the willingness of the car rider to pay and the natural and logical result of such a course would be the discontinuance of service by the power company. The imposition of paving costs in the present day is generally recognized as economically unsound; certainly the imposition of such a burden on an operation already losing nearly $100,000 annually is not to be seriously thought of. Nor is the fact that the Virginia Railway & Power Company is making profits from its operations in cities other than Portsmouth, if that be true, a valid reason for refusing to grant this request of the power company and thus compel it to divert to its Portsmouth operation, for the purpose of covering losses there, the profits made by operations in other communities. Brooks-Scanlon Co. v. Railroad Commission, 251 U. S. 396, 40 S. Ct. 183, 64 L. Ed. 323, P. U. R. 1920C, 579.[27] * * *

SECTION 5.—DIVISION OF JOINT RATES

CHESAPEAKE & POTOMAC TELEPHONE CO. v. WHITMAN.

(District Court of the United States, D. Maryland, 1925. 3 F.[2d] 938.)

ROSE, Circuit Judge.[28] * * * The Commission has, however, concluded that the methods by which the net earnings of the company, and therefore its return, have been heretofore figured, are inaccurate and unfair to the public. It has reached this conclusion because of certain consequences which it deduces from the relations between the Maryland Company [the Chesapeake & Potomac Telephone Company] and its owner, the National [the American Telephone & Telegraph Company]. To those relations it devotes a half or more of its opinion. In so far as it deals with the figures, the discussion centered principally around two matters; one the so-called license agreement, and the other the apportionment between the two companies of the charges

[27] On May 7, 1925, the Illinois Commerce Commission ordered "that every railroad company, operating in or within the state of Illinois, shall provide for the use of its conductors, brakemen, switchmen, engineers, firemen, train baggagemen, and hostlers suitable washrooms, bathing facilities, and locker rooms, when the Commission shall find that the same, or any part thereof, are necessary at any and all terminals, yard offices, and roundhouses." Brotherhood of Railroad Trainmen v. Atchison, T. & S. F. R. Co., P. U. R. 1925D, 697 (1925).

Here again, of course, is an expense required by the Commission which must be covered by the rates fixed by the same Commission.

[28] Portions of the opinion are omitted. The portion here printed appears on pages 954–959, of the report.

for such part of the interstate telephone communications as are carried on over the lines of the National Company. * * *

The toll arrangement in force during the time of the hearing before the Commission was one by which the Maryland Company received 25 per cent. of the cash receipts from each single connection, not exceeding 30 cents for each single connection, and twice as much when the business originated at pay stations from which the Maryland Company was entitled to a commission. During the hearing before the Commission a sliding scale of compensation to the Maryland Company had been arranged for, to become operative on the 1st of January, 1925. Apparently it will make an appreciable increase in the amount retained by the Maryland Company.

The Commission said in its opinion: "Admitting that the local company receives benefits as the result of the license contract, the Commission made diligent efforts to discover definitely in detail how the parent company, in turn, benefited from its relations with the local company, and what was the actual cost to the parent company of the services it renders under that contract." It was the opinion of the Commission, an opinion, as it thought, sustained by the testimony, that, while the Maryland Company and the other associated companies pay the entire cost of the service rendered under the license contract, and a very handsome profit on that cost, the benefits derived from the long lines division of the National Company from the service rendered the associated companies are as great as, if not greater than, those received by the associated companies themselves.

In this connection the Commission assumed that, in the case of a public utility, such as the National Company claims to be, and actually is, the cost of rendering a service to another division of that same utility ought to bear some relation to the charge made for the service. When corporations are so closely tied together by stock ownership as are the companies in the Bell System, they are, to all intents and purposes, the Commission said, one company. That was especially true, the Commission thought, when, as in this case, the allied companies form a substantial monopoly of an absolutely essential service, and are, to a very large extent, protected by law or custom in the possession of that monopoly. * * *

The Commission expressly said that it did not find fault with the unification of the telephone interests in the country in the Bell System; that it recognized the benefits obtained by the people by reason of that unification and by the standardization of services and equipment, by which alone long-distance service particularly is made practical. But the Commission felt that, if the system was to be considered as a whole for the benefit and purpose of its owners, it ought also to be considered as a whole when the subscribers' interests are at stake. It believed that the benefits of unification ought to be distributed evenly among all parts of the system, as well as the cost of maintaining the system, and the benefits should not be largely absorbed by one branch of the

service, while the other parts are burdened with the cost. On long-distance interstate calls the Commission said the Maryland Company owns, maintains, and operates all equipment, does all bookkeeping, collects all revenues, transmits over its lines to the nearest National Company junction point all originating messages, where they are delivered to the National Company's lines. It receives all in-coming messages of the National Company's lines and delivers them to Maryland subscribers. For all of this service the Maryland Company received about 15 per cent. of the originating commission.

All of the foregoing and other matters of the same general nature, but of less importance, led the Commission to the conclusion that the fair value of all of the telephone property in Maryland of both companies should be considered as the base for establishing telephone rates in Maryland, especially as the property is actually used as a whole, one part supplemented by the other. The Commission held that, if the rate of return from the whole was adequate and compensatory, it could make no material difference to the owners of the property how the whole was divided. It therefore took as a rate base what it was convinced was the fair value of this entire property; that is to say, it put a valuation, the substantial correctness of which is not, we believe, challenged, upon the value of the National Company's property in the state. It added that to what it found to be the fair value for rate-making purposes of the Maryland Company's property in Maryland, and assumed the total to be the amount upon which a fair return was to be earned. It determined the return which it thought was actually received by adding to the Maryland Company's admitted income all the payments to the National Company for toll messages and twenty-two thirty-eighths of those under the license contract, as well as some other miscellaneous receipts which apparently should not, in any theory, have been included unless certain offsetting entries were made. In this way it reached the conclusion that the present value of the property in Maryland on which a return was to be earned was $27,801,131, and the net revenue therefrom $2,037,498, or at the rate of 7.3 per cent. * * *

We have not the shadow of doubt, and we find as a fact, that the Maryland Company is completely controlled by the National. It has no independent will of its own. It follows that the dealings between the two, whether in the form of intercorporate contracts or otherwise, are necessarily open to the close scrutiny of courts and commissions.

The so-called license contract under which the Maryland Company pays the National 4½ per cent. of its gross revenues is identical in terms with that between the National Company and the Southwestern Bell Company, which figured in Houston v. Southwestern Bell Telephone Co., 259 U. S. 318, 42 S. Ct. 486, 66 L. Ed. 961, and in Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission, 262 U. S. 276, 43 S. Ct. 544, 67 L. Ed. 981, 31 A. L. R. 807, and also with that between the National and the Southern Bell Tele-

phone & Telegraph Company in issue in the case of the last-mentioned corporation against the Railroad Commission of South Carolina. (D. C.) 299 F. 615.

By these cases it is settled that, in the absence of some showing of bad faith, such contracts are binding upon local telephone companies, and must be respected by commissions and courts, provided that the company clearly shows that the charge made and allowed for the services rendered and supplies furnished was reasonable, and less than that at which the same could be obtained from other sources. Houston v. Southwestern Bell Tel. Co., supra. The evidence on this point offered upon the part of the company was convincing. Indeed, the Commission has never questioned that, if the National and the Maryland Companies were not under common control, the services rendered by the former to the latter would be well worth all that is charged for them.

What the Commission does claim is that, so far from being independent, the Maryland Company is a mere name under which the National operates a part of its business. To determine what return comes to the real owner of the property standing in the name of the Maryland Company, it is, in its view, necessary to consider all the income which that owner receives from such property, no matter what may be the channel through which it reaches its treasury. Of course, in determining whether such receipts amount to a fair return upon the property used in earning them, it is necessary to bring into the calculations the present actual value, not only of the assets technically belonging to the Maryland Company, but also any others actually employed in performing the services, whether the nominal proprietor of such other property is the National Company or some one of its subsidiaries, other than the Maryland Company. This contention has great force, but cannot be adopted by us, because it has been definitely rejected by the Supreme Court of the United States. Houston v. Southwestern Bell Telephone Co., supra; Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission, supra.

Very similar considerations apply to the agreements under which the receipts from interstate business are divided between the two companies. The testimony shows that the interstate business is profitable to the Maryland Company. Indeed, if we understand it correctly, it pays relatively better than does the intrastate business. It is not apparent that the Commission thinks otherwise; at least, we find no clear finding by it to the contrary. What it does say is that, whether the Maryland Company makes or it does not make money out of its interstate business, the National gets from it much more than the worth of any service it renders, and that, before the National can be heard to complain that it is not getting a large enough return from that part of its property which it chooses to put and keep in the name of its Maryland subsidiary, it must account for all the net profit directly accruing to it from its share of the tolls upon interstate business.

The Commission does not question that a system by which every

Marylander who has a telephone may, if he will, talk to anybody who is similarly equipped anywhere between the two oceans, is of incalculable value. The Maryland Company could well afford to pay for such widespread facilities all that it does, provided, of course, that what it does pay does not exceed what it gets for its part in maintaining and operating this system of nation-wide communication. As already stated, under the provisions of these contracts, the interstate business of the Maryland Company is profitable. Such being the case, we are unable on principle to distinguish these contracts for the division of toll revenues from the license agreements. If so, the questions raised by the Commission concerning them are also foreclosed by what the Supreme Court has said in the cases already cited.

As has been stated, we agree with the Commission that the Maryland Company is an instrument of the National. If one looks through form to substance, the National owns all the property of the Maryland. Nobody other than it and its stockholders is interested in the income from the telephone business in this state. The Commission, therefore, naturally feels that it is not possible to determine whether the owner of the property used for the telephone service in Maryland is receiving a fair return on its real value, unless there is taken into the reckoning everything it gets from all its property used in that service. The fact that part of what is really its property stands in the name of one of its instruments and part in that of another, and that some of the income which ultimately comes to it comes through one channel and the balance through another, does not go to the essence of things. Nor to one unlearned in the law would it be altogether clear that the situation is much altered by the fact that the owner and each of its controlled corporations have separate boards of directors, made up in whole or in part of different individuals, every one of whom, however, is named by the same will, and no one of whom retains his directorship longer than that will pleases, or by the other fact that these boards of directors go through the form of making contracts with each other.

Let it be granted that there is no answer to the contentions so stated. Yet, even so, they deal with only one part of a problem with which we are confronted under our dual system of rate-making. All of us, in Maryland, in Virginia, in Texas, and in California alike, want and need a telephone system operating as a unit throughout the land. Nowhere are the manifold advantages resulting from such a centralized control more forcibly put than in one of the paragraphs of the Commission's opinion in the instant case. There it is said the telephone "system as developed gives the people of this country the best and most economical telephone service in the world and is more universally used than in any other country. About 63 per cent. of all the telephones in the world are located in the United States. There are 13.1 telephones in this country per every 100 population, while in Europe there are only 1.2 telephones per 100 population. The telephone devel-

opment in this country has been entirely by private concerns, while in Europe the development has been mostly under government ownership. The highest telephone development in any country in Europe, 8.3 telephones per 100 population, is in Denmark, where the telephone service is almost entirely operated by private companies."

The experience of the men who built up this system of telephone service, and of those who now manage it, has convinced them that it can best be maintained by uniform arrangements, or substantially uniform arrangements, throughout the country, in the matter of license fees and the division of toll charges. Such uniformity will be impossible, if the reasonableness of the agreements for it are subject to the judgment of 48 distinct commissions, made up of men of varying types of mind and approaching the subject from widely different points of view. Many of them are keenly alive to the desirability of reducing rates within their own jurisdiction, but they are not all of them gifted with sufficient breadth of imagination to put themselves in the place of those living in distant parts of the country. As a practical matter, the regulation of the common business of the National system must be left to the federal government.

The National Company may be getting an unjustifiably large return upon the real value of the property it uses in the public service. Such evidence as was submitted to us tended to show that such was not the case. It, however, all came from the Maryland or the National Company. It did not go very deeply into the subject, and it was not necessarily conclusive. A full and searching inquiry into such matters can in practice scarcely be made otherwise than under the auspices of the federal government. If, as a result of such investigation, it shall be established the National Company is putting undue and unnecessary burdens upon the telephone users of the country, it may be required to reduce its license fees or to permit the local companies to retain a larger percentage of the tolls paid for interstate service. Such a method of dealing with the problem would be more effective than anything which could possibly be done by a state commission or by the commissions of several states. Moreover, if the subject be approached from that standpoint and dealt with in the manner indicated, there will be little or no reason for the federal commission in any wise to limit or interfere with the regulation of intrastate rates by state commissions.

Until the federal authorities act, state commissions and courts reviewing their action cannot, in the absence of some substantial proof of bad faith or of manifest unfairness, go farther than to satisfy themselves that the National Company is not charging its local subsidiaries more than the service rendered by it to them is worth. They may not, so the Supreme Court has said, go into an inquiry as to how profitable the business may be to the National Company, or as to what percentage that company earns upon its property used in the public service. * * *

THE NEW ENGLAND DIVISIONS CASE (AKRON, C. & Y. RY. CO. v. UNITED STATES).

(Supreme Court of the United States. 1923. 261 U. S. 184, 43 S. Ct. 270, 67 L. Ed. 605.)

Mr. Justice BRANDEIS delivered the opinion of the court.[29]

Transportation Act 1920, c. 91, § 418, 41 Stat. 456, 486, amending Interstate Commerce Act, § 15 (6), authorizes the Commission, upon complaint or upon its own initiative, to prescribe, after full hearing, the divisions of joint rates among carriers parties to the rate. In determining the divisions, the Commission is directed to give due consideration, among other things, to the importance to the public of the transportation service rendered by the several carriers; to their revenues, taxes, and operating expenses; to the efficiency with which the carriers concerned are operated; to the amount required to pay a fair return on their railway property; to the fact whether a particular carrier is an original, intermediate, or delivering line; and to any other fact which would, ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another of the joint rate.

Invoking this power of the Commission the railroads of New England[30] instituted, in August, 1920, proceedings to secure for themselves larger divisions from the freight moving between that section and the rest of the United States, the joint rates on which had just been increased pursuant to the order entered in Ex parte 74, Increased Rates, 1920, 58 I. C. C. 220. More than 600 carriers of the United States, mostly railroads, were made respondents. The case was submitted on voluminous evidence. On July 6, 1921, a report was filed. The relief sought was not then granted; but no order was entered. Instead, the parties were directed by the report to proceed individually to readjust their divisional arrangements, and the record was held open for submission of the readjustment. New England Divisions, 62 I. C. C. 513. This direction was not acted on. Five months later the case was reargued upon the same evidence. On January 30, 1922, the Commission modified its findings and made an order (amended March 28, 1922) which directed, in substance, that the divisions, or shares, of the several New England railroads[31] in the joint through freight rates be increased 15 per cent. New England Divisions, 66 I. C. C. 196. Since it did not increase any rate, it necessarily reduced the aggregate amounts receivable from each rate by carriers operating west of Hud-

[29] Unless otherwise indicated, the footnotes are by the court. Portions of the opinion are omitted.—[Editorial footnote.]

[30] Except the Boston & Albany, which is leased to the New York Central, one of the trunk lines which was a respondent before the Commission, and branches of two Canadian systems, the Grand Trunk and the Canadian Pacific.

[31] Other than the Bangor & Aroostook, which had been a complainant before the Commission, and the Boston & Albany, which had not.

son river. The order was limited to joint class rates and those joint commodity rates which are divided on the same basis as the class rates.[32] It related only to transportation wholly within the United States. It was to continue in force only until further order of the Commission, and it left the door open for correction upon application of any carrier in respect to any rate.

Prior to the effective date of that order, there was in force between each of the New England carriers and substantially each of the railroads operating west of the Hudson, a series of contracts providing for the division of all joint class rates upon the basis of stated percentages.[33] These agreements were in the form of express contracts. Section 208 (b) of Transportation Act of 1920 provided that all divisions of joint rates in effect at the time of its passage should continue in force until thereafter changed either by mutual agreement between the interested carriers or by state or federal authorities. The second report enjoined upon all parties the necessity for proceeding, as expeditiously as possible, with a revision of divisions upon a more logical and systematic basis, made specific suggestions as to the character of the study to be pursued, and invited carriers to present to the Commission any cases of inability to agree upon such revision. No further application was, however, made to the Commission.

In March, 1922, this suit was commenced in the federal court for the Southern District of New York to enjoin enforcement of the order and to have it set aside as void. The Akron, Canton & Youngstown Railway and 43 other carriers[34] joined as plaintiffs, suing on behalf of themselves and others similarly situated. The United States alone was named as defendant. But the Interstate Commerce Commission and 10 New England carriers intervened as such and filed answers. The case was then heard, on application for an interlocutory injunction, by three judges, under the provisions of Urgent Deficiencies Act Oct. 22, 1913, c. 32, 38 Stat. 208, 219 (Comp. St. § 998). The full record of the proceedings before the Commission, including all the evidence, was introduced. The injunction was denied ([D. C.] 282 F. 306), and the case is here by direct appeal. Plaintiffs urge six reasons why the order of the Commission should be held void.

First. It is contended that the order is void, because its purpose was not to establish divisions just, reasonable, and equitable, as between

[32] Thus the order does not include traffic passing through Canada. Nor does it apply to rates on coal (which constitutes about two-fifths of the total interchanged tonnage), nor to those on certain other commodities.

[33] Compare St. Louis Southwestern Ry. Co. v. United States, 245 U. S. 136, 139, note 2, 38 S. Ct. 49, 62 L. Ed. 199 (1917); Central R. R. Co. of New Jersey v. United States, 257 U. S. 247, 42 S. Ct. 80, 66 L. Ed. 217 (1921).

[34] The number of carriers named as respondents in the order entered by the Commission is 617. Only 44 of these originally joined as plaintiffs in this suit. One of these, the Illinois Central, withdrew; 39 intervened later as plaintiffs. Leading trunk lines—the New York Central, the Pennsylvania, and the Baltimore & Ohio—by which a large part of all traffic interchanged with the New England railroads was carried, acquiesced in the Commission's order.

connecting carriers, but, in the public interest, to relieve the financial needs of the New England lines, so as to keep them in effective operation. The argument is that Congress did not authorize the Commission to exercise its power to accomplish that purpose. An order, regular on its face, may, of course, be set aside if made to accomplish a purpose not authorized. Compare Southern Pacific Co. v. Interstate Commerce Commission, 219 U. S. 433, 443, 31 S. Ct. 288, 55 L. Ed. 283. But the order here assailed is not subject to that infirmity.

Transportation Act 1920 introduced into the federal legislation a new railroad policy. Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., 257 U. S. 563, 585, 42 S. Ct. 232, 66 L. Ed. 371. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses, particularly those arising from excessive or discriminatory rates. The 1920 act sought to insure, also, adequate transportation service. That such was its purpose Congress did not leave to inference. The new purpose was expressed in unequivocal language.[35] And, to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range.[36] Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service.[37] Upon the Commission new powers were conferred, and new duties were imposed.

The credit of the carriers, as a whole, had been seriously impaired. To preserve for the nation substantially the whole transportation sys-

[35] Thus: To enable the carriers "properly to meet the transportation needs of the public," section 422, p. 491; to give due consideration to "the transportation needs of the country, and the necessity * * * of enlarging [transportation] facilities," section 422, p. 488; to "best meet the emergency and serve the public interest," section 402, p. 477; to "best promote the service in the interest of the public and the commerce of the people," section 402, pp. 476, 477; "that the public interest will be promoted," section 407, p. 482.

[36] Among them are the establishment of the Railroad Labor and the Adjustment Boards. Title III, pp. 469–474. See Pennsylvania R. R. Co. v. United States Railroad Labor Board, 261 U. S. 72, 43 S. Ct. 278, 67 L. Ed. 536 (1923), decided this day. The provisions for raising capital, by new government loans, section 210, pp. 468, 469; by loans from the railroad contingent fund (the recapture provision), section 15a (10, 16), pp. 490, 491; those placing the issue of new securities under the control of the Commission, unaffected by the laws of the several states, section 439, pp. 494–496; the provision for consolidation of railways into a limited number of systems, section 407, pp. 480–482; provisions for securing adequate car service, Lambert Run Coal Co. v. Baltimore & Ohio R. R. Co., 258 U. S. 377, 42 S. Ct. 349, 66 L. Ed. 671 (1922); for joint use of terminals; for routing; for interchange of traffic between railroads, and between a railroad and water carrier, section 402, pp. 476–478; section 405, p. 479; sections 412, 413, p. 483.

[37] Section 422, pp. 488, 489. To this end, also, the Commission was empowered, among other things, to permit pooling of traffic or earnings, section 407, pp. 480, 481; to authorize abandonment of unprofitable and unnecessary lines, section 402, p. 477; Texas v. Eastern Texas R. R. Co., 258 U. S. 204, 42 S. Ct. 281, 66 L. Ed. 566 (1922); to fix minimum, as well as maximum, rates; and thus prevent cut-throat competition and the taking away of traffic from weaker competitors, section 418, p. 485; to prevent the depletion of interstate revenues by discriminating intrastate rates, Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., 257 U. S. 563, 42 S. Ct. 232, 66 L. Ed. 371 (1922); New York v. United States, 257 U. S. 591, 42 S. Ct. 239, 66 L. Ed. 385 (1922); and to determine the division of joint rates.

tem was deemed important. By many railroads funds were needed, not only for improvement and expansion of facilities, but for adequate maintenance. On some, continued operation would be impossible, unless additional revenues were procured. A general rate increase alone would not meet the situation. There was a limit to what the traffic would bear. A 5 per cent. increase had been granted in 1914, The Five Per Cent. Case, 31 I. C. C. 351; Id., 32 I. C. C. 325; 15 per cent. in 1917, The Fifteen Per Cent. Case, 45 I. C. C. 303; 25 per cent. in 1918, General Order of Director General, No. 28. Moreover, it was not clear that the people would tolerate greatly increased rates (although no higher than necessary to produce the required revenues of weak lines), if thereby prosperous competitors earned an unreasonably large return upon the value of their properties. The existence of the varying needs of the several lines and of their widely varying earning power was fully realized. It was necessary to avoid unduly burdensome rate increases and yet secure revenues adequate to satisfy the needs of the weak carriers. To accomplish this two new devices were adopted: The group system of rate making and the division of joint rates in the public interest. Through the former, weak roads were to be helped by recapture from prosperous competitors of surplus revenues. Through the latter, the weak were to be helped by preventing needed revenue from passing to prosperous connections. Thus, by marshaling the revenues, partly through capital account, it was planned to distribute augmented earnings, largely in proportion to the carrier's needs. This, it was hoped, would enable the whole transportation system to be maintained, without raising unduly any rate on any line. The provision concerning divisions was, therefore, an integral part of the machinery for distributing the funds expected to be raised by the new rate-fixing sections. It was, indeed, indispensable.

Raising joint rates for the benefit of the weak carriers might be the only feasible method of obtaining currently the needed revenues. Local rates might already be so high that a further increase would kill the local traffic. The through joint rates might be so low that they could be raised without proving burdensome. On the other hand the revenues of connecting carriers might be ample; so that any increase of their earnings from joint rates would be unjustifiable. Where the through traffic would, under those circumstances, bear an increase of the joint rates, it might be proper to raise them, and give to the weak line the whole of the resulting increase in revenue. That, to some extent, may have been the situation in New England, when, in 1920, the Commission was confronted with the duty, under the new section 15a, of raising rates so as to yield a return of substantially 6 per cent. on the value of the property used in the transportation service. Ex parte 74, Increased Rates, 1920, 58 I. C. C. 220.[38]

[38] There is evidence that the rate per ton per mile received by the New Haven from freight local to its lines was four times as high as the rate per ton

The deficiency in income of the New England lines in 1920 was so great that (even before the raise in wages ordered by the Railroad Labor Board) an increase in freight revenues of 47.40 per cent. was estimated to be necessary to secure to them a fair return. On a like estimate, the increased revenues required to give the same return to carriers in Trunk Line Territory was only 29.76 per cent. and to carriers in Central Freight Association Territory 24.31 per cent.[39] To have raised the additional revenues needed by the New England lines wholly by raising the rates within New England—particularly when rates west of the Hudson were raised much less—might have killed New England traffic. Rates there had already been subjected (besides the three general increases mentioned above) to a special increase, applicable only to New England, of about 10 per cent. in 1918. Proposed Increases in New England, 49 I. C. C. 421. A further large increase in rates local to New England would, doubtless, have provoked more serious competition from auto trucks and water carriers. For hauls are short and the ocean is near. Instead of erecting New England into a separate rate group, the Commission placed it, with the other two subdivisions of Official Classification Territory, into the Eastern Group, and ordered that freight rates in that group be raised 40 per cent. At that rate level the revenues of the carriers in Trunk Line and Central Freight Association territories would, it was asserted, exceed by 1.48 per cent. what they would have received if they had been a separate group. It was estimated that the excess would be about $25,000,000.[40] Substantially that amount (besides the additional revenue to be raised otherwise) was said to be necessary to meet the needs of the New England lines.

Plaintiffs insist that Transportation Act 1920 did not, by its amendment of section 15 (6) change, or add to, the factors to be considered by the Commission in passing upon divisions; * * * that the only new feature was the grant of authority to enter upon the inquiry into divisions on the Commission's initiative. * * * But Congress had, also, the broad purpose explained above. This is indicated, among other things, by expressions used in dealing with joint rates. By new section 15 (6), p. 486, the Commission is directed to give due consideration, in determining divisions, to "the importance to the public of the transportation services of such carriers;" [41] just as by new section 15 (3), p. 45,

per mile, under existing divisions, on freight interchanged by it with carriers west of Hudson river.

[39] What is known as Official Classification Territory comprises the three subdivisions, New England Freight Association Territory, Trunk Line Association Territory, and Central Freight Association Territory. See map, The Five Per Cent. Case, 31 I. C. C. 350 (1914).

[40] Estimated on the volume of traffic moving in 1919.

[41] In thus making clear that in fixing divisions as well as rates the public interest should be considered, Congress doubtless had in mind expression to the contrary in opinions of the Commission. See Germain Co. v. New Orleans & Northeastern R. R. Co., 17 I. C. C. 22, 24 (1909); Board of Trade of Chicago v. Atlantic City R. R. Co., 20 I. C. C. 504, 508 (1911); In re Divi-

the Commission is authorized upon its own initiative when "desirable in the public interest" to establish joint rates and "the divisions of such rates."

Second. It is contended that if the act be construed as authorizing such apportionment of a joint rate on the basis of the greater needs of particular carriers it is unconstitutional. There is no claim that the apportionment results in confiscatory rates, nor is there in this record any basis for such a contention. The argument is that the division of a joint rate is essentially a partition of property; that the rate must be divided on the basis of the services rendered by the several carriers; that there is no difference between taking part of one's just share of a joint rate and taking from a carrier part of the cash in its treasury; and, thus, that apportionment according to needs is a taking of property without due process. But the argument begs the question. What is its just share? It is the amount properly apportioned out of the joint rate. That amount is to be determined, not by an agreement of the parties or by mileage. It is to be fixed by the Commission; fixed at what that board finds to be just, reasonable, and equitable. Cost of the service is one of the elements in rate making. It may be just to give the prosperous carrier a smaller proportion of the increased rate than of the original rate. Whether the rate is reasonable may depend largely upon the disposition which is to be made of the revenues derived therefrom.

What the Commission did was to raise the additional revenues needed by the New England lines, in part, directly, through increase of all rates 40 per cent. and, in part, indirectly, through increasing their divisions on joint rates. In other words, the additional revenues needed were raised partly by a direct, partly by an indirect tax. It is not true, as argued, that the order compels the strong railroads to support the weak. No part of the revenues needed by the New England lines is paid by the western carriers. All is paid by the community pursuant to the single rate increase ordered in Ex parte 74. If, by a single order, the Commission had raised joint rates throughout the Eastern group 40 per cent., and, in the same order, had declared that 90 per cent. of the whole increase in the joint rates should go to the New England lines (in addition to what they would receive under existing divisions), clearly nothing would have been taken from the Trunk Line and Central Freight Association carriers, in so ordering. The order entered in Ex parte 74 was at all times subject to change. The special needs of the New England lines were at all times before the Commission. That these needs were met by two orders, instead of one, is not of legal significance. The order here in question may properly be deemed a supplement to, or modification of, that entered in Ex parte 74.[42] * * *

sions of Joint Rates on Coal, 22 I. C. C. 51, 53 (1911); Morgantown & Kingwood Divisions, 49 I. C. C. 540, 550 (1918).

[42] The discussion of the third, fourth, and fifth contentions of the appellants is omitted.—[Editorial footnote.]

Sixth. It is contended that the order is void, because it is unsupported by evidence. * * * That the evidence was ample to support the order made, is shown in the opinion of the lower court (282 F. 306, 308, 309), and in the reports of the Commission. To consider the weight of the evidence, or the wisdom of the order entered, is beyond our province. Manufacturers' Railway Co. v. United States, 246 U. S. 457, 38 S. Ct. 383, 62 L. Ed. 831; Skinner & Eddy Corporation v. United States, 249 U. S. 557, 562, 39 S. Ct. 375, 63 L. Ed. 772; Seaboard Air Line Ry. Co. v. United States, 254 U. S. 57, 62, 41 S. Ct. 24, 65 L. Ed. 129. But the way is still open to any carrier to apply to the Commission for modification of the order, if it is believed to operate unjustly in any respect.

Affirmed.*

SECTION 6.—EFFECT OF RATE REDUCTIONS ON THE NET EARNINGS

CHICAGO & GRAND TRUNK RY. CO. v. WELLMAN.

(Supreme Court of the United States, 1892. 143 U. S. 339, 12 S. Ct. 400, 36 L. Ed. 176.)

Mr. Justice BREWER delivered the opinion of the court.[43] * * *

Can it be, under these circumstances, that the court erred in peremptorily refusing to instruct the jury that an act fixing a maximum rate at two cents per mile is unconstitutional? * * * Must it be declared, as matter of law, that a reduction of rates necessarily diminishes income? May it not be possible—indeed, does not all experience suggest the probability—that a reduction of rates will increase the amount of business, and therefore the earnings? At any rate, must the court assume that it has no such effect, and, ignoring all other considerations, hold, as matter of law, that a reduction of rates necessarily diminishes the earnings? If the validity of such a law in its application to a particular company depends upon a question of fact as to its effect upon the earnings, may not the court properly leave that question to the jury and decline to assume that the effect is as claimed? There can be but one answer to these questions. * * *

* For the relations between a carrier which owns property and another to which it leases that property, see Fred Esch, "Valuation of Leased Railroad Property" (1924) 33 Yale Law J. 248.—[Editorial footnote.]

[43] The statement of facts and portions of the opinion are omitted. The portion here printed appears on pages 343, 344, of 143 U. S. (12 S. Ct. 401, 402).

CITY OF COLUMBIA v. WATTS ENGINEERING CO.

(Public Service Commission of Missouri, 1915. P. U. R. 1915B, 921.)

KENNISH, Commissioner.[44] * * * In support of the complaint of exorbitant and unreasonable rates, complainant introduced in evidence a written statement showing the rates charged by other gas companies in the smaller cities of this state, as compared with the rates complained of.[45] * * *

It appears from the foregoing table that the rates in force in Columbia are much higher than in any of the other cities. * * *

It was shown that the cost of coal at Columbia was not above an average, and that the character of the ground was not such as to make the construction of the plant more expensive than in other cities. On the other hand, Columbia is a place of much wealth, has several institutions of learning, including the State University, which bring to the city hundreds of thousands of dollars each year. There are also a number of factories. The University alone consumed in the year 1913, 2,058,000 cubic feet of gas, for which the defendant received the sum of $3,293; and the secretary of the University testified that the amount used by it "is increasing rapidly." From these facts it would seem to follow that Columbia possesses advantages, at least equal to, if not greater than, other cities in this state of its population, for successfully conducting a gas business; and yet it is shown by the testimony that although the plant is economically managed, it has not been a financial success to the owners.[46] * * *

The above figures, therefore, make it apparent that any action of this Commission reducing the present rates would be confiscatory and void, unless such rates are so exorbitant and unreasonable as to unduly restrict the market and thus be the real cause of the unfavorable showing made. We can readily conceive of rates being so high as to result in a loss, when reasonable rates would not be unprofitable; or a small part of the public might be served at a higher rate, when a lower rate within reach of the general public would yield an equal profit to the company. As the company receives its right to engage in business from the state representing the entire public, it should be required to charge such rates as would reach as large a portion of the public as is consistent with its right to just compensation for the use of its property. It appears from the table set out in defendant's brief that in six cities of this state therein compared with Columbia, the average number of consumers per hundred population is 13.3, while the average in Columbia is 5.1, and this comparison in connection with the further fact already shown, that the average net

44 Portions of the opinion are omitted. The portion here printed appears on pages 931–935 of P. U. R. 1915B.

45 A table of comparative rates is omitted.

46 Figures to support this statement are omitted.

rate for gas in the said five cities is $1.13 per thousand cubic feet and $1.75 in Columbia, raises the question whether under reasonable rates the market for the product would not be so expanded as to make the business more profitable even to the company.

The defendant has a plant of double the capacity of its present output, operating ten hours per day. It has a large investment upon which it asks a return, but which is not in full use for want of customers, and considering the great convenience and economy to the customer in the use of gas at reasonable rates, we think the unusually high rate exacted by the defendant is mainly responsible for the unfavorable results above disclosed. This conclusion, we think, is also warranted from a consideration of other testimony. Mr. Babb, secretary of the State University, testified that he delayed putting gas into his house for two years on account of the high rates and the high minimum of $1 per month. He also gave it as his opinion that the lowering of the rate and the minimum charge would materially increase the number of consumers. Mr. Judge, a witness for defendant, and an experienced gas man, took charge of the plant as manager in 1893 and continued in charge until 1905. He testified that the rate was lowered during his administration, saying in substance, "I came from Rock Island, Illinois, where I had a rate of $1.50 a thousand for fuel gas, and I decided that I would put that same rate in to try and build up the business. * * * I attribute the lack of success of the old plant previous to my coming here to the fact that it didn't have the consumers; didn't sell anything near to the capacity of the plant. That was why I reduced the price to those I could gather in to assist in keeping up the plant.

"Q. And their rates were so high it made it almost prohibitive?

"A. Well, not that, but for fuel. We knew fuel gas had to be sold at a lower rate, and the reason of that was that all during the day our plant was idle, because we had no place to store it. We stored it, but no place to get it out.

"Q. I understand you to say you reduced it to $1.50? A. Yes, sir.

"Q. What effect did that have? A. Well, the effect was that in the two years I increased the number of consumers nearly 50 per cent. * * *

"Q. And your judgment was that the rate for fuel gas should have been about $1.50 at that time?

"A. That was the price that I had been selling gas at in a larger town—a town of 17,500, the one I had left, and I ran the risk. It took me some time to persuade Mr. Watts to permit me to do it, and, in fact, I almost did it without his consent, because my judgment said I ought not to have the works idle."

Shortly after Mr. Judge went out of the defendant's service the rates were advanced and have so remained to the present time.

Without further extending this report and summarizing our con-

clusions, we find that the rates in question are unreasonably high, and that by reason thereof a small portion of the people, as compared with other cities, are able and willing to pay such rates; that by reason of the limited demand, the plant is not marketing over one-half of its full capacity, and that the cost of producing the gas sold is therefore correspondingly increased. To the end that the convenience and advantages of the use of gas may be brought within the reach of the general public, and that the defendant's property may be made more productive in the public service, we have fixed the following rates, namely:

For the first 10,000 cubic feet per month, $1.50 per thousand cubic feet. For all in excess of 10,000 cubic feet per month, $1.40 per thousand cubic feet.

Ten per cent. discount for payment on or before the 10th of the month following that for which service is rendered.

Minimum monthly charge of 75 cents.

The quality and pressure of the gas to be as provided by the rules of this Commission.

In order that the effect of the rates so fixed may be tested and that injustice may not be done to the defendant, a strict account of the monthly earnings and expenses of the plant will be required to be kept by the defendant and reports thereof made to the Commission in accordance with the terms of an order to be entered herein. The Commission will retain jurisdiction of the case, so that the rates may be modified if, upon a fair test, it shall develop that the increased demand has not justified the reduction herein made. An order will be entered accordingly. All concur.

WILLCOX v. CONSOLIDATED GAS CO. OF NEW YORK.

(Supreme Court of the United States, 1909. 212 U. S. 19, 29 S. Ct. 192, 53 L. Ed. 382, 48 L. R. A. [N. S.] 1134, 15 Ann. Cas. 1034.)

Mr. Justice PECKHAM * * * delivered the opinion of the court.[47] * * *

Upon a careful consideration of the case before us we are of opinion that the complainant [the company] has failed to sustain the burden cast upon it of showing beyond any just or fair doubt that the acts of the Legislature of the state of New York are in fact confiscatory.

It may possibly be, however, that a practical experience of the effect of the acts by actual operation under them might prevent the complainant from obtaining a fair return, as already described, and in that event complainant ought to have the opportunity of again

47 The statement of facts and portions of the opinion are omitted. The portion here printed appears on pages 54, 55, of 212 U. S. (29 S. Ct. 201).

presenting its case to the court. To that end we reverse the decree, with directions to dismiss the bill without prejudice, and

It is so ordered.[48]

SECTION 7.—EARNINGS FROM THE PARTICULAR BRANCH OF SERVICE

I. Relevance of Profits or Losses from Other Branches of the Public Service

SMYTH v. AMES.

(Supreme Court of the United States, 1898. 169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819.)

Mr. Justice Harlan delivered the opinion of the court.[49] * * *

It is further said, in behalf of the appellants, that the reasonableness of the rates established by the Nebraska statute is not to be determined by the inquiry whether such rates would leave a reasonable net profit from the local business affected thereby, but that the court should take into consideration, among other things, the whole business of the company; that is, all its business, passenger and freight, interstate and domestic. If it be found upon investigation that the profits derived by a railroad company from its interstate business alone are sufficient to cover operating expenses on its entire line, and also to meet interest, and justify a liberal dividend upon its stock, may the Legislature prescribe rates for domestic business that would bring no reward, and be less than the services rendered are reasonably worth? Or must the rates for such transportation as begins and ends in the state be established with reference solely to the amount of business done by the carrier wholly within such state, to the cost of doing such local business, and to the fair value of the property used in conducting it, without taking into consideration the amount and cost of its interstate business, and the value of the property employed in it? If we do not misapprehend counsel, their argument leads to the conclusion that the state of Nebraska could legally require local freight business to be conducted even at an actual loss, if the company earned on its interstate business enough to give it just compensation in respect of its entire line and all its business, interstate and domestic.

[48] Under the conditions of higher costs brought about by the World War, the same legislative rates were held to be no longer constitutional. Consolidated Gas Co. v. Newton (D. C.) 267 F. 231 (1920), affirmed in Newton v. Consolidated Gas Co., 258 U. S. 165, 42 S. Ct. 264, 66 L. Ed. 538 (1922).

[49] Portions of the opinion are omitted. The portions here printed appear on pages 540–542 of 169 U. S. and pages 431, 432, of 18 S. Ct.

We cannot concur in this view. In our judgment, it must be held that the reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. The state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the state has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the state that the state can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business. The argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for, out of a common fund; and that its capitalization is on its entire line, within and without the state,—can have no application where the state is without authority over rates on the entire line, and can only deal with local rates, and make such regulations as are necessary to give just compensation on local business.[50] * * *

NORTHERN PACIFIC RY. CO. v. NORTH DAKOTA ex rel. McCUE.

(Supreme Court of the United States, 1915. 236 U. S. 585, 35 S. Ct. 429, 59 L. Ed. 735, L. R. A. 1917F, 1148, Ann. Cas. 1916A, 1.)

Mr. Justice HUGHES delivered the opinion of the court.[51] * * *

But, broad as is the power of regulation, the state does not enjoy the freedom of an owner. The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other

[50] See, also, the opinion of Taft, C. J., in Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co., 257 U. S. 563, 42 S. Ct. 232, 66 L. Ed. 371, 22 A. L. R. 1086 (1922), for the effect on interstate traffic of inadequate intrastate rates. The case sustained the power of the Interstate Commerce Commission, under the act of 1920 (U. S. Comp. St. Ann. Supp. 1923, § 10071¼ et seq.), to remove discriminations against interstate commerce as a whole, by fixing minimum intrastate rates.

[51] Portions of the opinion are omitted. The portion here printed appears on pages 595–605 of 236 U. S. (35 S. Ct. 433). The decision holds unconstitutional a statute of North Dakota fixing maximum intrastate rates for the transportation of coal in carload lots.

terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or implicitly assumed. If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight. As a carrier for hire, it cannot be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage. The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection and seek to impose upon the carrier and its property burdens that are not incident to its engagement. In such a case, it would be no answer to say that the carrier obtains from its entire intrastate business a return as to the sufficiency of which in the aggregate it is not entitled to complain. * * *

We have, then, to apply these familiar principles to a case where the state has attempted to fix a rate for the transportation of a commodity under which, taking the results of the business to which the rate is applied, the carrier is compelled to transport the commodity for less than cost or without substantial compensation in addition to cost. We say this, for we entertain no doubt that, in determining the cost of the transportation of a particular commodity, all the outlays which pertain to it must be considered. We find no basis for distinguishing in this respect between so-called "out-of-pocket costs," or "actual" expenses, and other outlays which are none the less actually made because they are applicable to all traffic, instead of being exclusively incurred in the traffic in question. Illustrations are found in outlays for maintenance of way and structures, general expenses and taxes. It is not a sufficient reason for excluding such, or other, expenses to say that they would still have been incurred had the particular commodity not been transported. That commodity has been transported; the common carrier is under a duty to carry, and the expenses of its business at a particular time are attributable to what it does carry. The state cannot estimate the cost of carrying coal by throwing the expense incident to the maintenance of the roadbed, and the general expenses, upon the carriage of wheat; or the cost of carrying wheat by throwing the burden of the upkeep of the property upon coal and other commodities. This, of course, does not mean that all commodities are to be treated as carried at the same rate of expense. The outlays that exclusively pertain to a given class of traffic must be assigned to that class, and the other expenses must be fairly apportioned. It may be difficult to make such an apportionment, but when conclusions are based on cost the entire cost must be taken into account.

It should be said, further, that we find nothing in the record before us, and nothing in the facts which have been set forth with the most careful elaboration by the state court, that can be taken to indicate the existence of any standard whatever by reference to which the

rate in question may be considered to be reasonable. It does not appear that there has been any practice of the carriers in North Dakota which affords any semblance of support to a rate so low. * * *

It does not aid the argument to urge that the state may permit the carrier to make good its loss by charges for other transportation. If other rates are exorbitant, they may be reduced. Certainly, it could not be said that the carrier may be required to charge excessive rates to some in order that others might be served at a rate unreasonably low.[52] That would be but an arbitrary action. We cannot reach the conclusion that the rate in question is to be supported upon the ground of public policy if, upon the facts found, it should be deemed to be less than reasonable.

The Legislature, undoubtedly, has a wide range of discretion in the exercise of the power to prescribe reasonable charges, and it is not bound to fix uniform rates for all commodities or to secure the same percentage of profit on every sort of business. * * * The court, therefore, is not called upon to concern itself with mere details of a schedule; or to review a particular tariff or schedule which yields substantial compensation for the services it embraces, when the profitableness of the intrastate business as a whole is not involved.

But a different question arises when the state has segregated a commodity, or a class of traffic, and has attempted to compel the carrier to transport it at a loss or without substantial compensation, even though the entire traffic to which the rate is applied is taken into account. On that fact being satisfactorily established, the presumption of reasonableness is rebutted. If in such a case there exists any practice, or what may be taken to be (broadly speaking) a standard of rates with respect to that traffic, in the light of which it is insisted that the rate should still be regarded as reasonable, that should be made to appear. As has been said, it does not appear here. * * *

To repeat and conclude: It is presumed—but the presumption is a rebuttable one—that the rates which the state fixes for intrastate traffic are reasonable and just. When the question is as to the profitableness of the intrastate business as a whole under a general scheme of rates, the carrier must satisfactorily prove the fair value of the property employed in its intrastate business and show that it has been denied a fair return upon that value. With respect to particular rates, it is recognized that there is a wide field of legislative discretion, permitting variety and classification, and hence the mere details of

[52] If, however, the rates can be made low, not by causing the carrier to fail to get a fair return on its total business, and not by fixing rates for other services which are "exorbitant" or "excessive," but merely by fixing for these latter services rates which yield more than their pro rata of cost but which could not be reduced without causing a demand which would have to be denied, the argument fails to apply. That situation is dealt with in more detail infra, pages 1168 ff. Were the rates in North Dakota, from which the railroad recouped its losses from the low coal rates, of the type just described, it is possible that the court would have decided differently.

what appears to be a reasonable scheme of rates, or a tariff or schedule affording substantial compensation, are not subject to judicial review. But this legislative power cannot be regarded as being without limit. The constitutional guaranty protects the carrier from arbitrary action and from the appropriation of its property to public purposes outside the undertaking assumed; and where it is established that a commodity, or a class of traffic, has been segregated and a rate imposed which would compel the carrier to transport it for less than the proper cost of transportation, or virtually at cost, and thus the carrier would be denied a reasonable reward for its service after taking into account the entire traffic to which the rate applies, it must be concluded that the state has exceeded its authority.

The judgments, respectively, are reversed and the cases are remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice PITNEY dissents.[53]

PUGET SOUND TRACTION, LIGHT & POWER CO. v. REYNOLDS.

(Supreme Court of the United States, 1917. 244 U. S. 574, 37 S. Ct. 705, 61 L. Ed. 1325.)

Mr. Justice PITNEY delivered the opinion of the court.[54]

Appellant (plaintiff below) owns and operates a street railway system in the city of Seattle, Washington, aggregating about 200 miles. * * * It filed its bill in the District Court to obtain relief from the operation and effect of an order made by the Public Service Commission of the state on March 24, 1915, bringing in as defendants the members of the Commission and the Attorney General of the state. Plaintiff being a corporation of the state of Massachusetts, and defendants citizens of the state of Washington, the jurisdiction was invoked both upon the ground of diversity of citizenship and upon the ground that the order complained of was alleged to impair the obligation of contracts and deprive plaintiff of its property without due process of law, in violation of the Constitution of the United States. The order was made as the result of an investigation of which plaintiff had notice, and it contains the following provisions:

[53] In Norfolk & Western Railway Co. v. Conley, 236 U. S. 605, 35 S. Ct. 437, 59 L. Ed. 745 (1915), decided on the same day, an act of West Virginia fixing maximum intrastate passenger fares was held unconstitutional. In the course of the opinion the court (per Hughes, J.) said: "Thus, it would not be contended that the state might require passengers to be carried for nothing, or that it could justify such action by placing upon the shippers of goods the burden of excessive charges in order to supply an adequate return for the carrier's entire service." Page 609. For a comment on this language, see infra, pages 1122–1123, note 58.

[54] Portions of the opinion are omitted.

"(1) That the defendant company [plaintiff] continue the operation of through service on the Ballard Beach line.

"(2) That the Alki Point and Fauntleroy Park lines be operated through the city of Seattle on First and Second avenue as far north at least as Virginia street.

"(3) That the defendant company furnish sufficient cars to provide seats for substantially all persons using the Alki Point and Fauntleroy Park lines." * * *

The Alki Point and Fauntleroy Park lines, each of them 8 or 9 miles in length, were constructed under separate franchises granted to predecessors in interest of plaintiff by the city of Seattle. * * *

(2) It is insisted that neither the Alki nor the Fauntleroy Park line is earning sufficient to pay its operating cost, or ever can do so under a fare limited to 5 cents, and that for this reason an order requiring these lines to carry passengers beyond the termini fixed in their franchises upon 4-cent tickets, and to give them the more costly through service by means of a single car, is necessarily a taking of plaintiff's property without compensation, and hence without due process of law, within the meaning of the Fourteenth Amendment. A similar point was made in the bill with respect to the Ballard Beach line, but is not seriously pressed here. As to the other two lines, there seems to be no question that, since they run for a considerable distance over the tide flats, receiving and discharging but few passengers en route, so that a majority of the passengers are carried distances of 5 or 6 miles, these lines, separately considered, never have paid operating expenses, and probably never will.

But we cannot accede to the suggestion that the question whether the Commission's order is confiscatory or otherwise arbitrary within the inhibition of the Fourteenth Amendment is to be determined with reference alone to the Alki, the Fauntleroy, or the Ballard Beach lines. These are and long have been operated by plaintiff as parts of a system comprising 200 miles of tracks. The Commission found that the net earnings of the system for the year ending February 28, 1915, not including depreciation and taxes, were upwards of $1,600,000; that the company had refused to produce the valuations of its property made by experts, and had failed to show that there was not sufficient return from its property to pay operating expenses, taxes, and depreciation, and leave a balance. And from the evidence introduced the Commission found the fact to be that, allowing for the services required by its order, the company would have net returns over and above operating expenses, taxes, and depreciation. It was not and is not contended that the system earnings are unremunerative.

Plaintiff relies upon Northern P. R. Co. v. North Dakota, 236 U. S. 585, 604, 35 S. Ct. 429, 59 L. Ed. 735, 745, L. R. A. 1917F, 1148, P. U. R. 1915C, 277, Ann. Cas. 1916A, 1, where this court held that a statute which segregated a single commodity, and imposed upon it a rate that would compel the carrier to transport it for less

than the proper cost of transportation, was in excess of the power of the state. In our opinion, that decision is inapplicable, the present case being controlled rather by St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 665, 15 S. Ct. 484, 39 L. Ed. 567, 573, where the state of Arkansas had prescribed a maximum rate of 3 cents per mile for each passenger, under a penalty payable to the passenger from whom an overcharge was exacted, and in an action to recover such a penalty the company defended on the ground that the portion of its road over which plaintiff was carried was highly expensive to construct and maintain, and that the cost of maintaining it and transporting passengers over it exceeded the maximum rate fixed by law. But this court held "that the correct test was as to the effect of the act on the defendant's entire line, and not upon that part which was formerly a part of one of the consolidating roads; that the company cannot claim the right to earn a net profit from every mile, section, or other part into which the road might be divided, nor attack as unjust a regulation which fixed a rate at which some such part would be unremunerative; * * * and, finally, that to the extent that the question of injustice is to be determined by the effects of the act upon the earnings of the company, the earnings of the entire line must be estimated as against all its legitimate expenses under the operation of the act within the limits of the state of Arkansas." * * *

The decree of the District Court, so far as appealed from, is affirmed.[55]

[55] In Atlantic Coast Line Railroad Co. v. North Carolina Corporation Commission, 206 U. S. 1, 27 S. Ct. 585, 51 L. Ed. 933, 11 Ann. Cas. 398 (1907), the Supreme Court, in an opinion by Mr. Justice White, sustained an order of the Commission requiring the operation of an additional train, rejecting the company's plea that such train would be unremunerative. The court distinguished between an order fixing rates and "an order directing a carrier to furnish a facility which it is a part of its general duty to furnish for the public convenience." "Of course, the fact that the furnishing of a necessary facility ordered may occasion an incidental pecuniary loss is an important criteria [sic] to be taken into view in determining the reasonableness of the order, but it is not the only one. As the duty to furnish necessary facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required, and the public need for its performance." In Seward v. Denver & R. G. R. Co., 17 N. M. 557, 131 P. 980, 46 L. R. A. (N. S.) 242 (1913), the New Mexico Supreme Court, in an opinion by Roberts, C. J., holding that an order of the Commission was unreasonable which required the railroad to maintain a freight agent at a certain station at a cost of $960 per year, when but $1,850 was realized on the freight received at that station, laid stress on the distinction between an "absolute" and an "incidental" duty of the carrier, and held that the doctrine of the Atlantic Coast Line Case applied to the former alone. In Washington, P. & C. Ry. v. Magruder (D. C.) 198 F. 218, 231 (1912), the District Court for the District of Maryland (Rose, D. J.), held that the Atlantic Coast Line Case did not require it to uphold a statute requiring the railroad to operate two accommodation trains every weekday when, "if the increased accommodation was furnished, its [the railroad's] total gross income from all sources would be less than its necessary expenses of operation and maintenance without making any return whatever upon the capital invested." And in Mississippi Railroad Commission v. Mobile & Ohio R. Co., 244 U. S. 388, 37

The CHIEF JUSTICE [WHITE] and Mr. Justice MCKENNA dissent because they are of the opinion that this case, as a matter of authority, is controlled by Detroit United R. Co. v. Michigan, 242 U. S. 238, 37 S. Ct. 87, 61 L. Ed. 268, and that as a matter of original consideration the assailed legislation has impaired the obligation of a contract, in violation of the Constitution of the United States, and was repugnant to the Constitution because wanting in due process.

Mr. Justice MCREYNOLDS also dissents.

GROESBECK v. DULUTH, S. S. & A. RY. CO.

(Supreme Court of the United States, 1919. 250 U. S. 607, 40 S. Ct. 38, 63 L. Ed. 1167.)

Mr. Justice BRANDEIS delivered the opinion of the court.[56]

The Constitution of Michigan (article 12, § 7) authorizes the Legislature to pass laws establishing "reasonable maximum rates of charges for the transportation of passengers and freight." In 1907 it fixed two cents a mile as the maximum intrastate passenger fare on railroads operating in the Lower Peninsula and three cents for those in the upper. By act approved May 2, 1911 (Public Laws No. 276), the two-cent rate was made applicable to all the railroads of the state whose gross earnings on passenger trains equal or exceed $1,200 per mile of line operated. Before the statute took effect, the Duluth, South Shore & Atlantic Railway Company, an interstate carrier operating in the Upper Peninsula, brought this suit in the District Court of the United States for the Eastern District of Michigan to enjoin the enforcement of the act. The bill alleged that the reduced rate would deprive plaintiff of its property without due process of law in violation of the Fourteenth Amendment. The Attorney General and the railroad commissioners of the state, being charged by the law with its enforcement, were made defendants. They denied that the rate was confiscatory; and on this issue the District Court found for the railway. A final decree granting the relief sought was filed February 14, 1918, and an appeal to this court was promptly applied for by the defendants and allowed. * * *

The issues of fact were tried below with great thoroughness. The case was referred to a special master to hear the proofs and to report

S. Ct. 602, 61 L. Ed. 1216 (1917), the United States Supreme Court, in an opinion by Mr. Justice Clarke, affirmed a decree of the District Court enjoining the enforcement of orders of the Commission requiring the carrier to restore certain passenger trains to service, the court "looking to the extent and productiveness of the business of the company as a whole, the small traveling population to be served, the character and large expense of the service required by this order, and to the serious financial conditions confronting the carrier, with the public loss and inconvenience which its financial failure would entail."

56 Portions of the opinion and a footnote citing numerous cases are omitted.

the evidence together with his findings to the court. The report fills 503 pages of the printed record. The transcript of the testimony introduced before him covered more than 12,000 typewritten pages; and there were besides many exhibits. The evidence before the master related largely to the results of the operation of the railroad for the four years ending June 30, 1913. When the case came on for hearing before the District Judge in 1917, supplemental evidence was taken in open court covering the operations of the four additional years ending June 30, 1917. The evidence disclosed the usual diversity of opinion as to the value of the property and as to the proper method of dividing between the passenger and freight services the common expenses and the charges for property used in common. Upon the whole evidence the court found that the two-cent fare would have resulted in a return on intrastate passenger business of less than 2 per cent. during the six years ending June 30, 1917.

Between the commencement of this suit and the entry of the final decree many of the questions in controversy below have been settled by the decisions of this court in other cases. The state officials do not deny that there was legal evidence to justify the findings of fact made by the lower court; nor do they request that this court should undertake a general review of the evidence. But they insist that the finding of the district judge of the low return is erroneous, and that the error is due partly to his having included in his calculations property and operations which should have been excluded, and partly to his having adopted improper formulas for the division of common charges and expenses as between the freight and the passenger services; and that if these specific errors are corrected it will appear that the two-cent fare would have been highly remunerative. These alleged errors must be considered separately.

First. It is contended that the Western Division should be excluded from the calculation. The Duluth, South Shore & Atlantic Railway extends from Sault Ste. Marie to Duluth and has, including branches, 584 miles of line, 475 of which are in Michigan. The Eastern Division serves mainly the iron region; the Central, the copper country; the Western, extending through sparsely settled country from Nestoria, Mich., 101 miles to the Wisconsin state line, and thence to Duluth, serves mainly interstate business. This division is said to have been built not in a desire to serve local needs, but for the purpose of establishing a through line from Duluth to Sault Ste. Marie. The statement, if true, furnishes no reason for excluding it from the calculation. The cost per mile of transporting passengers varies greatly on different parts of the same railroad system according to circumstances, being dependent, among other things, upon the cost of the roadbed and terminals, the grade, the number and character of the trains, the density of traffic and the length of the haul. The justification for a uniform fare per mile is furnished by the doctrine of averages; and the Legislature of Michigan made clear its purpose

to apply the doctrine of averages in order to give to travelers the benefit of the two-cent fare on those portions of a railroad on which travel was light and the cost of carrying each passenger necessarily far in excess of two cents a mile. For this act declares:

"That in computing the passenger earnings per mile of any company the earnings and mileage of all branch roads owned, leased, controlled or occupied or that may hereafter be owned, leased, controlled or occupied by such company * * * shall be included in the computation [i. e., determining whether the year's gross passenger earnings equal $1,200 per mile], and the rate of fare shall be the same on all lines owned, leased, controlled or occupied by such company."

In other words, the Legislature has declared that for the purpose of determining the right of an intrastate passenger to travel on any part of the company's lines at the rate of two cents a mile, all of the lines within the state must be treated as one; that those on which travel is light must be averaged with those on which it is dense; and obviously also that those parts of the system which are unprofitable must be taken with those which are profitable. Every part of the railroad system over which the passenger is entitled by the act to ride for a two-cent fare must be included in the computation undertaken to determine whether the prescribed rate is confiscatory. This is true, at least, in the absence of illegality or mismanagement in the acquisition or operation of the division in question; and of such there is not even a suggestion in the record. There is nothing in San Diego Land & Town Co. v. National City, 174 U. S. 739, 758, 19 S. Ct. 804, 43 L. Ed. 1154, or in San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 446, 23 S. Ct. 571, 47 L. Ed. 892, upon which the state officials rely, which is inconsistent with this conclusion.

Second. It is likewise contended that the so-called South Line between Marquette and Ishpeming should be excluded from the calculation. This line, which for miles substantially parallels the main line, was originally built as an independent road and was purchased by plaintiff's predecessor in 1884 probably to avoid ruinous competition. It is used mainly for heavy freight, and the intrastate passenger travel over it is light. It is asserted that the construction of this road was not required to supply the transportation needs, and that it would still be possible to carry all existing traffic between Marquette and Ishpeming over the main line. What has been said above in regard to the Western Division applies equally to the South Line.

Third. It is contended also that a loss was incurred in operating through passenger trains from Houghton over the Mineral Range Railroad to Calumet and that such loss should be excluded from this calulation. This extension of plaintiff's service was clearly reasonable in view of the importance of Calumet, which lies only fourteen miles from its own lines. It was admitted by the state officials that passengers on the route were, under the act, entitled to travel at the

two-cent rate. The fact that the service was furnished by acquiring traffic rights instead of by building an independent line, clearly affords no reason for excluding the results of the operation from the calculation.

Fourth. The further contention is made that the sleeping car, parlor car and dining car services should be treated as separate operations; that they should be charged with their proportion of specific and general expenses but credited only with the amounts received from charges for the specific service; and that no part of the apparent loss on these services should be taken into consideration in determining whether the two-cent fare is confiscatory. In support of this contention it is urged that these services were voluntary; that the law (Michigan Public Acts of 1875, No. 38) permits railroads to make special charges for these services "in addition to the regular passenger fares allowed by law," and that travelers in day coaches must not be allowed to suffer because a railroad fails to make these services compensatory. On American railroads of importance these services have been well-nigh universal for more than a generation; and the charges for them are substantially uniform throughout the country. It would be practically impossible, as it would be obviously unwise, for a railroad like the plaintiff's either to discontinue the services or to increase the charges to cover the cost of the particular service on its line. It is inconceivable that the Legislature of Michigan should have intended in enacting the two-cent fare law to deny to its citizens these customary facilities; and for the purpose of determining whether the act is confiscatory the passenger service including these facilities must be treated as a whole.[57] The fact alleged that these facilities are used mainly by interstate travelers is immaterial.† * * *

The decree of the District Court is affirmed.[58]

[57] There are, of course, some passengers to whom it is a matter of indifference whether sleeping car, parlor car and dining car services are furnished or not. These passengers are thus required to pay higher fares than are essential for the kind of service with which they would be satisfied. If this were not done, however, other passengers, who prefer to pay a higher rate rather than forego the additional service, would suffer, in view of the impracticability of making separate charges sufficient to cover the cost of the additional services. The latter class are very likely more numerous than the former. In King et al. v. Wisconsin Telephone Co., 10 Wis. R. C. R. 517, 523 (1912), a higher class of telephone service would be possible, at higher rates. The Commission made "no further order * * * than that the Wisconsin Telephone Company shall install the new class of service when a majority of the subscribers at Altoona express their willingness to use such service at the rates indicated."

† The portion of the opinion here omitted deals with the proper formula for dividing joint costs. It is printed infra, p. 1148.

[58] In these decisions, it should be noted, the validity of the requirement that certain parts of the service be rendered though unremunerative is made to depend, in part at least, on whether the losses from those parts are made up from the rates on other parts of the service. If they are so made up, then the rates on the latter parts are more than sufficient to cover the costs of those services considered separately. Yet the court obviously does not consider these rates to be for that reason excessive. In dealing with situations such as arise in these cases, then, it seems that the contrary implica-

II. Allocation of Costs to the Particular Service

(A) In General

CITY OF MILWAUKEE v. MILWAUKEE ELECTRIC RAILWAY & LIGHT CO.[59]

(Railroad Commission of Wisconsin, 1912. 10 Wis. R. C. R. 1.)

* * * In table 25, the total cost of reproduction new of property used and useful for railway service aggregating $15,934,340 is apportioned as between urban railway service, suburban service, interurban railway service, and local service in Racine and Watertown. To obtain this estimate, land and buildings have been apportioned upon the relative floor space devoted to the separate services; car barns and their sites have been apportioned upon the basis of number of operating cars stored; car plants and substations and their sites have been apportioned upon the basis of electric and mechanical equipment contained in the buildings and upon the basis of output for the various services; shops, foundries, and stables have been apportioned upon the basis of the total car miles for various services; roadway, track and paving have been apportioned as actually used, where, however, such equipment is utilized for two or more services the apportionment has been made upon the basis of tributary car miles; transmission and distribution system has been apportioned as actually used, joint equipment being apportioned upon the tributary car-mile basis; mechanical and electrical equipment has been apportioned to the various services on the basis of station output. * * *

In making an apportionment of expense accounts on an arbitrary basis, the rule usually observed is that only those units should be used which have the closest relation to the expenses under consideration. Expenses varying with the volume of traffic should, therefore, be apportioned upon the basis of a traffic unit. If they are unaffected by the volume of traffic, a stationary unit is necessary. An examination of the maintenance of way expenses as reported by the company indi-

tions in the language of Mr. Justice Hughes in Northern Pacific R. Co. v. North Dakota, quoted supra on page 1115, and in Norfolk & Western Ry. Co. v. Conley, quoted supra, page 1116, note 53, are not meant to apply. It is possibly significant that Mr. Justice Pitney, who spoke for the court in the Puget Sound Case, dissented from the decision in the Northern Pacific Case, and that Mr. Justice Brandeis, who rendered the opinion in the Groesbeck Case, was not a member of the court when the Northern Pacific Case was decided.

This matter is discussed in more detail in an article by the editor of this chapter, entitled "Non-Cost Standards in Rate Making," to be published shortly in 36 Yale Law J.

59 Portions of the opinion are omitted. The portions here printed appear on page 112 and page 190 of the report, respectively.

cates that these have little or no relation to the car hour. Were traffic conditions similar, it might be expected that certain costs would fluctuate with the traffic and be properly prorated upon a car or ton mile. Certain other expenses might be expected to vary with weather conditions and be properly prorated upon the miles of single track. * * *

Petition of PUBLIC FRANCHISE LEAGUE RELATIVE TO EDISON ELECTRIC ILLUMINATING CO. OF BOSTON.[60]

(Board of Gas and Electric Light Commissioners of Massachusetts, 1908. 24 Rep. Mass. Bd. of G. & E. L. Com'rs, 20.)

* * * Unlike either water or gas, electricity can be stored only to a very limited extent and at a relatively great expense. It must be manufactured at the very instant it is used, and customers for electricity want a supply available for their needs at any moment of the day or night. To meet this want an electric light company must keep all of its system of wires alive with electricity, ready to meet instantly at any hour of the day or night its customers' requirements. Obviously the capacity of a customer's installation, whether of lamps or motors, determines the maximum amount of electricity he can possibly require at any one time, and the size or capacity of a company's plant determines the maximum amount of electricity it can make and deliver at any one time. Most of the lighting customers will want light at substantially the same hours of the day, and will make their greatest use of electricity during that season of the year when the days are shortest. On the other hand, a lighting customer may rarely use at any one time all of the electricity he can possibly require, and a customer who uses electricity for power will use it only as he actually needs it, and then ordinarily not to the full capacity of his installation.

A company must be prepared with a plant, however, for generating and distributing electricity of sufficient capacity to take care of the aggregate requirements of all of its customers at the moment of their greatest demand, or, as it is called, the "peak of the load," although it is evident that this capacity need not be equivalent to the greatest amount of electricity which all the customers might by possibility at any one time require. Experience indicates to a company what capacity is required to carry it safely by the "peak of its load," or, in other words, what its investment must be if it is to properly serve its customers. It may be said, therefore, that the investment of an electric light company, in generating plant at least, is practically determined by the greatest demand upon the station at any one time.

(a) *Cost of Service as the Basis.*—The company claimed that its annual expenses may be divided broadly into two classes, namely, those

60 Portions of the opinion are omitted.

which are independent of the amount of electricity delivered to its customers and those which depend directly upon and increase proportionately to the amount so delivered. It terms the first class "fixed costs," and the second class, "running costs." It claimed that the "fixed costs" of an electric company are extraordinarily large, relative to other business undertakings, because a considerable portion of the investment required to provide for the "peak of the load" must stand idle about twenty hours of each day, save for a short period of each year, and also because of the necessity of being ready at all times of the day or night to take care of any demand which the customers may make. From this standpoint an increase in output which does not increase the investment will result in a proportional increase in "running costs," but in no substantial increase in "fixed costs," and therefore in a decreased average cost per unit delivered.

What is true of the business as a whole in this respect the company contended is similarly true of the individual customer; that is to say, assuming that a certain proportion of the company's investment has been necessitated to serve the individual, if the latter increases his use of electricity without an increase in the investment for his benefit the result is a decreased average cost to the company per unit delivered to him. To further illustrate its relation to the individual customer, the company assumes to treat its plant as though it were a combination or aggregation of as many different plants as it has customers, each necessitated by and used to supply single customers. If a customer requires a plant of say ten kilowatts' capacity, and uses it but one hour per day, the cost for that hour will be not only the "running costs" for that hour, but the "fixed costs" of the plant, and will obviously be far larger for that hour than it will be per hour if the plant is used ten or twelve hours per day. As already noted, however, the company's plant does not need to be of a capacity equal to the aggregate of the possible requirements of its customers. This fact tends to reduce the company's actual costs below the costs of operating the supposed individual plants, but it does not, on the company's theory, otherwise disturb the relation of the individual customer to the company's costs.

In summarizing its explanation of electric lighting costs, the company used these words:

"The costs of an electric lighting company are actually the sum of what its customers' costs would be if they supplied themselves under the different conditions under which they consume current, less such deduction as is justified by the use of the same plant by different customers, and such deduction as is justified by the greater economy of the company's larger plant."

An essential feature of the company's system is that the cost of being ready to furnish electricity when called for is one thing and the cost of manufacturing the current actually delivered is a very different thing. Therefore the company claimed that the cost of supplying a customer

is not measurable merely by the amount of electricity used by him, but is dependent also on the amount of "fixed costs" he has required it to incur, and that unless his total annual payments to the company exceed the "fixed costs" upon the amount of plant which it has been obliged to install on his account, he must be a source of loss, to be made up from the profits from other customers whose payments do exceed their "fixed costs."

The foregoing states some of the reasons upon which the company relied in basing its prices for electricity upon the varying cost of supplying its different customers. To sum up the underlying theory of its system of rates, it claimed to charge *each* customer substantially the cost to it of supplying *him,* including a reasonable return on the investment made in his behalf.

(b) *The Application of the Theory.*—To carry into effect its purpose to make costs the basis of its rates or prices the company divides, as already noted, its annual expenses into "fixed" and "running" costs. In "running costs" it includes only those costs which are reasonably certain to vary with the amount of current made and sold, namely, coal, oil and waste, water, station wages, carbons and incandescent lamps. All of its other expenses, including dividends, are included in "fixed costs."

The company, then, in the application of its theory assumes to determine the actual average "running costs" per kilowatt hour for electricity supplied, and the portion of the "fixed costs" for which each customer is responsible. The former is readily obtained by dividing the total "running costs" for a given period, such as a fiscal year, by the total number of kilowatt hours supplied during that period, and by installing on his premises a meter which measures the current which he uses these costs are readily apportioned to the individual customer.

The latter is determined by a more elaborate process. By dividing the "fixed costs" for the year by the number of kilowatts representing the maximum station demand for the year the company finds the average of the "fixed costs" for each kilowatt of station demand. By installing upon the customer's premises an instrument which measures and records the greatest volume of current which the customer has called for at any one time, the company finds what is termed the customer's "maximum demand." If the "maximum demands" of all the customers actually occurred at the same time, it is evident that the sum of the customers' demands would equal the "peak of the load," or maximum station demand, and that the average "fixed costs" per kilowatt of station demand would be the average of the "fixed costs" per kilowatt of each customer's "maximum demand." Each customer's maximum demand would then, according to the company's claim, represent his proportionate share of the company's investment and also of the "fixed costs."

But it is admitted that the aggregate of the "maximum demands" of all the customers during any given period greatly exceeds the max-

imum station demand for the same period, and therefore that the "maximum demands" of all the customers are not made upon the station at the same time; that, in fact, the plant used by one customer at one time may be used in whole or in part by other customers at other times. Obviously, then, the average of the "fixed costs" per kilowatt of station demand will not properly represent what the company claims is the individual customer's proportionate share of the "fixed costs" per kilowatt of his "maximum demand." Therefore, to correct the result, the company introduces what it calls the "diversity factor," and defines this term as the "ratio of the sum of the customers' demands to the actual station demand."

In adopting its system of rates the company, having no experience of its own, assumed as applicable to its business the ratio determined by the experience of several English companies, and adopted by them prior to 1898. This experience showed that, owing to the peculiar intermittent use of power, the ratio for power customers and that for lighting customers differed greatly; that is to say, that the aggregate maximum demands of all lighting customers is one and a half times and of all power customers four times the greatest actual demand which each class ever makes upon the station. In other words, the same plant can supply a much larger number of customers for power than for light. By the use of these ratios the company calculates the average yearly "fixed cost" per kilowatt of maximum demand for its lighting customers at two-thirds and of its power customers at one-quarter the actual average yearly fixed cost per kilowatt of maximum station demand.

With a view to collecting from each customer the cost of supplying him, the company undertakes to charge for approximately the first hour's use per day, or for the first 400 hours' use per year of the customer's "maximum demand," an amount sufficient to cover his share of the "fixed costs" for the year, and also the "running costs" for the current consumed. These are called the primary hours, and the price charged the primary rate. For all hours used in excess of the primary hours, or, in other words, for the secondary hours, the company undertakes to charge as a secondary rate an amount at least sufficient to cover the running costs.

The application of this theory to rates requires, according to the company, two important modifications. To understand the first of these it must be borne in mind that the "fixed costs" as already described include repairs, maintenance, taxes, interest and dividends. Substantially 50 per cent. of the company's entire investment is in distribution system (lines, transformers, meters and lamps). The company claimed that its distribution system investment is very much greater per kilowatt of demand for small customers than for large ones; that, for illustration, the investment cost to distribute 100 kilowatts of demand to 100 customers is much greater than for the distribution of 100 kilowatts to a single customer, and that the construction cost to reach

customers of large size is not more than one-quarter as much per kilowatt of demand as the cost of reaching average size customers. With a view to this consideration the company "felt that a systematic method must be adopted by means of which the large customers should be relieved of the excess costs occasioned by the smaller customers, as nearly as possible in proportion to their increased size," and introduced what it calls "wholesale discounts" to those whose use exceeds a certain amount, whether due to long use of demand or to quantity of current consumed.

In the second place, there are a large number of customers, fully three-fourths of the total, whose consumption is so small that they cannot guarantee payment for 400 hours' yearly use of their respective maximum demands. Many of these use electricity in winter only, and nearly all of them use the service very irregularly. Instead, therefore, of basing the primary hours for such a customer on a definite use of his maximum demand for the year, the company allows him to use the service without any annual guaranty, and determines his primary and secondary hours for any month by the use of his maximum demand for that month. The company estimates that the average of the maximum demands of such customers in any year is about 75 per cent. of the maximum demand for the year, and therefore, by making the total primary hours for the year 520 instead of 400 (an increase of 30 per cent.), that such increase will compensate for the use of the monthly instead of the yearly maximum. These 520 hours are apportioned to the different months of the year on a shifting scale, from 60 hours for the months when the days are shortest to 30 hours for the months when the days are longest. Each month is settled by itself, and, while a customer pays only for current actually consumed, he must use an amount of electricity equivalent to his maximum demand for the month multiplied by the number of hours allotted to the month before he is entitled to the secondary rate. Inasmuch as there is no guaranty that such a customer will use all of his primary hours, and as experience shows that a large number of such customers do not, the company claims that a much larger secondary rate is necessary in order to make up for shortages in the primary hours, and to insure the collection of the fixed costs from this class of customers.

The company's rates now being considered were put in force on July 1, 1906, but the demand system of determining rates was adopted as early as 1898. It was conceded by the company that the rates in force prior to 1898, as well as the application of the system just described, had a material bearing upon the rates then established, and that the present rates have been affected by the experience of the intervening years.

The following explanation of the present rates is therefore made with reference to the maximum station load, total output and expenses or costs of the year ending June 30, 1906. In that year the company sold to its customers in all 51,157,932 kilowatt hours, and its maximum

station load was 26,311 kilowatts. Dividing the annual expenses, including dividends, as between "fixed" and "running" costs, on the basis used by the company and hereinbefore described, the "fixed costs" averaged $118 per kilowatt of maximum station demand and the "running costs" averaged 1.25 cents per kilowatt hour sold. Correcting this result as to "fixed costs" by use of the so-called "diversity factors," it follows on the company's theory that $80 is the average amount of "fixed costs" required of lighting customers and $30 of power customers per kilowatt of their respective maximum demands.

(c) *Resulting Prices—Yearly Lighting Rate.*—For a lighting customer who will guarantee 400 hours' use per year of his maximum demand, the rate is 20 cents for the primary and 5 cents for the secondary kilowatt hours used. The company is thus ensured an income of $80 per kilowatt of the customer's demand, which leaves, after allowing for the "running costs" of the primary hours, but $5 of the "fixed costs" to be collected from the secondary rate. If a customer's bill for a month exceeds $150, a discount of 40 per cent. is allowed on the excess up to $550, and a further discount of 50 per cent. on all in excess of $550. A customer may be entitled to the discount because either of a short use of a large demand or of a long use of his demand even though small. The discounts make it possible both theoretically and actually for a customer to obtain an average rate somewhat under 4 cents per kilowatt hour, but the company claims that the average rate obtained by reason of the wholesale discounts is only about 20 per cent. better than small customers of equally long use. A year's experience with the rate shows an average rate of 7.2 cents per kilowatt hour for yearly contract customers.

An alternative contract is also offered to a lighting customer who will guarantee 400 hours' use of his maximum demand, whereby the customer pays in equal monthly instalments $60 per year per kilowatt of his demand and 5 cents per kilowatt hour for all electricity used. It will be readily seen that this $60 payment plus 5 cents per 400 hours' use will yield $80, and is equivalent to charging 20 cents per hour for the 400 hours' guaranteed use, described above. This is known as the Hopkinson system, and is the form of contract now used almost entirely in making new contracts.

On a guaranteed demand of not less than 100 kilowatts a customer who supplies his own lamps and care is given a further discount of ½ cent per kilowatt hour.

Noncontract Lighting Rate.—For a lighting customer who does not or cannot guarantee the required use of his maximum demand the rate is 15 cents for primary hours and 12 cents for secondary hours. The primary hours are 520 for the year. While he is under no obligation to use or pay for all of the primary hours of the year, or even those allotted to the different months, yet if all are used the company will receive $78 per kilowatt of the customer's maximum demand for the year. This leaves, after allowing for the "running costs" of the

primary hours, but $7.50 to be collected from the secondary rate for "fixed costs." A minimum charge of $1 per month per meter is made. As one kilowatt hour is substantially the equivalent of twenty 16 candle power lamps burning one hour, the amount of this minimum charge may be the more readily appreciated. The same discounts on the monthly bills are allowed as in the "yearly lighting" rate. By reason of the discounts a customer may by possibility obtain an average rate of between 7½ and 8 cents. A year's experience with the rate, however, shows an average rate of 14.2 cents per kilowatt hour for non-contract lighting customers. * * *

Power Rate.—For a power customer the rate is 15 cents for 18 primary hours per month per kilowatt of the customer's demand, and 9 cents for the secondary hours, with a discount, if that portion of the monthly bill calculated at the 9-cent rate exceeds $10, of 70 per cent. on all in excess of $10, and a further discount of 30 per cent. if the bill, after the first discount is made, exceeds $100. No guaranty is required, but a minimum charge of $1 per month per meter is made. The primary hours for the year are 216. If all are used, the company will receive $32.40 per kilowatt of the customer's maximum demand, and after allowing for the "running costs" of the primary hours, this leaves substantially nothing to be collected on account of "fixed costs" from the secondary rate. Under the discounts some long-hour customers do reach an average rate as low as 2.5 cents. A year's experience with the rate, however, shows an average rate of 5.6 cents per kilowatt hour for power customers. * * *

No serious difference arose at the hearing relative to the duty of the company with respect to its customers. * * *

The chief question arose as to what extent, if at all, a differential system of rates such as the company has adopted is unlawful because discriminating. * * *

The Board has aimed in the earlier parts of this decision to explain from the company's standpoint its system of rates and the theory upon which the same is founded. It is hoped that the Board has made clear that the essential feature of the company's system of rates is that, instead of basing the price altogether on consumption, irrespective of demand, as is done with a uniform or flat meter rate, it bases the price both on demand and consumption. In other words, the company's system of rates, and, in fact, any founded on the demand system, is based primarily on two factors, namely, the length of time a given demand is used and the size of the individual demands. The combination of the two factors necessarily leads to different average rates for the customers, and even from month to month for the same customer. The arrangement of the rates under different schedules is incidental merely to the convenient application of the system.

The justification of a system of individual rates plainly must rest, however, upon the practicability of ascertaining with reasonable accuracy the cost of supplying each individual customer, and of auto-

matically apportioning this cost to him by the schedule of prices adopted. It is therefore essential that the company should be able to demonstrate that it is possible to ascertain individual costs with reasonable accuracy, since under its system a customer should not pay less than the cost of his supply, and properly and probably legally cannot be required to pay more.

In attempting to make this demonstration the company starts with certain factors which are capable of being definitely ascertained for any given period in the history of its business. These are the maximum station demand, the amount per kilowatt of station demand required to cover the expenses allotted to "fixed costs," the number of kilowatt hours sold and the amount per kilowatt hour sold required to cover the expenses allotted to "running costs." The company also knows the maximum demands of all customers upon whose premises demand indicators have been installed and their records noted, and it may estimate, with some approach to accuracy, from their installations, the maximum demands of its other customers whose demands have not been measured. The company then seems to assume as the essential premise in its demonstration that the ratio of a customer's maximum demand to the aggregate maximum demands of all customers, other conditions being equal, represents with reasonable accuracy his proportional share of the company's investment, and therefore of the so-called "fixed costs." But aside from the practical difficulty of ascertaining the elements necessary to determining this ratio, it is at once conceded that the ratio itself would not definitely determine his proportion, because actual conditions require the recognition of the so-called "diversity factors." In fact, in the year ending June 30, 1907, the maximum station load was 35,310 kilowatts, as against over 48,000, the aggregate of the customers' maximum demands as nearly as they could be ascertained or estimated. The "diversity factors" adopted by the company are not based on the company's experience, nor was it shown that they were based on the experience of others supplying electricity under substantially similar conditions. While the evidence tended to show some recent efforts to test the accuracy of these "factors," it also tended to show that residence lighting, for example, may have a far more favorable "diversity factor" than the one assumed in making the present lighting rates, and this is probably due to the fact that, unlike business lighting, the maximum demands of residence customers are not so nearly coincident. It goes without saying that the maximum demand of a residence customer often represents his exceptional and not his normal use of electricity.

The importance and significance of the "diversity factors" to the company's demonstration must not be underestimated. The purpose of their introduction is to so correct the relation of an individual customer's maximum demand to the maximum demands of all customers that his responsibility for the station "peak," and therefore of the company's investment because of it, shall be properly ascertained and

apportioned. But accuracy in this process certainly requires that before the "diversity factors" are used the "fixed costs" shall be divided as between lighting and power, or any portions of the company's business to which they are applicable. The company recognizes the necessity of such a division, but, because of the obvious impracticability of making it, does not undertake it. Without it there is no demonstration that the resulting charge to the individual is proportional to his cost.

But the "diversity factors," however determined and applied, ascertain and apportion not the actual cost of supplying an individual customer, taking into account the conditions peculiar to his supply, but rather the supposed cost of supplying him, assuming that his supply is based on certain average conditions. It is equally evident that the investment for which each customer is claimed to be responsible is not an amount definitely ascertainable once for all, but an amount dependent upon a standard, namely, his maximum demand, which may vary widely from time to time without any actual influence on the company's investment.

The practical difficulty of ascertaining the particular cost of an individual customer is also illustrated in the company's division of its annual expenses as between "fixed" and "running" costs. As already stated, "fixed costs" are apportioned according to the maximum station demand, and may be assumed to be dependent upon it. This perhaps is sufficiently accurate with regard to expenses connected with the generating department. But the problem is quite different with regard to the distribution investment and the expenses connected therewith. The distribution investment is practically one-half of the total investment. It is apparent that the actual costs of reaching and supplying individual customers must vary widely. It is clear that to separate the actual cost of reaching an individual customer is well-nigh impossible. In fact, the company admits that in the case of the city of Boston it is unable to state the actual cost of the distribution investment necessary to supply the city's street lights, although the lines, lamps and other apparatus directly connected therewith are used for that and for no other purpose. Confronted with the impossibility of determining actual individual distribution investment costs, it might be expected that the company should apportion to the individual distribution as well as generating costs on the basis of maximum demand, on the ground that lamps and copper conductors are a considerable part of the distribution investment and are proportional to demand. But instead the company departs from its first theory by introducing an assumption, namely, that on the average it costs far more per kilowatt of demand to reach and supply a small customer than a large customer, and upon this bases its justification for its wholesale discounts because of quantity, irrespective of length of use. In other words, it is again made evident that the company is not ascertaining actual individual costs but is substituting results obtained from apply-

ing the almost universal rule of averages by means of a system of arbitrary and sometimes inconsistent factors.

The division made by the company of its expenses into "fixed" and "running" costs was considered and criticised in great detail in its relation to the determination of individual costs. For the purposes of this inquiry it does not seem to be necessary to attempt to discuss most of the items of the actual division made, or to reach a conclusion as to whether or not a different division might be made or a third division created with results more scientifically accurate. Two items of "fixed costs," however, are of sufficient size to merit attention, namely, general expenses of management and dividends, amounting for the year ending June 30, 1907, to $457,634.96 and $1,304,283.50 respectively, or, together, to $1,781,918.46, out of a total expenditure for the year of $4,117,557.37. On the other hand, the items for that year which are used by the company in determining the "running costs," namely, coal, oil and waste, station wages, carbons and incandescent lamps, amount in all to $718,182.48, or 1.2 cents per kilowatt sold. By putting dividends into "fixed costs" they seem no longer to represent profits, but rather interest on the capital employed in the business. But while, in determining the rate for the primary hours, the company made this assumption, yet later it claimed that it was from the secondary rather than the primary rate that a certain portion of the profits of the company should come, and further says:

"This is also just, as it would appear to be quite proper that the customers using the plant for the longest time should pay the largest proportion of the profits of the company. An additional reason why the secondary rate should be higher than the actual cost is that the only excuse for the extra outlay to make a station highly economical is in order to reduce the operating or running costs, therefore the interest, etc., on the extra investment for this purpose should be chargeable to the running expense."

A very considerable part of the company's investment has been for the purpose of reducing operating expenses, and to this extent, on its own theory, a certain proportion of the dividends belong with "running costs." On the other hand, if dividends be reckoned as in the nature of profits, then they cannot be known and divided until all the results of the business for the given period have been determined. The company's system, however, demands of each customer his theoretical pro rata contribution for this purpose as the sine qua non of doing business with the company.

It is also difficult to find on what theory general expenses of management are directly dependent on investment. Ordinarily it seems to be assumed that such expenses are incurred for the benefit of the business as a whole, thus warranting attributing them to output, and averaging them among the units sold.

In the year ending June 30, 1907, the dividends required a trifle over 2 cents per kilowatt sold, and general expenses of management

about .7 cent. If these two items, or any considerable part of them, may fairly be chargeable to "running costs," then it is difficult to find on what theory the company made a profit and not an actual loss on any customer to whom current was sold at an average rate per kilowatt of much less than 3 cents, and yet the special-rate customers paid but an average of 3.8 cents per kilowatt. Even on the company's division of "fixed" and "running" costs as confessedly lighting customers they should have contributed an average of $80 per kilowatt of demand, as against an actual contribution of $29.20 per estimated kilowatt of demand. It requires all of the assumptions incident to the justification of the wholesale discount to account for this discrepancy in the returns made by this class of customers to "fixed costs."

The basis for the prices charged to noncontract lighting customers has already been described. Whatever may be said of the company's other prices, its method of determining the primary and secondary rates for this class of customers has little or no reference to the individual, but rather to certain average conditions of supply, and to the average return to be obtained from these customers as a class. The one thing of which the company makes sure is to make no substantial concession to them as a class, but to charge prices sufficient in amount to cover all the so-called "fixed" and "running" costs attributable upon its theory to the class.

In what has been said the Board has not intended to discuss every phase of the company's system of rates or every possible objection to it. The Board is of the opinion that no differential system of rates for a public utility can be equitably and properly based solely upon the cost to the company of supplying the individual. It is important, however, where such a system exists, that in case of dispute over the price, or upon application for a compulsory supply, the actual cost to the company of serving one customer in distinction from all others should be capable of definite proof. The company undertook to demonstrate the correctness of its system, not perhaps in charging a customer with the absolute cost of his supply, but in making the charge reasonably and fairly proportional to the cost. After careful consideration, however, the Board is not convinced that it is practicable, even though desirable, to ascertain the respective costs to the company of its individual customers and to apportion such costs in the prices charged, either under the system used by the company or under any other known to the Board.

The Board has stated and discussed the company's system of rates at considerable length because it represents, to a very large extent, the theory and practice prevailing among the electric light companies in this and other states. Since the adoption of it, and other systems more or less similar, the companies have developed the volume of their business and increased their revenue, and have become sufficiently strong financially to be efficient public servants. The Board also

recognizes that it is not in the public interest that any changes in existing conditions shall be made so radical or rapid as to impair the efficiency of the company's service.

Two considerations which vitally affect the relation of the company to its customers have not received from the company in these hearings the attention which they deserve. They become, however, essential to a proper adjustment of this relation the moment the varying costs to the company of supplying its different customers is abandoned as a sound and practicable basis for rates.

In the first place, a kilowatt hour is now the established unit for measuring electricity. It represents a definite amount of electrical energy. It will do exactly the same amount of work for one customer as for another. Unless a customer can consider seriously generating his own electricity, the value to him of each kilowatt hour furnished by the company has no necessary relation either to demand, quantity or length of use. If, however, he can seriously consider supplying himself, these factors may affect his own cost, and therefore the price which he might be willing to pay the company instead of installing his own plant.

In the second place, the use of electricity for light and power has grown with great rapidity during the past two decades, and while it may be generated and used even in small quantities on private premises, yet as a practical matter it is impossible for every individual to manufacture electricity for himself. Most of the members of a community must seek a supply from some common agency, or not enjoy its use. To serve this need, and to promote the public welfare and convenience, the company has been given substantially exclusive privileges to extend its lines throughout the territory which it supplies.

The company has, therefore, a public duty to perform, and is bound to discharge this duty for the equal benefit of all. It is also to be remembered that it has but one service to render its customers, namely, to supply them with electricity. The company conceded that it cannot, consistently with its duty to the community, supply A and refuse to supply B, both being within reach of its lines. It is equally clear that to charge A one price and B another for the same service under like conditions is a violation of duty. In a proper conception of the nature of this duty, mere difference in size of customers does not of itself constitute such a difference in conditions as to justify a difference in price. But the company contended that in any event variations in length of use of a given demand constitute such differences in condition as to warrant differences in price. Here again, however, it is plain that such differences in price must be justified, if at all, because of reasonably proportional differences in cost of service, and yet it has already been set forth that this consideration, even on the company's theory, must frequently yield to considerations of the nature of the customer's use of electricity, and that at best the company can assign the costs of supplying its customers only on broad lines, and upon certain general assumptions and averages. Due weight

should be and has been given to the necessity and desirability of increasing the efficiency of the plant without increasing the investment, in order thereby to decrease the average cost of the electricity produced. It may be admitted as a general truth that, other conditions being equal, length of use of a given demand has an influence upon the company's costs. But unless the variations in use are sufficiently marked, it is apparent that their influence upon costs is slight, and therefore, with respect to the great majority of customers they are practically negligible. The Board is also not convinced that this consideration is so controlling as to warrant the conclusion that such conditions necessarily create individual differences in cost upon which different prices to customers may properly be based.

If all the customers of the company were dependent upon it for a supply, it is believed that there would be little occasion to discuss or attempt to justify differential rates, and that a uniform meter rate, determined by reasonable operating costs and a fair return on the investment reasonably necessary for the public convenience, would prevail universally. It may be conceded that, if a uniform meter rate prevailed, there would be some unprofitable customers. This may be predicated with truth of any system of rates for a public service. The Board is of the opinion, however, that this view of such a rate is exaggerated, and that in any event it is likely to result in no greater amount of injustice than in an attempt to make every customer theoretically, if not actually, profitable. There can be no more desirable requisite for every public service charge than that it shall be simple, definite and readily understood and applied. Even its most ardent advocates do not claim that these characteristics are inherent in the demand system.

In an analysis of the last year of the company's business, the noncontract lighting customers were in point of numbers 15,000 out of 20,000 approximately, or 75 per cent. of the whole number of customers. As a class they used an average of 512 hours per kilowatt of their aggregate maximum demands out of the 520 hours required by the company's schedule, and it seems fair to assume that as a class, because of their fluctuating use of electricity, their maximum demands represent exceptional and not normal conditions. On a 15-cent primary rate and a 12-cent secondary rate, with the discounts, they paid an average rate of 14.27 cents. Those customers who cannot manufacture electricity for themselves, and whose needs and convenience the company is bound to serve, are chiefly of this noncontract class. Whatever view may be taken of the matter, the conditions under which customers so situated use electricity are not so unlike as to make a uniform meter rate work any substantial injustice to them. Neither is there any sufficient advantage to the company, in the present system of rates as applicable to this class, to compensate for the complications and misunderstandings which they introduce. The Board is of the opinion that, in view of these considerations and in place of the present so-

called noncontract lighting rates, the company should offer to sell electricity to its customers for any use at a uniform meter rate.

In distinction from the large body of customers just mentioned there is a considerable number, both actual and possible, who may readily supply themselves with light or obtain power from some other source. To such customers the value of the service furnished by the company will depend to a considerable extent on the probable cost of supplying themselves. If the company is to supply them, it is subject to the ordinary rules of business competition; it must meet prices established by conditions which it does not create and cannot control, or not do the business. The prices which an electric light company must thus meet or not do business are determined, not by an open market, but largely by individual conditions, which differ widely with different customers. Had the company not taken the initiative in offering prices which have attracted this business, and the customers now under consideration were attempting to compel the company to serve them at prices which fitted their respective conditions, it is probable that they could not compel the company to serve them except at a price open to all. On the other hand, should the company now refuse to serve its customers save at a uniform price, or uniform prices for lighting and power respectively, as some have suggested, it is equally probable that the immediate effect would be a considerable loss in the volume of its business. The question arises whether or not the existing practice of the company in respect to its prices for business of this character is so far inconsistent with its recognized duty to serve all without discrimination that it should no longer be tolerated.

In considering this question it must not be forgotten that the advantage enjoyed by a customer whose use of electricity will warrant the installation of his own supply of electricity or power is one which the company cannot prevent. It is equally to be remembered that there is always a strong temptation to the manager of a public service, if unrestrained, to maintain a high rate for business which he controls while making disproportionate concessions to get that which can take care of itself. Experience is also making more and more evident that the duty of one who undertakes a public service must necessarily deprive him of the right to base his policies upon many practices common to and even commendable in private business.

In reaching out for additional business by making concessions from the average rate, it is plain that the only justification for permitting the continuance of such a policy is that this additional business will be for the benefit of the large body of customers who must pay the regular rate. For it is not the advantage of the few but rather the advantage of the many which should be the controlling test. In the opinion of the Board this "competitive" business, if it may be so termed, is of such value in the present development of the company that it may be of substantial advantage to the customer who must pay the regular rate. In fact, the only means by which the average lighting customer

can hope to see the price to him materially reduced is through a greater increase in the volume of the business relative to the company's investment. Long use of a customer's installation, especially during parts of the day or year when otherwise a considerable proportion of the company's plant is standing idle, even at very low rates, provided they reasonably exceed proper "running costs," may yield a revenue otherwise not available, which will materially help to dilute the company's general expenses, and should lead, as the business of the company develops, to the steady reduction of the price to the regular customer.

The customers who have just been under discussion are now supplied almost wholly under the yearly lighting, elevator and power schedules. It is under these three schedules, and especially the latter, that the most substantial increases have been made this past year in the company's business. While this is an indication that the prices are sufficiently low to attract business, yet the evidence submitted at the hearings does not justify the conclusion that the company is taking business under these schedules at a loss, and thus imposing a burden on the average customer. Of course, with respect to the so-called "competitive" customers, it is clear that prices should not be determined by special bargain in each case, and on whatever basis offered by the company should be free to all desiring a supply under like conditions. The demand system, whatever its faults in determining the individual's cost to the company, has at least the merit of recognizing the most essential elements determining the probable cost to the individual of supplying himself, and therefore operates to fit the price which the company must make to get his business to his actual conditions. To the extent to which this business is really competitive it will take care of itself. For these reasons the Board makes no recommendations with respect to these schedules, although believing that some readjustment with a view to their simplification upon broader and more uniform lines may be wisely undertaken.

The Board is aware of the danger of abuse in permitting concessions to some customers not granted to all. It is also aware that the terms "noncompetitive" and "competitive" cannot be applied to the company's customers with precision, and that, if used, they may not describe with absolute strictness the present noncontract lighting as distinguished from the yearly lighting, power and elevator customers. But the Board believes that these terms recognize as existing certain economic conditions attending the sale of electricity which, in the interest of the many whose needs and convenience the company should serve, seem to warrant a continuance of certain differences in prices, not as a permanent policy, but until the uniform rate recommended can from time to time be safely reduced so low as to be in itself an encouragement to the unrestricted use of electricity for all purposes.[61]

[61] For further discussion of the policy of making concessions to secure patronage which would not bear a higher rate, see infra, pages 1155ff.

The Board is also convinced that the present system of rates has operated to select as customers those whom the company deemed desirable, and has tended to discourage small users of electricity from becoming customers. To the extent to which this is true the company is disregarding its plain duty. Furthermore, in the opinion of the Board the value of the small user to the company may have been underestimated. A study of the company's load curves, and the fact that the last year's business compared with the preceding year showed an increase of 36 per cent. in the maximum station load, as against an increase in output of 15 per cent. under the noncontract lighting schedule, 36 per cent. under the yearly lighting schedule and 137 per cent. under the power schedule, suggest that the small users of electricity may not have such an undue responsibility for the "peak of the load" after all, and that residence lighting may be considerably extended without increasing the "peak," and with substantial advantage to the company and all of its customers. * * *

It remains to determine the uniform maximum rate hereinbefore recommended, and this determination must be reached in view not only of the considerations already set forth but also of the existing prices. It appears that on the basis of the electricity sold and the maximum station demand during the year ending June 30, 1907, the company required but an average of $95 per kilowatt of maximum station demand to meet its so-called "fixed costs," as against $118 the preceding year. This of itself would seem to warrant, even on the company's theory, a reduction of 20 per cent. in the primary rate for noncontract lighting, or to 12 cents. Residence lighting is almost wholly under this schedule, and constitutes a considerable part of the electricity sold under it. As already stated, the evidence tended to prove that it has a more favorable "diversity factor" than the company has heretofore assumed, and therefore on the company's theory should have a more favorable rate than 12 cents. But the recommendations of the Board involve a radical change in the basic principle of the company's system of charges, and its effect cannot be predicted with certainty, especially in view of the change in business conditions since the investigation was begun. It is also desirable that the introduction of the new high efficiency lamps shall be encouraged and not discouraged. The Board prefers to go no farther than it can see its way clear with reasonable certainty. The Board therefore recommended:

That on and after July 1, 1908, the company offer to sell electricity for any use at a uniform price, not to exceed 12 cents per kilowatt hour, and that if a customer elects to be served under the present schedules, whenever the average price per kilowatt hour charged to him for any year thereunder exceeds said uniform price, his account shall be adjusted so that he shall not pay more than said uniform price.

The Board also recommended:

That on or before the 1st day of October, 1909, said uniform price shall be further reduced by such amount as may be approved by the

Board, unless meantime the company shall show to the Board good cause why such further reduction should not be made, or this question is reopened by complaint for reduction of price, as provided by law.

"ANALYSIS OF RATE CALCULATIONS FOR ELECTRIC LIGHT AND POWER." [62]

(Report by James E. Allison, Commissioner and Chief Engineer, to St. Louis Public Service Commission, 1910. Appendix B of the Report of the Comsion to the Municipal Assembly on Rates for Electric Light and Power, Submitted by the Commission, 1911.)

[After explaining in detail and criticising the assumptions of the "maximum demand" and of the "connected load" methods of apportioning the costs of the service, Mr. Allison continues:]

In the theory of the foregoing methods of calculation, we have the primary assumption that the investment peak is the K. W. measurement of the investment in dollars. This seems logical and not subject to attack (if we neglect the distance factor).

But we next assume that each consumer should pay investment charges in proportion to the K. W.'s which he demands at the instant of the investment peak, or according to his peak responsibility, leaving entirely out of account the essential element of the *time* during which he uses a portion of the investment in off-peak hours. In other words, his share in *causing* the investment is assumed to be the sole measure of his investment charges. Now, is it not logical and fair to assume that his *use* of the investment is equally a factor in determining his investment charges?

The omission of the time factor or *use* of the investment by the individual, not only renders a correct solution of the problem impossible, but it goes against all established and tried theories of cost accounting, opposes fundamental commercial principles and attempts to place the electric business in a unique class, for which there is no adequate reason or justification.

We have assumed that the K. W.'s which occur on the investment peak should bear all of the charges for that investment, and that the K. W.'s which occur off the peak should go entirely free of investment charges.

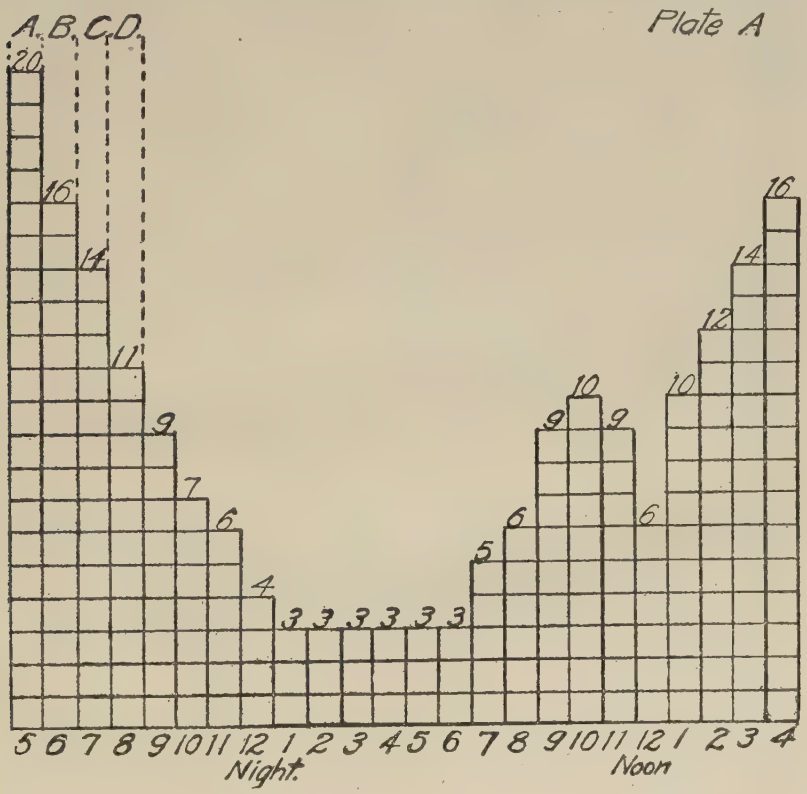
If these peak K. W.'s were persons, would they pay all the investment charges and then allow their investment to be used free by the off-peak K. W.'s? Certainly not. And they are persons in the sense that each one of them traces back to a consumer.

Is it not proper, even if the peak K. W.'s have *caused* the investment, that the off-peak K. W.'s pay proportionately for their *use* of the investment?

[62] Portions of the report are omitted. The portion here printed appears on pages 18–21 of Appendix B.

As the multiplicity of instantaneous K. W.'s is measured by the hour, it is seen that if the off-peak K. W.'s are taken into account, as well as the peak K. W.'s, the investment charge will spread itself evenly into a K. W. H. charge, making each K. W. H. equally responsible for its share in the investment.

Let us illustrate this by the diagram as shown on Plate A. The diagram is supposed to represent a station load curve, varying the load at the hour periods. The results would be the same if the variations



occurred every second or less, but it would not offer quite so clear an illustration of the principle involved.

The diagram is made to represent only one day, while of course the real curve would extend over the entire year. But this also would make no difference in the result of the illustration.

In the diagram each square is supposed to represent a K. W. H., the vertical ordinates of the curve being the measure of the K. W.'s.

Introducing the time element, we will assume that the peak column (A) is all the load there is; then of course the total investment charge must be borne by the K. W. H.'s in that column. In this instance,

there being 20 K. W. H.'s in the peak column, each would be responsible for one-twentieth of the investment charge.

So far this seems correct and just, but now come the 16 K. W. H.'s in column (B) and make use of the plant in proportion to the height of their column. It is logical and just that they should bear their portion of the investment charge, so we would then have the charge shared among 36 K. W. H.'s instead of the original 20. Introducing column (C)—14 K. W. H.'s—we would have the investment charge shared among 50 K. W. H.'s, and so on throughout the year or the revenue period, each K. W. H. bearing an equal portion of the investment charge.

There is nothing new about this theory except as applied to present methods of reasoning on electric rates.

That time is an element of investment charge is, as stated above, not merely a theory, but an accepted principle underlying nearly all commercial calculation.

In some of the larger industrial plants the cost accounting even goes so far as to keep account of the time of use of the larger machines in producing a certain article, and the cost of the article is charged with that *time* of *use* separately from the accompanying labor charge, making it purely an investment charge.

Boiled down to a few words, the theory is that investment charge is a species of rent and should be paid in proportion to the fraction of the plant used, and the duration of the time during which it is used.

For convenience in discussion, let us call the theory of distributing investment charges in proportion to peak responsibility the *Cause* of Investment Theory and the theory here advanced and diagramed the *Use* of Investment Theory, or the *Cause* Theory and *Use* Theory.

From page 1140 it would appear eminently unjust and illogical to apply the *Cause* Theory alone, even if correct calculations for the individual consumer could be made under it, which, from preceding pages, seems impossible.

The Use Theory seems much more rational and more likely to result in substantial justice between the consumers. The calculation also can be easily made and applied. But in considering the entire neglect of the Cause Theory there appear some very disturbing possibilities, as illustrated by the following case:

Suppose a given plant, having apportioned its investment charge evenly over the estimated K. W. H. consumption, should take on a consumer or class of consumers who would cause an increase in investment, but would bring a K. W. H. consumption of a less ratio to the increased investment than the ratio formerly existing for the whole body of consumers. The result under a strict application of the *Use* Theory would be an increase of investment charge for all the K. W. H.'s sold, without the original consumers receiving any additional benefit as consumers.

This line of reasoning might be applied throughout the whole building up of the business, and would tend to show that, theoretically at least, the Cause Theory should not be wholly neglected in attempting to solve the problem of individual cost to serve rates.

It would seem that the ideal method would be a combination of the Cause Theory and the Use Theory. But, unfortunately, even if it were possible to assign even approximately correct charges to the individual under the Cause Theory, there is no logical way of determining the proportion of weight which each of the two theories should have in the calculation.

While there seems to be no absolutely correct theoretical solution of the difficulty, yet it may perhaps be possible to find some practical solution which will result in at least approximate justice to all consumers.[63] * * *

[63] The "Cause Theory" would not require "that the K. W.'s which occur on the investment peak should bear all of the charges for that investment, and that the K. W.'s which occur off the peak should go entirely free of investment charges." Take Mr. Allison's illustration at its simplest, when the 16 K. W.'s in column (B) are added to the 20 in column (A). The investment necessitated ("caused") by column (A) *as distinct from other users* is not 20 K. W.'s, but 4; i. e., if the company did not have to be ready to serve the peak users at all, it would still have to be prepared to furnish 16 K. W. H.'s simultaneously to those in column (B), and the saving would be but 4. The "Cause Theory" would require that those in column (A) should pay the entire investment charge necessitated by these 4 additional peak K. W.'s (⅕ of the total investment charge, each of the 20 peak K. W. H.'s paying 1/20 of this ⅕ or 1/100 of the total); and that in addition, those in both columns should pay for the investment charge necessitated by readiness to supply 16 K. W. H.'s simultaneously, or ⅘ of the total. Then ⅘ of the investment charge, not the entire amount thereof, might be apportioned by "use" without violating the "Cause Theory," and each K. W. H. in both columns required to pay 1/36 of this ⅘, or 1/45 of the total. Under this arrangement, each K. W. H. in column (A) would pay 1/100 plus 1/45, and each K. W. H. in column (B) 1/45 of the investment charge; and thus the total would be covered. This procedure eliminates the difficulty Mr. Allison describes as following from "a strict application of the Use Theory," as well as the unfairness he attributes to the "Cause Theory" as he (erroneously, it seems) understands it. Difficulties in the choice of a "use unit" for the allocation of those costs to which the "Cause Theory" is inapplicable, are referred to infra, page 1148, note 69.

Space forbids the inclusion of detailed discussion of the allocation of costs in other kinds of utility companies. For a separation of the costs of rural from urban telephone service, see Tighe v. Clinton Telephone Co., 3 Wis. R. C. R. 117 (1908). For an analysis of the costs of a water company, see City of Ashland v. Ashland Water Co., 4 Wis. R. C. R. 273 (1909). A far more thorough discussion of electrical rates than is possible here will be found in G. P. Watkins, "Electrical Rates" (N. Y., D. Van Nostrand Co., 1921). The wider aspects of this problem are treated profoundly in John Maurice Clark, "The Economics of Overhead Costs" (University of Chicago Press, 1923). A problem similar to that discussed by Mr. Allison, but referring to railroads, is discussed on pages 282–286. The assumption that the peak traffic is entirely responsible for the capacity costs is first made, and then qualified, but not on the grounds given in the first paragraph of this note. See, also, by the same author, "Social Control of Business," chapter XXV (University of Chicago Press, 1926).

(B) Apportionment of Joint Costs

CITY OF RIPON v. RIPON LIGHT & WATER CO.[64]

(Railroad Commission of Wisconsin, 1910. 5 Wis. R. C. R. 1.)

* * * From the foregoing discussion it will be seen that the operating expenses of any utility, which is subject to these characteristics of operation, naturally fall into two well-defined groups—those which are determined by the capacity of the plant and are independent of the output, and those which vary solely with the output. In accepted terminology, the former are designated the fixed or capacity expenses, and include all or a part of such expenses as taxes, insurance, return on the investment, physical decay and obsolescence of the plant, etc., while the latter are called the variable or output expenses, and include such items as fuel and other steam supplies, lubricants, maintenance of equipment as the result of wear and tear in service, etc. Certain items of expense, however, are of such a nature as not to be entirely includable in either class, but must be divided between both. Illustrative of this is the expense for fuel where the plant is in operation only a portion of the time each day; it being cheaper to bank the fire than to permit it to become extinguished. A further example is the expense for wages where the employees are actively engaged only a portion of the time. * * *

BUELL v. CHICAGO, M. & ST. P. RY. CO.[65]

(Railroad Commission of Wisconsin, 1907. 1 Wis. R. C. R. 324.)

* * * From the quotations given [from writers on accounting], which represent the best thought upon the subject, it appears that all direct costs—that is, all expenses that can be actually separated for each department and job—should be charged to their respective departments; and that all indirect costs and general expenses which are common to all departments and contracts should be apportioned between them in proportion to the direct expenses, or to some part of the direct expenses, such as the cost of either labor or material, or of both. As to which one of these bases should be applied is a matter that depends on the conditions in each case. In some instances and for some items the labor cost is perhaps the best. In other instances the cost of material is the most available. Again, the total of both may be the best unit. General expenses, interest upon the investment, and items of this nature should be distributed to each department in proportion to the total expense. * * *

64 Portions of the opinion are omitted. The portion here printed appears on pages 29, 30, of the report.

65 Portions of the opinion are omitted. The portion here printed appears on page 398 of the report.

COLUMBUS ADVANCEMENT ASSOCIATION v. WISCONSIN TELEPHONE CO.[66]

(Railroad Commission of Wisconsin, 1910. 4 Wis. R. C. R. 414.)

* * * Miscellaneous advertising and canvassing has always been apportioned by respondent to the various exchanges on the basis of direct expenses incurred by each exchange for that purpose. This method results in unusual portions of miscellaneous advertising and canvassing being charged against an exchange in years during which that exchange is incurring unusual expenditures for advertising and canvassing. In other words, the more each exchange expends directly for advertising and canvassing, the more it is made to bear the burden of indirect advertising and canvassing done by the company as a whole. It is apparent that the relative benefit derived by each exchange from the expenditure of money by the company as a whole does not vary much from year to year. It therefore appears to be a double tax upon an exchange which makes unusual direct expenditures to charge it indirectly with a pro rata share of expenses on the basis of its direct expenses. While this is a well-accepted general rule, it has its necessary exceptions. Earnings are supposed to be increased by advertising and canvassing, yet they do not fluctuate as between the various exchanges in so marked a degree as do expenses for advertising and canvassing. Hence, earnings probably constitute a safer and more stable basis and has [sic] been resorted to in this instance. * * *

THE MINNESOTA RATE CASES.

(Supreme Court of the United States, 1913. 230 U. S. 352, 33 S. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. [N. S.] 1151, Ann. Cas. 1916A, 18.)

Mr. Justice HUGHES delivered the opinion of the court.[67] * * *

Apportionment of Values. * * * The apportionment of the value of the property, as found, between the interstate and intrastate business was made upon the basis of the gross revenue derived from each. This is a simple method, easily applied, and for that reason has been repeatedly used. It has not, however, been approved by this court, and its correctness is now challenged. * * *

In support of this method, it is said that a division of the value of the property according to gross earnings is a division according to the

66 Portions of the opinion are omitted. The portion here printed appears on page 419 of the report.

67 Portions of the opinion are omitted. The portion here printed appears on pages 458–461 of 230 U. S. (33 S. Ct. 764). In it the court is dealing with the Northern Pacific Railway, as to which it held that the rates established by the state had not been shown to be unconstitutional.

"value of the use," and therefore proper. But it would seem to be clear that the value of the use is not shown by *gross* earnings. The gross earnings may be consumed by expenses, leaving little or no profit.[68] If, for example, the intrastate rates were so far reduced as to leave no net profits, and the only profitable business was the interstate business, it certainly could not be said that the value of the use was measured by the gross revenue.

It is not asserted that the relation of expense to revenue is the same in both businesses; on the contrary, it is insisted that it is widely different. * * * It is contended, according to the computations, that only a little over 10 per cent. of the entire net revenue of the test year ($5,431,514.66) was made in the intrastate business, and that 90 per cent. thereof was made in the interstate business; but approximately 21 per cent. of the total value of the property was assigned to the intrastate business.

If the property is to be divided according to the value of the use, it is plain that the gross-earnings method is not an accurate measure of that value.

In Chicago, Milwaukee, etc., Ry. Co. v. Tompkins, 176 U. S. 167, 20 S. Ct. 336, 44 L. Ed. 417, the court below had found the value of the plaintiffs' property in South Dakota to be $10,000,000, and had divided it between the interstate and intrastate business according to the gross receipts from each. Mr. Justice Brewer, in delivering the opinion of the court, after referring to the result reached, said:

"Such a result indicates that there is something wrong in the process by which the conclusion is reached. That there was, can be made apparent by further computations, and in them we will take even numbers as more easy of comprehension. Suppose the total value of the property in South Dakota was $10,000,000, and the total receipts

[68] If "value of the use" means value *to the consumers*, it is difficult to see the relevance of the expense incurred by the company. If value to the consumers means general social value or benefit, it might be argued that the expenses should be apportioned in inverse ratio to "value," so that the most beneficial of the services might be rendered the most cheaply. From this point of view, economists might indeed argue that the net *social* value can be determined only by deducting from the value to the consumers the social cost of rendering it, and this cost might be indicated roughly by the expense to the company. It is not likely, however, that the court had in mind any such subtle notion. "Value" to the consumers might, of course, refer to exchange value; but the exchange value of all the intrastate service rendered *is* the gross earnings from that service (subject to a qualification infra, page 1171, note 97), and the succeeding arguments of the court in this case dispose of that basis for apportionment; but these arguments are not based on the failure to subtract expenses from the gross earnings. If "value of the use" means value *to the company*, rather than to the consumers, the relative value to the company of the two services depends upon their relative net earnings, and these in turn depend on how the expenses are apportioned. The value of the use *to the company* is therefore objectionable as a basis for apportionment for the reasons given by the court in the later part of this opinion; and the true objection to the gross-earnings basis is not that it is not an accurate measure of the value *to the company*.

both from interstate and local business were $1,000,000, one-half from each. Then, according to the method pursued by the trial court, the value of the property used in earning local receipts would be $5,000,000, and the per cent. of receipts to value would be 10 per cent. The interstate receipts being unchanged, let the local receipts by a proposed schedule be reduced to one-fifth of what they had been, so that, instead of receiving $500,000, the company only receives $100,000. The total receipts for interstate and local business being then $600,000, the valuation of $10,000,000, divided between the two, would give to the property engaged in earning interstate receipts in round numbers $8,333,000, and to that engaged in earning local receipts $1,667,000. But, if $1,667,000 worth of property earns $100,000, it earns 6 per cent. In other words, although the actual receipts from local business are only one-fifth of what they were, the earning capacity is three-fifths of what it was. And, turning to the other side of the problem, it appears that, if the value of the property engaged in interstate business is to be taken as $8,333,000, and it earned $500,000, its earning capacity was the same as that employed in local business—6 per cent. So that, although the rates for interstate business be undisturbed, the process by which the trial court reached its conclusion discloses the same reduction in the earning capacity of the property employed in interstate business as in that employed in local business, in which the rates are reduced." 176 U. S. 176–177.

The value of the use, as measured by return, cannot be made the criterion when the return itself is in question. If the return, as formerly allowed, be taken as the basis, then the validity of the state's reduction would have to be tested by the very rates which the state denounced as exorbitant. And, if the return as permitted under the new rates be taken, then the state's action itself reduces the amount of value upon which the fairness of the return is to be computed.

When rates are in controversy, it would seem to be necessary to find a basis for a division of the total value of the property independently of revenue, and this must be found in the use that is made of the property; that is, there should be assigned to each business that proportion of the total value of the property which will correspond to the extent of its employment in that business. It is said that this is extremely difficult; in particular, because of the necessity for making a division between the passenger and freight business and the obvious lack of correspondence between ton miles and passenger miles. It does not appear, however, that these are the only units available for such a division; and it would seem that, after assigning to the passenger and freight departments, respectively, the property exclusively used in each, comparable use-units might be found which would afford the basis for a reasonable division with respect to property used in common. It is suggested that other methods of calculation would be equally unfavorable to the state rates, but this we cannot assume.

It is sufficient to say that the method here adopted is not of a character to justify the court in basing upon it a finding that the rates are confiscatory.[69] * * *

GROESBECK v. DULUTH, S. S. & A. RY. CO.

(Supreme Court of the United States, 1919. 250 U. S. 607, 40 S. Ct. 38, 63 L. Ed. 1167.)

Mr. Justice BRANDEIS delivered the opinion of the court.[70] * * *

The remaining objection relates to the formula adopted by the lower court for dividing charges and expenses common to freight and passenger services, and not capable of direct allocation. What

[69] When expenses are apportioned on a use-unit, the attempt is not to find the cost necessitated by the individual service (as distinct from the other services rendered at joint expense), but the use or benefit derived by it from the joint costs. Note Commissioner Allison's remarks about the "Use Theory" as distinguished from the "Cause Theory," supra, page 1142. The extent to which one user benefits from the service in comparison with the benefit derived by other users, can be determined only in the vaguest way. Certainly there is no presumption that his benefit is proportional to the separable costs which are indeed occasioned by his use. The attempt made in some cases to apportion the joint costs equally among the consumers is perhaps to be defended on the ground that there is less probability of error in the assumption that all benefit equally per unit than in any particular assumption that could be made as to unequal benefits. Cf. the reasoning of Professor T. N. Carver in regard to the theory of taxation, where he defends a principle involving "the assumption that wants are equal, which, though obviously not true, approximates more nearly to the truth than any other working assumption that could possibly be invented. * * * Where the chances are even on both sides it is safer to assume equality. Of a given number of men of the same age and the same general standard of health (by way of illustration) it is obviously untrue to assume that they will all live the same number of years; yet it is nearer the truth to assume that than any other definite workable principle. Consequently the life insurance company acts justly when it assumes that they will live the same number of years and apportions their premiums accordingly." "Principles of National Economy." (Boston, Ginn & Co., 1921), p. 654.

The attempt to apportion the joint costs equally per unit of use, however, while plausible, is difficult of application. What is the unit? Is the unit of use of electric light the kilowatt hour, or is it something which has relation to the number of lights? Is the unit of use of a railroad for freight transportation the ton mile, or is it the amount of car space occupied per mile, or is it a unit unrelated to mileage? In one case the Wisconsin Commission expressed the opinion that those expenses of telephone service "which remain practically the same whatever the amount of business done * * * should be borne equally by all subscribers, since no one of them gets more benefit from the outlay than another." In re Application of Pewaukee-Sussex Telephone Co., 7 Wis. R. C. R. 465, 471 (1911). Might it not be argued that the subscriber who makes much use of his telephone gets more benefit than he who uses it but seldom? Yet what is the unit of use—the call, or the call per mile, or the time during which the company is ready to serve the subscriber? The choice of one unit rather than another in any of the above cases might make a significant difference in the rates.

The problem of choosing a unit for the apportionment of joint costs should not be confused with the problem of choosing a unit whereby to measure the separable cost really caused by a particular service.

[70] Portions of the opinion are omitted. See supra page 1119. The portion

method should be pursued in making such division is a very difficult problem to which railroad accountants, the Interstate Commerce Commission and state Railroad Commissions have for years given serious attention.[71] Despite much patient study and the exhibition of great ingenuity no wholly satisfactory method has yet been devised. The variables due to local conditions are numerous; and experience teaches us that it is much easier to reject formulas presented as being misleading than to find one apparently adequate. The science of railroad accounting is in this respect in process of development; and it may be long before a formula is devised which can be accepted as satisfactory. For the present, at least, the question what formula the trial court should adopt presents a question, not of law, but of fact; and we are clearly unable to say that the lower court erred in adopting the method there pursued.[72] * * *

here printed appears on pages 614, 615, of 250 U. S. and page 41 of 40 S. Ct. The remaining footnotes are by the court.

[71] The Interstate Commerce Commission upon its organization July 1, 1887, required the railroads to report operating expenses separately as between the freight and passenger services. The difficulties were so great and the results so widely discredited that the requirement was withdrawn as of June 30, 1894. The requirement was restored as of July 1, 1915. In the Matter of Separating of Operating Expenses, 30 Interst. Com. Com'n R. 676. In the interval railroad accounting had in this respect made gradual advances. J. M. Talbott, Transportation by Rail (1904); Buell v. Chicago, Milwaukee & St. Paul Railway Co., 1 Wis. R. R. Com. 324 (1907); The Minnesota Rate Cases, 230 U. S. 352, 458–461, 33 S. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18 (1913); 14 American Railway Engineering Association Proceedings, pp. 587, 1128–1135 (1913); Western Passenger Fares, 37 Interst. Com. Com'n R. 1, 12–30 (1915). See M. O. Lorenz, "Railroad Rate Making," 30 Quarterly Journal of Economics, pp. 221–232 (1916); W. J. Cunningham, "The Separation of Railroad Operating Expenses between Freight and Passenger Services," 31 Quarterly Journal of Economics, pp. 200–249 (1917).

[72] The average rate of return for the years 1914–1917 according to the formula adopted by the trial judge was 1.20 per cent. By the use of a formula more favorable to the defendant he found it to be 2.52 per cent. The modified revenue train mile ratio used by the plaintiff showed a loss of over $100,000 a year; while the gross ton mile ratio proposed by the defendant indicated an average return of at most 5.82 per cent. Of these methods employed by the parties it may be noted that the Interstate Commerce Commission has said:

"The representatives of the state commissions advocated the use of 'gross ton miles' as a basis, while the representatives of the railways favored 'engine ton miles.' The discussion seemed to be somewhat influenced by the possible effect of these respective bases on statistical evidence which might be introduced in passenger rate cases. It may fairly be said that the facts and arguments presented do not warrant the final approval by the Commission of either the gross ton mile or the locomotive ton mile at this time." Rules Governing the Separation of Operating Expenses Between Freight Service and Passenger Service on Large Steam Railways, effective July 1, 1915, p. 3. These rules are now in process of revision.

HENRY WHITE EDGERTON, "VALUE OF THE SERVICE AS A FACTOR IN RATE MAKING." [73]

* * * It appears, then, that the various circumstances other than cost which are sometimes referred to, under the name of value of the service, as bearing on rates—such as the prosperity or depression of a class of patrons; the cheapness or costliness, the necessary or luxurious character of an article served; the fact that rates elsewhere are high or low—not only do not, but should not and in some directions could not operate to overrule cost or reasonableness to the producer. There must always be a substantial return to the utility, if that is possible; and this could not be so if rates were limited at the upper end by any consideration of value of the service or reasonableness to the consumer. The return to the utility must never be enormous, and this could not be so if rates were limited at the lower end by any such consideration. The sole primary requirement is that the return to the utility shall be reaonable; in other words, the maximum and minimum limits of rates are fixed exclusively by cost.

It does not follow that the circumstances referred to as value of the service have no effect on rates. They readily may, there are reasons why they should, and some of them undoubtedly do, operate to fix rates at a higher or lower point within the range of cost. * * *

Since the primary requirement is that rates shall equal cost, the value of the service can take effect only so far as cost is in doubt. But cost is always in doubt. Even the cost of a company's whole product is by no means free from doubt. * * * In the case of a particular service, the doubtful element of cost is far larger still. When, as in the case of a carrier, a company is performing a variety of services, it is clear and familiar that there is no means of determining neatly the share of the value of the whole property, or of depreciation, or of the costs of operation and maintenance, which ought to be attributed to each. The question exactly what a particular service costs is therefore "one of almost insuperable difficulty." [74] * * *

As the Interstate Commerce Commission said, in 1912, "In all classification consideration must be given to what may be termed public policy, the advantage to the community of having some kinds of freight carried at a less rate than other kinds." [75]

[73] Reprinted, by permission, from 32 Harvard Law Review, 516 (1919). Portions of the article are omitted. The portions here printed appear on pages 547–554. The remaining footnotes are by the author of the article.

[74] Central Yellow Pine Ass'n v. Illinois Central R. R., 10 Interst. Com. Com'n R. 505, 538 (1905).

[75] In re Advances in Coal Rates, 22 Interst. Com. Com'n R. 604, 623 (1912). The dictum in this case that the Norfolk & Western did not prove itself entitled to an advance by the mere showing that existing rates did not cover the cost of the service is overruled, if it ever was law—which is very doubtful—by Northern Pacific Railway v. North Dakota, 236 U. S. 585, 35 S. Ct. 429, 59 L. Ed. 735, L. R. A. 1917F, 1148, Ann. Cas. 1916A, 1 (1915).

In Coke Producers' Ass'n v. Baltimore & O. R. R., 27 Interst. Com. Com'n

For example, the Interstate Commerce Commission has treated the prosperity or depression of the business affected by a particular rate as bearing on the question what the rate should be, when there has been no question of going above or below the limits of cost. The complainant's prosperity was treated in Hitchman Coal & Coke Co. v. Baltimore & Ohio Railroad [76] as pointing more or less to the conclusion, which the Commission reached, that the rates complained of were not too high; and in Cattle Raisers' Association of Texas v. M., K. & T. Railway [77] the depression of the complainants' business was treated as having some tendency, though a slight one, to justify the Commission's action in lowering rates.[78] But it can hardly be said to be established law that prosperity or the lack of it on the part of consumers is entitled to any weight at all.

On the other hand, it is entirely settled that the value of an article served counts in fixing the rate. In 1917, in dismissing a complaint against a carrier's rate on raw silk, the Interstate Commerce Commission said:

"'The increase in the hazard is not the only fact to be considered in prescribing rates for the transportation of highly valued commodities. The Supreme Court in N. P. Ry. v. North Dakota, 236 U. S. 585, 599, 35 S. Ct. 429, 59 L. Ed. 735, L. R. A. 1917F, 1148, Ann. Cas. 1916A, 1, in giving some of the many factors which should be considered in making rates, names 'the risk assumed' and also 'the value of the service.' The Commission has throughout its history given consideration to the value of a commodity when determining what is a reasonable rate thereon. Illustrative of the value of service is the percentage that the rate paid bears to the value of the article. * * * Silk is one of the commodities of the highest value in proportion to the ratio which the charges bear to the value of the commodity." [79]

R. 125, 132, 140 (1913), rates were lowered on the ground, among others, of public policy in favor of dissemination of an article. The Public Service Commission of West Virginia took similar action in Greer v. Baltimore & O. R. R. Co., P. U. R. 1916D, 286, 301 (1916). Cf. Railroad Passenger Rate Case (Mass. Pub. Serv. Com.) P. U. R. 1915B, 362, 386 (1915), and Bogart v. Wisconsin Tel. Co., P. U. R. 1916C, 1020, 1054 (1916), on propriety of favoring some classes of traffic.

[76] 16 Interst. Com. Com'n R. 512 (1909).

[77] 11 Interst. Com. Com'n R. 296, 348 (1905).

[78] In Central Yellow Pine Ass'n v. Illinois Central R. R. Co., 10 Interst. Com. Com'n R. 505 (1905), and Tift v. Southern Railway, 10 Interst. Com. Com'n R. 548 (1905), the Interstate Commerce Commission, in holding that the prosperity of a business cannot excuse the imposition of a rate which exceeds cost, used language which, taken literally, would indicate that the prosperity of a business served has nothing at all to do with the propriety of a rate. But the Commission may be supposed to have had in mind only the question with which it was dealing, viz., the question of allowing a rate to exceed cost. The question of fixing a rate higher or lower within the range of cost is distinct.

[79] Silk Ass'n of America v. Penn. R. R., 44 Interst. Com. Com'n R. 578, 581 (1917). Similarly, in 1916, in a case involving advances on live stock, the Commission adjudged that "rates for the transportation of any of the animals named * * * which are increased * * * by more than 2 per cent. for each 50 per cent. * * * of additional value * * * are unreasonable."

Weight is constantly being given, in passing on rates, to comparisons with rates at other points where conditions are similar.[80]

In passing on the rate for a particular service, tribunals not infrequently refrain altogether from guessing what the cost of the service may be. The difficulty or impossibility of fixing exactly the cost of a particular service, and the special regard which is consequently shown for value in fixing the rates on particular services, have sometimes led to the assertion—notably by the Interstate Commerce Commission [81]—that very different considerations must govern the fixing of particular rates from those that apply to an entire schedule; that the cost of a particular service, being unascertainable, can have little to do with the propriety of a particular rate; and that particular rates must therefore be governed largely by value of service. This assertion is true within limits, but there are two observations to be made upon it which greatly qualify its apparent meaning. In the first place, it implies that the value of a service is ascertainable, if not quite definitely, at least more definitely than its cost. But if one recalls the variety of elusive ideas which go under the name of value of the service, it is evident that this is not so. On the contrary, as the Interstate Commerce Commission itself has pointed out, "the cost of the service is ascertainable with much more precision and capable of more tangible expression than the value of the service." [82] In the second place, the proposition more or less suggests that, in respect to particular rates, the criterion of

National Society of Record Ass'ns v. Aberdeen & Rockfish R. R. Co., 40 Interst. Com. Com'n R. 347, 355 (1916). The same principle was applied in Iowa R. R. Commrs. v. Atchison, T. & S. F. Ry. Co., 36 Interst. Com. Com'n R. 79, 85 (1915). Cf. Coke Producers' Ass'n v. Baltimore & O. R. R., 27 Interst. Com. Com'n R. 125 (1913); J. B. Ford Co. v. Michigan Central R. R., 19 Interst. Com. Com'n R. 507, 509 (1910); Union Tanning Co. v. Southern Ry. Co., 26 Interst. Com. Com'n R. 159, 163 (1913).

State tribunals have recognized the same principle. Cf., e. g., Copeland Ore Sampling Co. v. Midland T. Ry. Co. (Colo. Pub. Util. Com.) P. U. R. 1917F, 182, 195 (1917).

[80] E. g., Freight Bureau of Cincinnati v. Cincinnati, N. O. & T. P. Ry., 6 Interst. Com. Com'n R. 195 (1894); Oregon & Washington Lumber Mfrs. Ass'n v. Southern Pacific Co., 21 Interst. Com. Com'n R. 389, 392, 393 (1911); Boileau v. Pittsburgh & L. E. R. Co., 22 Interst. Com. Com'n R. 640 (1912); Marian Coal Co. v. Delaware, L. & W. R. R., 24 Interst. Com. Com'n R. 140, 142 (1912). Cf. Interstate Commerce Com. v. Louisville & Nashville Ry. (C. C.) 118 F. 613 (1902). Comparisons with other rates were used in support of increases in Re East St. Louis Light & Power Co. (Ill. Pub. Util. Com.) P. U. R. 1918B, 320 (1917); Railroad Passenger Rate Case (Mass. Pub. Serv. Com.) P. U. R. 1915B, 362, 392 (1915); and in support of reductions or refusals to increase, in State ex rel. Watts Engineering Co. v. Public Service Commission, 269 Mo. 525, 191 S. W. 412, Ann. Cas. 1917E, 786, P. U. R. 1917C, 581, 591 (1916); Public Service Gas Co. v. Board of Public Utility Com'rs, 84 N. J. Law, 463, 474, 475, 87 A. 651, L. R. A. 1918A, 421 (1913); Hocking Valley R. R. Co. v. Public Utilities Com. of Ohio, 92 Ohio St. 362, 110 N. E. 952, P. U. R. 1916B, 406 (1915); In re Kansas City Electric Light Co. (Mo. Pub. Serv. Com.) P. U. R. 1917C, 728, 790 (1917); In re Kent Water & Light Co. (Ohio Pub. Util. Com.) P. U. R. 1917D, 394, 397 (1917).

[81] Central Yellow Pine Ass'n v. Illinois Central R. Co., 10 Interst. Com. Com'n R. 505, 539, 540 (1905).

[82] Boileau v. Pittsburgh & L. E. R. R., 22 Interst. Com. Com'n R. 640, 652 (1912).

value is deliberately preferred and preferable to the criterion of cost; in other words, it overrules cost. This is far from true. To allow value to influence rates within the range where cost is doubtful is not to prefer value to cost; it is simply to prefer value to nothing. The question which is to prevail can arise only when both are known; so far as either is unknown there is no conflict. And, as has been pointed out, when there is a conflict, it is cost and not value that prevails. * * * From the fact that costs are less accurately determinable in the case of a particular service than in that of an entire business, it follows that the range of what may or might be found to be cost is a broader range in the case of a particular service; and this is the truth in the statement that cost has less, and value more, to do with rates for particular services than with entire schedules. * * *

SECTION 8.—VALUE OF THE SERVICE

I. "What the Service Is Worth" as an Upper Limit of Reasonableness

(A) In General

ROBERT L. HALE, "VALUATION AND RATE MAKING."

(Columbia University Press, 1918. Page 16, note 1.)

It should be noted, however, that this rule [that the company is entitled to charge rates sufficient to cover operating expenses, depreciation and a "fair return" on the "value" of its property] has been said to be subject to some exceptions. In Covington & Lexington Turnpike Co. v. Sandford, 164 U. S. 578, 596, 17 S. Ct. 198, 41 L. Ed. 560, December 14, 1896, Mr. Justice Harlan remarked that "the public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends." Again, in Smyth v. Ames, 169 U. S. 466, 547, 18 S. Ct. 418, 42 L. Ed. 819, March 8, 1898, he said:

"What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

Again, in San Diego, etc., Co. v. National City, 174 U. S. 739, 757, 19 S. Ct. 804, 43 L. Ed. 1154, May 22, 1899, Mr. Justice Harlan referred to the actual-cost basis as "defective in not requiring the real value of the property and the fair value in themselves of the services rendered to be taken into consideration." Finally, in Willcox v. Consol-

idated Gas Co., 212 U. S. 19, 52, 29 S. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034, January 12, 1909, Mr. Justice Peckham, after declaring the general rule to be that the company is entitled to the benefit of any increase in land values, added:

"We do not say there may not possibly be an exception to it, where the property may have increased so enormously in value as to render a rate permitting a reasonable return upon such increased value unjust to the public."

These exceptions, however, need not detain us here. They seem to have no definite meaning. To say that the rate must not exceed what the service is reasonably worth means nothing. If the Court means what it is worth to each potential patron (what the economists term the "utility" of the service), that differs with each patron, and approaches zero in the case of the one to whom the service is worth least. If, on the other hand, the court means what the service is worth to that one of the actual patrons to whom it is worth least (what the economists term the "marginal utility" of the service), the existing price can never exceed this unless it is so high that none of the service is sold at all. The existing price may indeed fall short of the "marginal utility," for the price may be lower than essential for attracting the "marginal" buyer without bringing about additional purchases. That situation might be due either to a discrepancy between the pecuniary demand of the last actual and of the next potential buyer, or to such a limitation of the supply as necessitates shutting out some of the would-be buyers. But the price cannot exceed the pecuniary "utility" of that unit of the service which, under that price, is "marginal." Moreover, if the court means the exchange value of the service, this too (while not strictly identical with the "marginal utility") cannot possibly exceed the price asked, unless it is so high as to preclude all sales. Under any possible definite meaning that can be given to the phrase, it is idle to forbid rates higher than the services are worth.

In several cases, it may be remarked, the Wisconsin Railroad Commission has interpreted the phrase as justifying the fixing of a rate which will yield less than a fair return in cases where a higher rate would yield still less. See, for instance, In re Appl. Manitowoc Gas Co., 3 W. R. C. R. 163, 177, December 17, 1908, State Journal Printing Co. v. Madison Gas & El. Co., 4 W. R. C. R. 501, 625, March 8, 1910, In re Appl. Oconto City Water Supply Co., 7 W. R. C. R. 497, 556, 557, August 7, 1911. In the two cases first mentioned, the remarks of the Commission were dicta, since a rate sufficient to yield a fair return was not out of the question.

The "value of the services" concept was not needed to justify the Commission in the situation described, as it must be quite clear that the company is deprived of nothing at all when its rates are kept down to the point where they yield the utmost net earnings commercially possible. Indeed in another case the Commission points out that "reasonable rates" "cannot be exclusively measured by what the services are

reasonably worth, for this reasonable value is so indefinite a quantity that it cannot always be determined. It may be represented by the cost of substitutes for the services in question; by the cost to the municipality, plus a fair addition for risks of furnishing the same; by what the customers can be made to pay; by the rates charged in other places; and by many other factors." Hill v. Antigo Water Co., 3 W. R. C. R. 623, 725, August 3, 1909.

(B) Where Traffic Will Not Bear a Higher Rate Profitably

In re RATES ON WASTE LUMBER PRODUCTS.[83]

(Railroad Commission of Wisconsin, 1906. 1 Wis. R. C. R. 291.)

* * * The carriers get no revenue out of the freight that does not move, so it has become a recognized principle in the making of railway rates that they should be so adjusted that the traffic can move under them. This, of course, does not mean that the carriers should haul freight at an actual loss, but it does mean that, where it is necessary to haul freight at a low margin of profit in order to move it at all, rates should be made so that the traffic can move. * * *

"ANALYSIS OF RATE CALCULATIONS FOR ELECTRIC LIGHT AND POWER."[84]

(Report by James E. Allison, Commissioner and Chief Engineer, to St. Louis Public Service Commission, 1910. Appendix B of the Report of the Commission to the Municipal Assembly on Rates for Electric Light and Power, Submitted by the Commission, 1911.)

* * * In attempting to assign rates as closely as possible in accordance with the cost to serve principle, great care must be exercised in applying new rates to an established plant and business, that a raise in rate for certain of the consumers shall not, by driving them to other sources of power and light, so decrease the general consumption as to materially increase the investment charge for those consumers who remain.

This brings us to the consideration of a phase of rate making entirely distinct from the question of just apportionment of costs to serve among the individual consumers, but having a vital relation to the cost to serve as a whole.

The principle involved may be called the "Expediency Principle,"

[83] Portions of the opinion are omitted. The portion here printed appears on page 295 of the report.

[84] Portions of the report are omitted. The portion here printed appears on pages 30, 31, of Appendix B.

and in the public regulation of rates it presents some extremely puzzling aspects, owing to the fact that any improvement in the load factor of a plant can be shown to offer the opportunity for a decrease in the investment charge per K. W. H. In fact, even without an improvement or with an actual impairment of the load factor, most plants can show an opportunity for at least a temporary decrease in investment charge per K. W. H. by the mere increase in the volume of business. This last phase is due to the fact that under ordinary conditions the capacity of a plant may be considerably increased without making a proportionate increase in the whole investment.

Given a certain plant, we generally find that the original and necessary investment in real estate, buildings, poles, and, under certain circumstances, conduits, need not be increased materially to adequately care for a very considerable increase in capacity.

(In using the investment peak in the theoretical calculation of cost to serve rates, these more or less fixed investment items are immediately redistributed among the K. W.'s of the peak upon any change taking place in the peak.)

Where there is no public regulation of rates, the conditions described above offer constant opportunity for increase in profit to the company by taking on consumers whose business will not stand the full and just share of investment charges of the whole plant, but who will pay a rate giving a substantial profit over manufacturing cost; the balance of the consumers being left to bear the greatest part of the investment charges. Under public regulation it may be required that the whole body of consumers shall receive a fair reduction of rate as the investment charges per K. W. H. diminish with the increased output. A correct application of the expediency principle requires that no concession in price shall be made to one consumer or class of consumers, unless it is very clear that such concession will be to the distinct advantage of all the consumers.

Before leaving the subject of expediency, it may be pertinent to briefly mention the custom of giving wholesale discounts, depending solely upon the quantity of current used or the size of the consumer's bill.

If it can be shown conclusively that it costs less to serve a large consumer, a discount or lower rate is justifiable, under the cost to serve principle, but it is justifiable only so far as it is cheaper to serve him, or the low rate may be justifiable under the expediency principle, but there can be no justification of a wholesale discount, except under these two principles, for under public regulation, where income is approximately a fixed amount, no consumer can escape a part of his proportion of charges without shifting the burden to another.

The admission of the expediency principle into rate regulation, while in some cases necessary, and for the benefit of the consumers, will, if followed too far, result in the absolute destruction of any plan or mode of calculation based upon equity between the consumers; and the very

difficult problem presents itself to the Commission of determining how far it is wise to depart from the sound and just principle of cost to serve, for the sake of a possibly lower rate resulting from increased volume of business. * * *

STATE JOURNAL PRINTING CO. v. MADISON GAS & ELECTRIC CO.[85]

(Railroad Commission of Wisconsin, 1910. 4 Wis. R. C. R. 501.)

* * * The street railway belongs to a separate company and simply buys its current from the respondent, taking this current at the switchboard. The contract for this current was taken by the respondent on terms that, on the ordinary basis of figuring, yield very little in the way of profits. In fact, it appears to have been taken on the additional cost basis. That is, the respondent, in taking it, based its conclusion largely on the increase this additional business would cause in its operating expenses. It apparently had to adopt this course because the business could not be had on better terms, and on the theory that it was better both for itself and the rest of the consumers to take on the street railway, even if the income from it yielded less than the average rate of return on the investment.

That the street railway is among those consumers who occasion the plant the lowest relative cost for the current it obtains is certain. It consumes large quantities of current, and it is a well-known fact that in production the cost of the output per unit decreases with the amount of the output. It also takes the greater amount of its current during the daytime, when the demand for current for other purposes is light and when the plant would otherwise have little or nothing to do. In other words, the street railway is largely an off-peak load. These are important facts, that must be taken into consideration in fixing the rates for such consumers. If they had not been given considerable weight in fixing the rates in this case, it is quite likely that the street railway company would have found it more economical to produce its own power. It is for these reasons, mainly, that in computing the cost for the railway department we confined ourselves mostly to such expenses as were added to the operation of the respondent's plant by taking on the business of the street railway. This basis for fixing rates, however, has well-defined limitations. It would seem that it can be justified only in cases where the additional business can be had on no better terms and where these terms are such as to yield something in the way of profit and are not unjustly discriminatory. That it would not be sound practice, from the point of view of either business or public policy, to accept such additional business at rates that would not

[85] Portions of the opinion are omitted. The portion here printed appears on pages 670, 671, of the report.

cover the additional cost of taking it on, when this cost includes ordinary operating items which are affected, together with taxes, depreciation and something in the way of return on the investment, needs no argument. While in this case the rate paid by the street railway company is low, it is probably not so low as to come within this rule. Had the street railway been charged the full proportion of all the expense items, including taxes, depreciation and interest, but omitting general expenses, the cost for the street railway on the basis of apportionment used here would have amounted to about $30,232 [instead of $17,829].[86] * * *

[86] Instead of adhering to the policy enunciated above, the Wisconsin Commission sometimes apportions joint costs or what may even be separable costs in such a manner as to favor those classes of the service which will not bear a high rate. Without differentiating between the additional cost of rendering a particular service, and the share of the joint costs allocated thereto, it is impossible to know whether the concession, necessary for obtaining the customer, results in a rate below the additional cost of serving him or not. The following passage from In re Rates on Grain, 1 Wis. R. C. R. 124, 129 (1906) looks like an attempt to secure the traffic without regard to the limitation set forth in the case in the text:

"Generally speaking, we divided the operating expenses between passenger and freight traffic in the most careful manner, and on this basis we arrived at certain conclusions with reference to the cost of doing freight business both with respect to terminal and to haulage charges. The rates for the shorter distances were loaded much more heavily with operating expense than the rates for the long distances, for the reason that, unless this is done, the long distance grain traffic will move only with difficulty or not at all."

It is possible, however, that it was only the joint costs with which the short distance rates were more heavily loaded. The opinion does not set forth the figures. See, also, a passage in the case of In re Menominee & Marinette Lt. & Tr. Co., 3 Wis. R. C. R. 778, 851 (1909).

For a thorough discussion of the economic significance of making concessions to railroad traffic which will not bear a high rate, see Professor F. W. Taussig, "A Contribution to the Theory of Railway Rates" (1891), 5 Quarterly Journal of Economics, 438–465 (reprinted in part in W. Z. Ripley, "Railway Problems" [Boston, Ginn & Co., 1907] pp. 123–144). See, also, a discussion between Taussig and A. C. Pigou in the Quarterly Journal of Economics, vol. 27, pp. 378, 535 and 687 (1913). See, also, the discussion by the Massachusetts Board of Gas and Electric Light Commissioners in the Public Franchise League Case, supra, pages 1137, 1138.

For a discussion of many of the limitations to be observed in the application of this principle space is lacking here. It should be observed, however, that within the limitations stated in the case in the text, the application of the concession in favor of the traffic which will not otherwise be forthcoming does not impose a burden on the other classes of service, but lightens the burden of joint costs which those classes would have to bear without assistance if this favored traffic were not obtained. In such a situation, the following statement by the Wisconsin Commission is inapplicable:

"On the cost theory, each form of service should be charged with the expenses of operation direct or proportional which it incurs, or one class of service will be shifting its burdens and increasing the expenses of another class."—City of Ripon v. Ripon Lt. & Water Co., 5 Wis. R. C. R. 1, 30 (1910).

More pertinent is the following statement:

"Among the more important elements that enter into rate making are the cost of the services to the carrier and 'what the traffic will bear.' * * * The cost is the first element that should be determined, and this cost should then be modified by 'what the traffic can fairly bear.' Under these methods of fixing rates, articles of high value and high cost will be charged higher rates than articles of low value and low cost. Generally speaking, no rate should be lower than sufficient to cover operating expenses and to contribute at least

II. "What the Service Is Worth" as a Lower Limit of Reasonableness

(A) In General

PUBLIC SERVICE GAS CO. v. BOARD OF PUBLIC UTILITY COM'RS.

(Supreme Court of New Jersey, 1913. 84 N. J. Law, 463, 87 A. 651, L. R. A. 1918A, 421.)

Swayze, J.[87] * * * The next question is whether the rate fixed was just and reasonable. On the one hand a just and reasonable rate can never exceed, perhaps can rarely equal, the value of the service to the consumer. On the other hand, it can never be made by compulsion of public authority so low as to amount to confiscation. A just and reasonable rate must ordinarily fall somewhere between these two

a small amount towards the interest upon the investment. There are perhaps conditions under which exceptions to this may be warranted, but they should not be numerous or general. No rates should be so high as to interfere with the free and unhampered movement of the goods, or yield unreasonably high profits when the situation as a whole is considered. Between these two extremes, or between the upper and lower level, there may be almost all sorts of rates. Some may be close to the bottom; others may be close to the top; while still others may be midway between the two limits. * * * When it is found that certain commodities cannot bear rates that will cover operating expenses plus their equal proportion of a reasonable profit on the investment, and that there are other commodities which can bear these costs and something besides, it is usual, and, for the reasons given, in line with the best interests of both the carriers and the public, to so adjust the rates that the former are made to contribute less and the latter more than their equal proportions of the interest on the investment. * * * When the rates are adjusted accordingly, it will be found that of the rates in the rate schedule so built up some will yield much less in the way of interest than that to which the carriers are entitled, and that others will yield a great deal more than this."—In re Rates on Milk and Cream, 2 Wis. R. C. R. 450, 465, 466 (1908).

For the bearing of the principle of "what the traffic will bear" on the situation which gave rise to the "long and short haul clause" of the Act to Regulate Commerce, see Eliot Jones, "Principles of Railway Transportation" (MacMillan, 1924) c. IX.

Competition with other carriers may constitute one of the circumstances requiring a low rate if the traffic is to be had. This circumstance, in the case of interstate railroads, is subject to a certain degree of control by the Interstate Commerce Commission, as a result of the Transportation Act of 1920 (U. S. Comp. St. Ann. Supp. 1923, § 10071¼ et seq.). Speaking of that act, Justice Brandeis remarked, in sustaining an order of the Commission: "In view of the policy and provisions of that statute, the Commission may properly have concluded that the carrier's desire to originate traffic on its own lines, or to take traffic from a competitor, should not be given as much weight in determining the justness of a discrimination against a locality as theretofore; for now the interests of the individual carrier must yield in many respects to the public need, Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., 257 U. S. 563, 42 S. Ct. 232, 66 L. Ed. 371, 22 A. L. R. 1086 (1922); New England Divisions Case, 261 U. S. 184, 43 S. Ct. 270, 67 L. Ed. 605 (1923); and the newly conferred power to grant relief against rates unreasonably low may afford protection against injurious rate policies of a competitor, which were theretofore uncontrollable."—U. S. v. Illinois Cent. R. Co., 263 U. S. 515, 525, 44 S. Ct. 189, 193, 68 L. Ed. 417 (1924).

[87] Portions of the opinion are omitted. The portion here printed appears on pages 471–475 of 84 N. J. Law, and pages 655, 656, of 87 A.

extremes, so as to allow both sides to profit by the conduct of the business and the improvements of methods and increase of efficiency. Justice to the consumer ordinarily, would require a rate somewhat less than the full value of the service to him; and justice to the company would, ordinarily, require a rate above the point at which it would become confiscatory. To induce the investment and continuance of capital there must be some hope of gain commensurate with that realizable in other business; the mere assurance that the investment will not be confiscated would not suffice.[88] Many of the cases in the federal courts and in the courts of our sister states have involved a determination of the confiscatory character of the rate under the Fourteenth Amendment or similar constitutional provisions. We are not called upon to deal with this constitutional question; we have to do only with the question submitted to our judgment by the Legislature and expressed in the language of the statute authorizing the commissioners to fix just and reasonable individual rates. * * * In cases involving the constitutional question, the whole property used in the particular public service and the net return upon the whole must be considered, and if the whole net return is a fair return for the whole property, there is no confiscation, although some individual rates may be unremunerative. Minneapolis & St. Louis Rd. Co. v. Minnesota, 186 U. S. 257, 22 S. Ct. 900, 46 L. Ed. 1151. But where, as in this case, the individual rates must be just and reasonable, the net return upon the whole investment may be less than the ordinary return upon investments involving equal risks (Covington, etc., Turnpike Co. v. Sandford, 164 U. S. 578, 17 S. Ct. 198, 41 L. Ed. 560), or may be very much more (Cotting v. Kansas City Stockyards Co., 183 U. S. 79, 22 S. Ct. 30, 46 L. Ed. 92). With this statutory declaration before us, we may well adopt the language of Lord Selborne in Canada Southern Railway Co. v. International Bridge Co., 8 App. Cas. 723: "The principle must be, when reasonableness comes in question, not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged. That is the only thing he is concerned with." Lord Selborne expressly reserves the case where the results to the company are so enormously disproportionate to the money laid out as to be some evidence that the charge is unreasonable with reference to the person against whom it is charged. That, however, is a case not now before us. By submitting the question of the justice and reasonableness of the individual rate to the Commissioners, the Legislature must have meant that if that rate was just and reasonable, the company was to be allowed to secure such net returns on all its operations as might result from the volume of its business, or from its skill in conducting the same. By making the individual rate just and reasonable, one difficulty is avoided that would result from the attempt to make the justice and reasonableness of the rate depend upon the net result from the whole business; the difficulty is

[88] See, however, the cases in section 2, IV, and section 3, I, supra.

that a well managed, old established, successful company, paying large dividends, would be compelled to reduce its rates to the disadvantage sometimes of a new rival which, however well managed, might not yet be in vogue, and might be paying no dividends, and thus the natural advantage of the old established company would be artificially enhanced to the detriment of the new company. This difficulty is indeed less likely to arise in the case of a gas company than in the case of railroads between competing points; but as long as other methods of obtaining light, heat and power are available, the difficulty is not negligible. An illustration is found in the necessity European governments have been under to forbid railroads to reduce their rates to such a point as to deprive public canals of traffic. A just and reasonable rate must allow for possible competition and must be such as will allow the ordinarily well managed or ordinarily well located concern to exist without giving an artificial advantage to the more skillful or better located. There is another advantage which the Legislature probably had in mind in requiring the individual rate to be just and reasonable. One of the difficulties in rate cases is to allow properly for a return justly due to superior skill. If rates were to be adjudged just and reasonable in accordance with the net returns upon the whole investment, the skillful, prudent, economical manager would have no advantage over his least skillful and most imprudent rival. The fruits of his skill would be seized for the benefit of the public. So, too, by the adoption of the standard of just and reasonable individual rate, the Legislature has met the difficulty that would arise where one company by reason of superior credit due to its greater age, greater vogue or more efficient management, is able to secure capital at a lower rate of interest than another; to base the rate upon net return on the whole business would either allow the more fortunate company a higher net return or reduce the net returns to the less fortunate company to a point where it would be impossible for it to secure capital. It was probably for those reasons, perhaps for other reasons also, that the Legislature required the *individual* rate to be just and reasonable. The difficulty is that which is always present—to ascertain a standard by which this justice and reasonableness shall be gauged. The necessity of public regulation of rates arises out of the monopoly of the public service company. The unregulated price of the service ceases, except so far as some substitute for the particular service may be found, to be determined by competition, and the individual consumer is unable to contract on equal terms. Fixing rates by public authority may secure to each individual the advantage of collective bargaining by or in behalf of the whole body of consumers, and result in such a rate as might fairly be supposed to result from free competition if free competition were possible.[89] A just and reasonable rate, therefore, is necessarily rather a question of business

judgment than one of legal formula, and must often be tentative since the exact result cannot be foretold. Willcox v. Consolidated Gas Co., 212 U. S. 19, 29 S. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034; Northern Pacific Ry. v. North Dakota, 216 U. S. 579, 30 S. Ct. 423, 54 L. Ed. 624. Like so many other questions in the law that involve the reasonableness of conduct, it is a question of fact to be settled by the good sense of the tribunal it may come before. That it is not a question of legal formula is shown by the decision that a rate may be reasonable although it fails to produce an adequate return to the public service company, owing to the fact that business has not developed sufficiently to be remunerative or to the fact that the plant is on a larger scale than is justified by the present demand. San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 23 S. Ct. 571, 47 L. Ed. 892; Long Branch Commission v. Tintern Manor Water Co., 70 N. J. Eq. 71, 62 A. 474. The real test of the justice and reasonableness of an individual rate seems to be that it should be as low as possible and yet sufficient to induce the investment of capital in the business, and its continuance therein.[90] This also is a business question, and depends on the opportunities that may be offered for more profitable investments and the risk involved. In determining the justice and reasonableness of rates, perhaps no better test can ordinarily be found than the rates customarily charged in localities similarly situated, although we do not say that even that test is infallible. A table printed in one of the briefs shows that while in some municipalities with a population no larger than that of the Passaic district the charge is less than ninety cents, in others it is as high or higher. Upon the whole we find no reason in the rates charged elsewhere, to believe that ninety cents is too high for a community with the population of the Passaic district. Nor do we find the charge too low when compared with other municipalities. As a business question, the price seems within the bounds of a fair chance. It is the price which the president of the company offered to establish in 1916; the commissioners have anticipated the reduction by three years. It is urged, however, on behalf of the company that the fairness of the charge is to be tested by the amount of the company's investment and the average return thereon.† * * *

[89] The rates that would result from "free competition" are presumably rates which would yield sufficient net earnings to give the capital a value that is "normal." As to what value would be "normal" under "free competition," see the divergent views of Henry Rottschaefer ("Valuation and Rate Cases," 1925, 9 Minnesota Law Rev. 211), and R. L. Hale ("Economic Theory and the Statesman," in "The Trend of Economics," R. G. Tugwell, Ed. Knopf, 1924). See, also, John E. Kirshman, "The Principle of Competitive Cost in Public Utility Regulation" (1926) 35 Yale Law J. 805. In any event, the rates which "free competition" would establish cannot be determined without reference to earnings.

[90] Here, again, the rate that will induce the investment of capital can be determined only when the earnings yielded by that rate are known.

† The court proceeds to sustain the rates fixed by the Commission, when tested by the returns yielded thereby.

DULUTH STREET RAILWAY CO. v. RAILROAD COMMISSION OF WISCONSIN.

(Supreme Court of Wisconsin, 1915. 161 Wis. 245, 152 N. W. 887, P. U. R. 1915D, 192.)

The Commercial Club of the city of Superior filed a complaint with the Railroad Commission of Wisconsin setting forth that the rate of fare charged by the Duluth Street Railway Company for carrying passengers on its street cars in the city of Superior was excessive. * * * At the time the petition was filed a charge of 5 cents was made for carrying each person, except children under five years of age, the payment of which sum entitled a person to one continuous ride with the privilege of a universal transfer. After the hearing was had the Railroad Commission, on November 13, 1912, ordered the plaintiff in this action to sell, through its conductors, six tickets for 25 cents, good on all lines at all hours, and subject to existing transfer privileges. The plaintiff brought an action in the circuit court for Dane county to set aside this order. * * * As a conclusion of law the court found that the defendant was entitled to judgment dismissing the complaint, and from a judgment accordingly entered this appeal is taken. * * *

BARNES, J.[91] * * * The further contention is made by the appellant that the Railroad Commission erroneously attempted to regulate the reasonableness of the plaintiff's return, and not the reasonableness of the rate of charge, and that, under the Public Utilities Law (section 1797—14), the Commission is authorized to reduce rates only when they are unreasonable, and that there is no evidence whatever to show that the rate of fare charged in the instant case was not reasonable. The Commission held that, inasmuch as the rates charged yielded a return of more than 7½ per cent. per annum on the fair value of the property, they were excessive, and because they were excessive they were unreasonable. This is at least the substance of the holding of the Commission, although the language used did not follow the statutory requirement very closely. * * *

It is argued that there is very little connection between the profit which a party makes out of a service performed and what it is worth, and that in determining the value of a thing like railroad transportation the question is not whether the profit is large or small, but what is the service actually worth to the public. It is also argued that this element was lost sight of by the Commission, and that it based its idea of reasonableness solely on the amount of profit which plaintiff was making, and regardless of what the service performed was worth. The weakness of this test was, no doubt, apparent to counsel, because it was suggested, rather than pressed. If it were adopted, it would be

[91] The statement of facts is condensed, and portions of the opinion are omitted.

extremely difficult for any one to say that a rate of ten cents a mile for carrying passengers on our railroads was unreasonable. So it is contended that the market value of the service should be deemed the reasonable value of it rather than its worth, and that, inasmuch as a five-cent fare is charged in most cities, this fact establishes market value. If this should be established as a guiding principle, it would be impossible to make any compulsory reductions in rates, no matter what economies might be practiced in the transportation business. Then it leaves out of account difference in conditions in different localities. A good many generalities which lead nowhere have been indulged in by courts and economists in reference to methods of establishing the value of railway properties, as well as the manner of determining the reasonableness of rates. Street railways are natural and necessary monopolies. At least such was the case before the advent of the "jitney" bus, and its usefulness is at least problematical. They are quasi public corporations that are permitted to use the streets in the interest of public convenience and necessity. Our cities might, if they deemed it advisable, carry on the business themselves. So long as they do not do so, it is pretty well established that the privately owned street railway should be permitted to earn its reasonable and necessary expenses, including a reasonable sum for depreciation, as well as a fair rate of return on the reasonable value of the investment. The amount of this return should be governed to some extent by the character of the management. A company that is on the alert to practice economies should have some part of the saving, else there would be no inducement to reduce the cost of the service. It is not our purpose here to discuss the elements that should be considered in fixing the cost of a service. It is not involved. But we think that net earning power is one of the most important elements to consider in ascertaining whether rates of fare are reasonable or otherwise. Where a monopoly is created by law, it is entirely proper and generally advisable that its power to take more than fairly belongs to it, to wit, a reasonable return on the reasonable value of the property, should be restricted. Investments of this character are permanent, and the risks are not very great, unless bad judgment is used in building a road where there is no sufficient call for it to justify the expenditure. The cost of the service is the most definite and tangible guide there is to tie to in making rates, if, indeed, it is not the only one. Where rates are so adjusted as to yield a fair return on the value of the property over and above expenses and depreciation, they are reasonable. Where they are so fixed as to materially exceed this sum, they are not. * * *

Judgment affirmed.

MARSHALL, J., dissented, and TIMLIN, J., took no part.

(B) A Rate Injurious to Competitors

PUBLIC SERVICE COMMISSION OF WASHINGTON v. GARFIELD.[92]

(Public Service Commission of Washington, 1916. P. U. R. 1916B, 835.)

BY THE COMMISSION: * * *

This complaint is based upon section 80, c. 117, Laws of 1911, as amended by chapter 145, Laws of 1913.

The complainant in this case operates a line of boats on Puget Sound. * * * The complainant operates on a regular schedule throughout the year, and has filed with the Public Service Commission its tariff. The respondent, Bremerton Transportation Company, operates one boat and performs a "tramp service." This tramp boat touches at some of the points on plaintiff's regular schedule. Respondent's boat does not operate regularly, but goes into the points served by the complainant when it can obtain business. The respondent concedes plaintiff's rates to be fair, reasonable, and sufficient. It also concedes that it cuts rates when by so doing it can obtain freight. The respondent claims the right to do this, and to compete with the complainant in any manner. * * *

The boat situation in Puget Sound presents a very difficult question to the Commission. The general rule for fixing rates for public utilities is to ascertain the fair value of the property devoted to the public service, and then allow such rate as will result in a reasonable return upon the fair value of the property used in serving the public. This rule cannot be applied in establishing just, fair, and sufficient rates for steamboats. A boat costing $20,000 is in competition with a boat costing $10,000. Both boats are operating over the same route, and may be capable of carrying the same number of passengers. The one boat may be able to serve the public at rates much less than the other, and at the same time make a fair return upon the fair value of its property devoted to the public service. This condition exists in a greater or less degree all over the Sound. The larger, more commodious, best equipped, and safer boats are required to compete with boats that barely pass the necessary standard of safety, and which are very poorly equipped and unfitted to perform a service such as is contemplated by the statute, and such as the public is entitled to enjoy. During the winter months when the travel is light these smaller, cheaper, and poorly equipped boats may not operate at all, and then during the summer months when the route is profitable compete with the larger boats, and by charging rates that are not remunerative to the larger and better equipped boats practically deprive them of a sufficient amount of business to warrant their operation. If this practice is permitted to continue, it is only a matter of time until the better

[92] Portions of the opinion are omitted.

boats will disappear entirely from the service, and the public will be required to use boats inferior in equipment and more dangerous to the safety of the passengers.

It would seem that the amendment to section 80, supra, was intended to meet a condition of this sort. The portion of the section which seems peculiarly applicable reads as follows:

"That when two or more public service corporations are engaged in competition in any locality, or localities, in the state either may make complaint against the other or others that the rates, charges, rules, regulations, or practices of such other or others with or in respect to which the complainant is in competition, are unreasonable, unremunerative, discriminatory, illegal, unfair or intending, or tending, to oppress the complainant, to stifle competition or to create or encourage the creation of monopoly."

"Cut-throat" competition not only tends to oppress, but to stifle competition, and to create and encourage the creation of monopoly. The public is vitally interested in the development of a safe, adequate, and sufficient boat service on Puget Sound and the continuance of the practices of cutting rates by boats poorly equipped and capable only of furnishing an inferior service will eventually result in the poorer boats only performing the service upon the waters of Puget Sound. This Commission is of the opinion that such a result should be prevented, and such rates established as will insure to the public a safe, adequate, and sufficient service. This result can only be obtained by establishing rates for all boats sufficient to remunerate and encourage the operation of boats so constructed and equipped as to be capable of furnishing adequate and sufficient service. While the poorer boats can operate for less, they should not be heard to complain if rates are established which will return to them more than an adequate, just, and sufficient return upon the value of their property devoted to the public service, particularly in view of section 80, c. 117, Laws of 1911, as amended by chapter 145, Laws of 1913, which provides that the Commission shall have power to establish "uniform rates." * * *

The said respondent is hereby ordered to file with the Public Service Commission of Washington a tariff in all respects identical with said Washington route, freight tariff No. 3, and to charge or collect no other, greater, or less rates for the transportation of freight than are set forth in said tariff No. 3 on file with the Public Service Commission of Washington, and said rates as set forth in said tariff, schedule No. 3, are hereby established and promulgated as the fair, reasonable, just, and sufficient rates to be charged by all boats transporting freight between said points.[93]

[93] In Jefferson Island Salt Mining Co. v. United States, 6 F. (2d) 315, 318 (1925), before Donahue, Circuit Judge, and Westenhaver and Jones, District Judges, the United States District Court, N. D. Ohio, E. D., said (through Westenhaver, District Judge): "In the present case, the evidence is ample that ruinous rate wars can only be avoided and a reasonable relationship be-

In re STREET RAILWAY RATES.

(Public Utilities Commission of District of Columbia, 1921. P. U. R. 1921E, 13.)

BY THE COMMISSION:[94] * * *

In connection with the second question, the testimony of the Washington Railway & Electric Company was to the effect that under the present rates of fare it had earned a return of 5.53 per cent. on its fair value for the year ended May 31, 1921. The evidence submitted by the Capital Traction Company shows that for the year ended April 30, 1921, the rate of return was 10.69 per cent. According to calculations made by the Commission, the result for the Capital Traction Company for the year ending May 31, 1921, gives a rate of return of 10.47 per cent.

If the two principal street railway companies be considered as one, and their operations during the period under consideration combined, it will be found that they have earned on the average a return of 7.88 per cent. on their combined fair values, or, if deduction from fair value be made for depreciation accrued since the date of the Commission's valuation of the properties (July 1, 1919), the return becomes 8.10 per cent.

The Commission believes that a reduction in the rate of fare is justified from the evidence in this case, and after considering the effect on the revenues of the combined companies, reaches the conclusion that the token fare should be reduced from 7½ cents to 7 cents, the cash fare to remain unchanged and the present charge for intercompany transfers to continue.

The Commission is aware that this action does not grant the relief asked for in the petition of the Federation of Citizens' Associations; that if the Capital Traction Company were to be considered by itself, a further reduction of fares on its lines could be justified. The Commission, however, repeats what it has said in previous street railway rate cases, that to give this reduction on the lines of the Capital Traction Company, and at the same time to continue the present rates on the lines of its competitor the Washington Railway & Electric

tween rates collected and service rendered can only be maintained by the power exercised by the Commission"—namely the fixing of minimum rates, as authorized by the Transportation Act of 1920 (U. S. Comp. St. Ann. Supp. 1923, § 10071¼ et seq.).

In re Coal from Detroit, Toledo & Ironton Railroad Mines, 64 Interst. Com. Com'n R. 564 (1921), the Commission canceled some schedules of reduced rates proposed by the railroad. In the opinion, by Commissioner Esch, it is stated (page 566): "Respondent participates in joint rates from other competitive districts, and concedes that, unless the other coal-carrying roads serving other Ohio mines and the inner crescent should make corresponding reductions in their coal rates, there would be no substantial justification from the standpoint of a proper rate relationship for the reduction proposed by it.

"The financial condition of respondent at this time might warrant the proposed reduction, provided the issue could be determined solely upon that basis. * * *"

[94] Portions of the opinion are omitted.

Company, would mean that so much traffic would be deflected from the Washington Railway & Electric System to the Capital Traction Company that the revenues of the former would be decreased probably to a point below actual operating expenses, thus necessitating increased rates on its lines, and at the same time destroying the service standard of the Capital Traction Company by an overwhelming traffic load which it could not possibly accommodate. In other words, it is highly desirable in the public interest to maintain a uniform rate of street railway fare to prevent a disarrangement of street railway service disastrous to the companies and to the public alike.

In its order No. 373, issued April 15, 1920 [P. U. R. 1920E, 39], the Commission referred to the legislative measures pending before Congress which seek to equalize the disparity in net earning power of the petitioners and that of the competing company (the Capital Traction Company) by a revision of the method of taxation on the earnings of these companies. Since that time, several other bills have been introduced but no action has yet been taken by the Congress. The Commission is of the opinion that no appreciable relief from present conditions whereby one system receives less than a fair return and the other an excessive return can be obtained until some change in the taxation methods is adopted, or until a merger of the several companies is effected.

After a careful consideration of the evidence in this case, the Commission is of the opinion that the reduction in fare, as outlined above, is just and reasonable, and should be applied uniformly to the several street railways operating in the District of Columbia, and that this reduced rate of fare should become effective at the expiration of the date set in Commission's order No. 417, viz., September 1, 1921.

(C) *A Rate So Low that Demand Exceeds Company's Capacity*

(a) Overcrowding the Service

EDWARDS v. GLEN TELEPHONE CO.

(Public Service Commission of New York, Second District, 1915. 4 P. S. C. [2d D. N. Y.] 712, P. U. R. 1916B, 940.)

Carr, Commissioner.[95] * * * At this point we must consider whether or not the introduction of a toll charge between the cities of Johnstown and Gloversville is a proper method of increasing the revenue of the company. The record in this case shows that the trunk lines between the two cities were tremendously burdened with traffic prior to the time the toll charge was placed in effect, and that

[95] Portions of the opinion are omitted. The portion here printed appears on page 739 of 4 P. S. C. (2d D., N. Y.), and page 965 of P. U. R. 1916B.

since that time the intercity traffic is only about 13.5 per cent. of what it was prior thereto, thus indicating that there was probably a great deal of unnecessary traffic between the cities. The principal effect of the toll charge has been to regulate the traffic between the cities and prevent the company from being unnecessarily burdened with business for which it is not properly remunerated, and which would require increased capital expenditures without any additional return. The increase in revenue from the toll charge is small. Therefore, considering this toll charge as a means of regulating the traffic rather than as a revenue producer solely, we believe that it is justified.[96] * * *

(b) INABILITY TO SERVE ALL APPLICANTS—RATIONING

STATE ex rel. SAGNESS v. HAWK CREEK TELEPHONE CO.

(Supreme Court of Minnesota, 1913. 120 Minn. 395, 139 N. W. 711.)

BROWN, C. J. Several farmers residing near the village of Sacred Heart, in Renville county, associated together for the purpose of establishing and constructing a rural telephone line leading from the village to their homes. An incorporation was formed, "under and pursuant to the provisions of chapter 58 of the Revised Laws of the state of Minnesota for the year 1905," as expressed in the articles of incorporation, and the organization was completed by the election of officers to manage the affairs of the company. It was not in fact incorporated for the purpose of pecuniary profit, but solely for the benefit of the members forming the association and such others as should thereafter become members, and for the single purpose of affording them telephone communication over the line constructed. Certain rules and regulations governing the affairs of the company and for the admission of members were duly enacted. Among other things, each of the original members of the association was required to pay into the treasury the sum of $50, in consideration of which one share of stock was issued to him. The money thus obtained was insufficient to defray the cost of constructing the line, and an additional amount of $10 was levied upon and paid by the members. The line was constructed as contemplated, with several branches, and fully equipped for service. Subsequently further regulations provided for the admission of new members, each new applicant being required to pay to the company the sum of $60, for which he was entitled to a share of stock and to be connected with the company's line. For this payment the company furnished the new members a telephone, three telephone poles, and performed the work of connecting the wires; the member furnishing all wire and doing the work of building

[96] See, also, the opinion of Shaw, Commissioner, of the Illinois Commission, in Re Oblong Gas Co., P. U. R. 1915A, 598, 606 and 614 (1915).

the line up to the point of connecting with the company line. The only revenue received by the company to defray the expense of keeping the line in repair is from the payments so made by the members. There are no subsequent charges for the use of the telephones or lines, except such as are imposed by the local Sacred Heart Telephone Company for switching charges; but no part thereof is for the benefit of this company. The company constructed, with branches, what are termed in the record as "line 1," and "line 2," and by rule limited the number of subscribers upon either thereof to 15. Line 1 was, prior to the time of this controversy, occupied by that number, while line 2 has but 11 subscribers. The limitations in this respect are imposed in the interests of the service, a larger number of subscribers upon any one line having a tendency to impair the same.

Relators Fagerlie and Sagness reside in the vicinity of both lines, 1 and 2; the former being one-half mile from line 1, and 2½ miles from line 2, while the latter resides a mile from line 1 and 1¾ miles from line 2. They joined in an application to become members of the association and for telephone connection, offering to comply with all the rules and regulations of the company. They demanded that they be connected with line 1. The company refused this connection, but offered to connect them with line 2. Claiming that they had been wrongfully refused the relief demanded, relators brought this proceeding to compel compliance therewith. The trial court found the facts, substantially as here stated, but in greater detail, denied the relief prayed for, and ordered judgment of dismissal, with costs. Relators appealed from an order denying a new trial.

A number of questions are presented and discussed in the briefs, only one of which requires consideration. It may be conceded for the purpose of the case that the defendant is a public service corporation, and as such under legal obligation to supply relators with telephone service, and that the company may be compelled by mandamus to do so. Counsel for the company earnestly contends that it is not such a corporation, that it was not organized for pecuniary profit, and hence is not a public service corporation. We do not consider or pass upon this question; for it is clear, conceding the character of the company in that respect, that relators have not shown themselves entitled to the particular relief demanded. They joined in a demand for connection with line 1, and refused the offer made by the company to connect them with line 2. The most relators can claim is that the company is under legal obligation to afford them facilities for telephone service equal to others similarly situated, and that they be not arbitrarily or unjustly discriminated against. 37 Cyc. 1652, and cases cited. And the sole question for consideration is whether the company, by offering to connect relators with line 2, performed its legal duty in the premises, or whether the refusal to connect with line 1 was arbitrary, unjust, or unreasonable.

We are of opinion, and so hold, that the learned trial court properly resolved the question against relators. It appears from the findings that the number of telephones now connected with line 1 are all that can receive good service therefrom, and that to attach more thereto would greatly lessen and impair the efficiency of the line. The evidence fully supports this finding. And it further appears that the sole reason for denying to relators this connection was that it would overburden the line. In view of that situation, it seems clear that the company is not open to the charge of unreasonably or arbitrarily denying to relators a service it is under any legal obligation to extend. It also appears that three of the present subscribers upon line 1 could with a small expense be shifted to line 2, thus making room for relators. The company was under no obligation to make such a change. That was a matter resting in its judgment and discretion, having in mind the situation and relation of the parties and all facts throwing light upon the question, and it cannot be said the conclusion reached by the company was either arbitrary or unreasonable. The cost to relators to connect with line 2 would be $70 or $80 in excess of the expense of connecting with line 1; but that fact furnishes no basis for interference by the court. The offer to connect relators with line 2, under the facts found by the court, was a full discharge of whatever legal duty the company owed relators, and they fail to show a right to the use of line 1, or an unreasonable refusal by the company to connect them therewith.

Order affirmed.[97]

[97] See, also, Terminal Ice Co. v. Birmingham Electric Co. (Alabama Public Service Commission) P. U. R. 1925E, 333 (1925), where the company was permitted to furnish its limited supply of off-peak current to applicants in the order of the priority of their applications.

In cases where some would-be patrons have to be denied service at the same rates at which it is furnished to others, it is not inaccurate to say that those who obtain the service are paying a rate below the exchange value thereof, even though that rate yields the company an adequate return. If the rate were increased so that it no longer fell short of the exchange value of the service, there would be no demand in excess of the company's capacity. The company, however, would be receiving more than an adequate return, and a problem would be raised with which the next section deals.

Where reasons of public policy, however, dictate the establishment of rates below the exchange value (i. e., rates which call forth a demand in excess of the capacity) the problem of rationing the available supply arises. At certain seasons there is a demand for transporting more coal than that for which the railroads have available coal cars. The Interstate Commerce Commission has power to make rules as to the apportionment of coal cars among the various mines. See, for instance, United States v. New River Co., 265 U. S. 533, 44 S. Ct. 610, 68 L. Ed. 1165 (1924), and cases cited. But cf. Berwind-White Coal-Mining Co. v. United States (D. C.) 9 F. (2d) 429 (1925). Congress can authorize the Commission, in an emegrency, to "require a preference in the order of purposes for which coal should be carried." Avent v. United States, 266 U. S. 127, 45 S. Ct. 34, 69 L. Ed. 202 (1924); U. S. v. P. Koenig Coal Co., 270 U. S. —, 46 S. Ct. 392, 70 L. Ed. — (1926); U. S. v. Mich. Portland Cement Co., 270 U. S. —, 46 S. Ct. 395, 70 L. Ed. — (1926).

The problem of priority in the rationing of supply arises frequently in the case of natural gas companies. See a note in 31 Harv. Law Rev. 1025 (1918), entitled "Discrimination by a Natural Gas Company." An act of West Vir-

SECTION 9.—EXCESSIVE OR DEFICIENT EARNINGS

I. Permitting the Company to Retain the Surplus and Requiring it to Bear the Deficiency

In re ATCHISON, T. & S. F. RY. CO.

(Public Service Commission of Missouri, 1915. P. U. R. 1916A, 594.)

Kennish and Shaw, Commissioners.[98] * * * When it is considered that we are asked to fix one schedule of rates that will be reasonable for fourteen railroads serving territory dissimilar in cost of construction of road, in density and character of traffic, some connecting large commercial centers and forming valuable connections with other carriers, while others do not, it is apparent that, however well informed the Commission should be as to the value of the property upon which the carrier is entitled to earn a reasonable return, no adjustment of rates can be expected in which equal results will follow as to the return received by each carrier. The rates fixed will doubtless prove more profitable to some of the carriers than to others, nor do we think a general schedule is open to criticism because of that fact. For a carrier should not be denied all benefit of the advantage that comes from favorable location and from the efficient and economical management of its property. The most we can hope to accomplish is that the schedule of rates which we shall adopt, considering all of the carriers and all of the intrastate traffic and the property devoted thereto, will be just and reasonable and will yield a reasonable average return on the value of such property.[99] * * *

ginia giving inhabitants of that state a preferred right of purchase over inhabitants of other states was held unconstitutional in Pennsylvania v. West Virginia, 262 U. S. 553, 43 S. Ct. 658, 67 L. Ed. 1117, 32 A. L. R. 300 (1923). Mr. Justice Brandeis, in his dissenting opinion, points out the complexity of the problem of making "an equitable distribution" of the gas among the inhabitants of the various states concerned.

See a very suggestive article by Alvin Johnson, "What Priority Means," in The New Republic for June 30, 1917 (vol. 11, p. 237).

[98] Portions of the opinion are omitted. The portion here printed appears on pages 635, 636, of P. U. R. 1916A.

[99] Cf. the language of Mr. Justice Butler in Board of Public Utility Com'rs v. N. Y. Tel. Co., supra, p. 1056, and note the following language of Prouty, Commissioner, in Advances in Rates—Eastern Case, 20 Interst. Com. Com'n R. 243, 274 (1911):

"Under rates reasonable for these three systems there may be lines whose earnings will be extravagant, but that is their good fortune. There may be lines which cannot make sufficient earnings, but that is their misfortune. We ought not to impose upon this territory, for the purpose of allowing these defendants additional revenues, higher rates than are adequate to these three systems considered as a whole."

And see comments by F. H. Dixon, "Railroads and Government," p. 233 ff. (Scribner's, 1922).

II. Recapturing the Surplus and Subsidizing for the Deficiency

DAYTON-GOOSE CREEK RAILWAY CO. v. UNITED STATES.

(Supreme Court of the United States, 1924. 263 U. S. 456, 44 S. Ct. 169, 68 L. Ed. 388, 33 A. L. R. 472.)

Mr. Chief Justice Taft delivered the opinion of the court.[1]

The main question in this case is whether the so-called "recapture" paragraphs of the Transportation Act of 1920 (chapter 91, § 422, 41 Stat. 456, 489–491 [Comp. St. Ann. Supp. 1923, § 8583a] adding section 15a, pars. 5–17, to the Interstate Commerce Act) are constitutional.

The Dayton-Goose Creek Railway is a corporation of Texas, engaged in intrastate, interstate, and foreign commerce. Its volume of intrastate traffic exceeds that of its interstate and foreign traffic. In response to orders of the Interstate Commerce Commission, the carrier made returns for 10 months of 1920, and for the full year of 1921, reporting the value of its railroad property employed in commerce and its net revenue therefrom. It earned $21,666.24 more than 6 per cent., on the value of its property in the 10 months of 1920, and $33,766.98 excess in the 12 months of 1921. The Commission requested it to report what provision it had made for setting up a fund to preserve one half of these excesses, and to remit the other half to the Commission.

The carrier then filed the present bill, setting forth the constitutional invalidity of the recapture provisions of the act and the orders of the Commission based thereon, averring that it had no adequate remedy at law to save itself from the irreparable wrong about to be done to it by enforcement of the provisions, and praying that the defendants, the United States, the Interstate Commerce Commission, and the United States district attorney for the Eastern district of Texas, be temporarily restrained from prosecuting any civil or criminal suit to enforce the Commission's orders and that the court on final hearing make the injunction permanent. The Commission answered the bill. The United States and the district attorney moved to dismiss it for want of equity jurisdiction and for lack of equity. An application for an interlocutory injunction before a court of three judges under the Act of October 22, 1913, c. 32 (38 Stat. 208, 220), was denied, and the court, proceeding to consider the equities, dismissed the bill.

The question of equity jurisdiction raised below has not been discussed here by counsel for the appellees, either upon their briefs or in oral argument. They do not rely on it, but seek without delay a decision on the merits.

While the Dayton-Goose Creek Railway Company was the sole complainant below and is the sole appellant here, 19 other railway companies have, as amici curiæ, upon leave granted, filed briefs in support of its appeal. * * *

[1] Portions of the opinion are omitted.

By section 422 of the Transportation Act there was added to the existing Interstate Commerce Act, and its amendments, section 15a. The section in its second paragraph directs the Commission to establish rates which will enable the carriers, as a whole or by rate groups or territories fixed by the Commission, to receive a fair net operating return upon the property they hold in the aggregate for use in transportation. By paragraph 3 the Commission is to establish from time to time and make public, the percentage of the value of the aggregate property it regards as a fair operating return, but for 1920 and 1921 such a fair return is to be 5½ per cent., with discretion in the Commission to add one-half of 1 per cent. as a fund for adding betterments on capital account. By paragraph 4 the Commission is to fix the aggregate value of the property from time to time, using in doing so the results of its valuation of the railways as provided in section 19a of the Interstate Commerce Act (Comp. St. § 8591) so far as they are available and all the elements of value recognized by the law of the land for rate-making purposes, including so far as the Commission may deem it proper, the investment account of the railways.

Paragraph 5 declares that because it is impossible to establish uniform rates upon competitive traffic which will adequately sustain all the carriers needed to do the business, without giving some of them a net income in excess of a fair return, any carrier receiving such excess shall hold it in the manner thereafter prescribed as trustee for the United States. Paragraph 6 distributes the excess, one half to a reserve fund to be maintained by the carrier, and the other half to a general railroad revolving fund to be maintained by the Commission. Paragraph 7 specifies the only uses to which the carrier may apply its reserve fund. They are the payment of interest on bonds and other securities, rent for leased lines, and the payment of dividends, to the extent that its operating income for the year is less than 6 per cent. When the reserve fund equals 5 per cent. of the value of the railroad property, and as long as it continues to do so, the carrier's one-half of the excess income may be used by it for any lawful purpose. Under paragraph 10, and subsequent paragraphs, the general railroad revolving fund is to be administered by the Commission in making loans to carriers to meet expenditures on capital account, to refund maturing securities originally issued on capital account and for buying equipment and facilities and leasing or selling them to carriers.

This court has recently had occasion to construe the Transportation Act. In Wisconsin R. R. Commission v. C., B. & Q. R. R. Co., 257 U. S. 563, 42 S. Ct. 232, 66 L. Ed. 371, 22 A. L. R. 1086, it was held that the act in seeking to render the interstate commerce railway system adequate to the country's needs had by sections 418 and 422 (Comp. St. Ann. Supp. 1923, §§ 8583, 8583a), conferred on the Commission valid power and duty to raise the level of intrastate rates when it found that they were so low as to discriminate against interstate commerce and unduly to burden it. In the New England Divisions

Case, 261 U. S. 184, 43 S. Ct. 270, 67 L. Ed. 605, it was held that under section 418 the Commission in making division of joint rates between groups of carriers might in the public interest consult the financial needs of a weaker group in order to maintain it in effective operation as part of an adequate transportation system, and give it a greater share of such rates if the share of the other group was adequate to avoid a confiscatory result.

In both cases it was pointed out that the Transportation Act adds a new and important object to previous interstate commerce legislation which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.

It was insisted in the two cases referred to, and it is insisted here, that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that when these objects are attained, the power of regulation is exhausted. This is too narrow a view of the commerce clause. To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety. * * *

If Congress may build railroads under the commerce clause, it may certainly exert affirmative control over privately owned railroads, to see that such railroads are equipped to perform, and do perform, the requisite public service.

Title IV of the Transportation Act, embracing sections 418 and 422, is carefully framed to achieve its expressly declared objects. Uniform rates enjoined for all shippers will tend to divide the business in proper proportion so that when the burden is great, the railroad of each carrier will be used to its capacity. If the weaker roads were permitted to charge higher rates than their competitors, the business would seek the stronger roads with the lower rates, and congestion would follow. The directions given to the Commission in fixing uniform rates will tend to put them on a scale enabling a railroad of average efficiency among all the carriers of the section to earn the prescribed maximum

return. Those who earn more must hold one half of the excess primarily to preserve their sound economic condition and avoid wasteful expenditures and unwise dividends. Those who earn less are to be given help by credit secured through a fund made up of the other half of the excess. By the recapture clauses Congress is enabled to maintain uniform rates for all shippers and yet keep the net returns of railways, whether strong or weak, to the varying percentages which are fair respectively for them. The recapture clauses are thus the key provision of the whole plan.

Having regard to the property rights of the carriers and the interest of the shipping public, the validity of the plan depends on two propositions.

First. Rates which as a body enable all the railroads, necessary to do the business of a rate territory or section, to enjoy not more than a fair net operating income on the aggregate value of their properties therein economically and efficiently operated, are reasonable from the standpoint of the individual shipper in that section. He with every other shipper similarly situated in the same section is vitally interested in having a system which can do all the business offered. If there is congestion, he suffers with the rest. He may, therefore, properly be required in the rates he pays to share with all other shippers of the same section the burden of maintaining an adequate railway capacity to do their business. This conclusion makes it unnecessary to discuss the question mooted whether shippers are deprived of constitutional rights when denied reasonable rates.

It should be noted that, in reaching a conclusion upon this first proposition, we are only considering the general level of rates and their direct bearing upon the net return of the entire group. The statute does not require that the net return from all the rates shall affect the reasonableness of a particular rate or a class of rates. In such an inquiry, the Commission may have regard to the service done, its intrinsic cost, or a comparison of it with other rates, and need not consider the total net return at all. Paragraph 17 of section 15a makes this clear:

"The provisions of this section shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates, but no shipper shall be entitled to recover upon the sole ground that any particular rate may reflect a proportion of excess income to be paid by the carrier to the Commission in the public interest under the provisions of this section."

This last clause only prevents the shipper from objecting to a particular rate otherwise reasonable, on the ground that the net return from the whole body of rates is in excess of a fair percentage of profit, a circumstance that was never relevant in such an inquiry, as hereafter shown.

Second. The carrier owning and operating a railroad, however strong financially, however economical in its facilities, or favorably situated as to traffic, is not entitled as of constitutional right to more than a fair net operating income upon the value of its properties which are being devoted to transportation. By investment in a business dedicated to the public service the owner must recognize that, as compared with investment in private business, he cannot expect either high or speculative dividends but that his obligation limits him to only fair or reasonable profit. If the company owned the only railroad engaged in transportation in a given section and was doing all the business, this would be clear. If it receives a fair return on its property, why should it make any difference that other and competing railroads in the same section are permitted to receive higher rates for a service which it costs them more to render and from which they receive no better net return? Classification of railways in the matter of adjustment of rates has been sustained in numerous cases. In the Minnesota Rate Cases, 230 U. S. 352, 469, 473, 33 S. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18, it was held that the rates imposed by the state upon two railways were not confiscatory, but that they were so in the case of a third railway performing service in the same territory, because the latter was put to greater expense in rendering the service. An injunction was refused to the first two railways and was granted to the third. The same principle has been upheld in analogous cases. Chicago, Burlington & Quincy Ry. v. Iowa, 94 U. S. 155, 24 L. Ed. 94; Dow v. Beidelman, 125 U. S. 680, 8 S. Ct. 1028, 31 L. Ed. 841; Chicago & G. T. Ry. v. Wellman, 143 U. S. 339, 12 S. Ct. 400, 36 L. Ed. 176; Interstate Commerce Commission v. Union Pacific Ry., 222 U. S. 541, 549, 551, 32 S. Ct. 108, 56 L. Ed. 308; Northern Pacific Ry. Co. v. North Dakota, 236 U. S. 585, 599, et seq., 35 S. Ct. 429, 59 L. Ed. 735, L. R. A. 1917F, 1148, Ann. Cas. 1916A, 1.

It is argued that to cut down the operating profit of the stronger roads to a certain per cent. is not cutting or reducing rates, since the net income of a carrier has no proper relation to rates and cannot be used as evidence of their reasonableness. Northern Pacific Ry. v. North Dakota, 236 U. S. 585, 35 S. Ct. 429, 59 L. Ed. 735, L. R. A. 1917F, 1148, Ann. Cas. 1916A, 1, and Interstate Commerce Commission v. Union Pacific R. R., 222 U. S. 541, 32 S. Ct. 108, 56 L. Ed. 308, are cited to this point. They merely decide that where the reasonableness of one rate or a class of rates is in issue, the total operating profit of the railroad or public utility is of little use in reaching a conclusion. * * *

There is nothing in the act requiring the use of the net return as evidence to fix a particular rate. As we have already pointed out, paragraph 17, section 15a, gives fullest latitude for evidence on such an issue.

Reliance is also had on decisions of this court in cases where the question was of the reasonableness of state rates, and it was held

that evidence to show that the revenue of the carrier from both state and interstate commerce gave a fair profit, was not relevant. The state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, and on the other hand the carrier can not justify unreasonably high rates on domestic business on the ground that only in that way is it able to meet losses on its interstate business. The Minnesota Rate Cases, 230 U. S. 352, 435, 33 S. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; Smyth v. Ames, 169 U. S. 466, 541, 18 S. Ct. 418, 42 L. Ed. 819. But this conclusion does [not] make against the use of a fair return of operating profit as a standard of reasonableness of rates when the issue is as to the general level of all the rates received by the carrier.

The reduction of the net operating return provided by the recapture clause is, as near as may be, the same thing as if rates had all been reduced proportionately before collection. It is clearly unsound to say that the net operating profit accruing from a whole rate structure is not relevant evidence in determining whether the sum of the rates is fair. The investment is made on the faith of a profit, the profit accrues from the balance left after deducting expenses from the product of the rates, and the assumption is that the operation is economical and the expenditures are reasonably necessary. If the profit is fair, the sum of the rates is so. If the profit is excessive, the sum of the rates is so. One obvious way to make the sum of the rates reasonable, so far as the carrier is concerned, is to reduce its profit to what is fair.

We have been greatly pressed with the argument that the cutting down of income actually received by the carrier for its service to a so-called fair return is a plain appropriation of its property without any compensation; that the income it receives for the use of its property is as much protected by the Fifth Amendment as the property itself. The statute declares the carrier to be only a trustee for the excess over a fair return received by it. Though in its possession, the excess never becomes its property, and it accepts custody of the product of all the rates with this understanding. It is clear, therefore, that the carrier never has such a title to the excess as to render the recapture of it by the government a taking without due process.

It is then objected that the government has no right to retain one-half of the excess, since, if it does not belong to the carrier, it belongs to the shippers and should be returned to them. If it were valid, it is an objection which the carrier cannot be heard to make. It would be soon enough to consider such a claim when made by the shipper. But it is not valid. The rates are reasonable from the standpoint of the shipper as we have shown, though their net product furnishes more than a fair return for the carrier. The excess caused by the discrepancy between the standard of reasonableness for the shipper, and that for the carrier due to the necessity of maintaining uniform rates to be charged the shippers, may properly be appropriated by

the government for public uses because the appropriation takes away nothing which equitably belongs either to the shipper or to the carrier. Yet it is made up of payments for service to the public in transportation, and so it is properly to be devoted to creating a fund for helping the weaker roads more effectively to discharge their public duties. Indirectly and ultimately this should benefit the shippers by bringing the weaker roads nearer in point of economy and efficiency to the stronger roads and thus making it just and possible to reduce the uniform rates.

The third question for our consideration is whether the recapture clause, by reducing the net income from intrastate rates, invades the reserved power of the states and is in conflict with the Tenth Amendment. In solving the problem of maintaining the efficiency of an interstate commerce railway system which serves both the states and the nation, Congress is dealing with a unit in which state and interstate operations are often inextricably commingled. When the adequate maintenance of interstate commerce involves and makes necessary on this account the incidental and partial control of intrastate commerce, the power of Congress to exercise such control has been clearly established. * * * The combination of uniform rates with the recapture clauses is necessary to the better development of the country's interstate transportation system as Congress has planned it. The control of the excess profit due to the level of the whole body of rates is the heart of the plan. To divide that excess and attempt to distribute one part to interstate traffic and the other to intrastate traffic would be impracticable and defeat the plan. This renders indispensable the incidental control by Congress of that part of the excess possibly due to intrastate rates which, if present, is indistinguishable. * * *

The act fixes the fair return for the years here involved, 1920 and 1921, at 5½ per cent. and the Commission exercises its discretion to add one-half of 1 per cent. The case of Bluefield Waterworks & Improvement Co. v. Public Service Commission, 262 U. S. 679, 43 S. Ct. 675, 67 L. Ed. 1176, is cited to show that a return of 6 per cent. on the property of a public utility is confiscatory. But 6 per cent. was not found confiscatory in Willcox v. Consolidated Gas Co., 212 U. S. 19, 48, 50, 29 S. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034, 48 L. R. A. (N. S.) 1134, in Cedar Rapids Gas Light Company v. Cedar Rapids, 223 U. S. 655, 670, 32 S. Ct. 389, 56 L. Ed. 594, or in Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 172, 35 S. Ct. 811, 59 L. Ed. 1244. Thus the question of the minimum of a fair percentage on value is shown to vary with the circumstances. Here we are relieved from considering the line between a fair return and confiscation, because under the provisions of the act and the reports made by the appellant the return which it will receive after paying one-half the excess to the Commission will be about 8 per cent. on the reported value. This can hardly be

called confiscatory. Moreover, the appellant did not raise the issue of confiscation in its bill and it cannot properly be said to be before us.

It is also said in argument that the value of the carrier's property, upon which the net income was calculated, was too low and was unfair to the carrier. The value of property, it is argued, really depends on the profit to be expected from its use, and should be calculated on the income from rates prevailing when the law was passed which must be presumed to have been reasonable. The true value of the carrier's property would thus be shown to be so much higher than reported that the actual return would not be higher than 6 per cent. of it and there would be no excess.

We do not think that, with the record as it is, such an argument is open to the appellant. It did allege that the values upon which the return was estimated were not the true values, but it did not allege what the true values were. This was not good pleading and did not properly tender the issue on the question of value. Under orders of the Commission, the carrier itself reported the values of its properties for 1920 and 1921, upon which the excesses of income were calculated. The bill averred that a return of these particular values was required under the orders of the Commission. This statement is not borne out by the orders themselves. They gave the carrier full opportunity to report any other values and to support them by evidence. This it did not do. We cannot consider an issue of fact that was primarily at least committed by the act to the Commission, when the carrier has not invoked the decision of that tribunal.

The decree of the District Court is affirmed.[2]

[2] The court might have pointed out, had it been essential for a decision, that the company's last contention would either completely annul the recapture clause or else justify recapture of part of the earnings of the very weakest railroads. If the existing earnings are capitalized at 6 per cent., they will amount to precisely 6 per cent. of the value found by so capitalizing them; if they are capitalized at less than 6 per cent., they will constitute less than 6 per cent. of the value so found. In either of the above cases, there would be nothing to recapture. That such nullification of the clause would be the result of basing the permitted return on the value must not be supposed to have been overlooked by the counsel who advanced the argument. In an address delivered at the annual meeting of the Public Utility Section of the American Bar Association at Minneapolis on August 28, 1923, Mr. Leslie Craven, Counsel, Western Group, Presidents' Conference Committee on Federal Valuation of Railroads, said:

"1. If the value protected by the Constitution is not value in an economic sense, * * * a recapture of earnings under the provisions of the Transportation Act constitutes a confiscation of the property. * * *

"2. On the other hand, if value is determined as the court contemplated in Smyth v. Ames, and as a jury would determine it in a condemnation case, * * * whether there will be any taking of the property through the operation of the recapture provision will depend as a practical matter on the judgment of the commission, court, or jury in fixing the value. * * * Theoretically, the amount subject to recapture will be nothing, and the recapture will be defeated."—9 American Bar Association Journal, 681, 686 (November, 1923).

The fallacy is the same as that involved in basing the permissible return in rate cases on the value of the property. See supra, pages 983 ff. Theoretically,

III. Reserves for Equalizing Returns from Year to Year[3]

JOHN BAUER, "EFFECTIVE REGULATION OF PUBLIC UTILITIES." *

(Macmillan, 1925. Chapter XI, "Rate Schedules," § 12, pp. 293–295.)

Flexible Rates.

Apart from the desirability of rate differentiation based upon experimentation and scientific inquiry, our conception is that rates in

the amount subject to *reduction* will be nothing, and the *power to regulate* will be defeated. "Theoretically," because in practice "the judgment of the Commission, court, or jury in fixing the value" will usually contain some element of error, and it is this error alone which brings about an apparent, but not a true, reconciliation between the power to regulate (or to recapture) and the doctrine that no value must be impaired.

If the earnings be capitalized, however, at a rate greater than 6 per cent., they will constitute more than 6 per cent. of the value so found, and one-half the surplus will be recaptured; but the weaker the road, the higher the capitalization rate (which is synonymous with the rate needed to attract capital to that road), and, on this theory, the weaker the road, the more there will be to recapture. The result of applying the rule for which counsel contended would therefore be, either to defeat the recapture clause altogether in practical effect, or else to apply it in such a manner as to effect results the precise contrary of those for which it was intended, as set forth in the opinion.

An interesting constitutional question would arise in case the recapture clause were so amended as to apply to the surplus above a "fair return" (instead of the 6 per cent. specified in paragraph 6) on the actual prudent cost (instead of the "value"). If the actual prudent cost in a given case is less than what the court conceives to be the "fair value" in that case, then a reduction of rates to the point where they yield no more than a fair return on the actual prudent cost would be held unconstitutional. But a different result would ensue if, instead of the rate-making analogy, the analogy of the late excess profits tax were extended to apply to the case. In discussing the recapture clause, prior to the decision of the case in the text, Professor F. H. Dixon remarked: "It is difficult to characterize the clause as confiscatory in the face of the application of the same principle on a large scale in our taxation policy. It is the principle of the excess profits tax—a tax of 50 per cent. upon differential profits above a certain fixed amount." "Railroads and Government" (Scribner's 1922) p. 236. The excess profits tax law has been interpreted by the Supreme Court as requiring the tax to be based on the excess resulting after a deduction of a certain percentage, not on the present value of the property, but on its actual cost, and as so interpreted, the court has held the tax consistent with the Fifth Amendment. La Belle Iron Works v. United States, 256 U. S. 377, 41 S. Ct. 528, 65 L. Ed. 998 (1921).

For a further statement of the purpose of the recapture clause, see I. Leo Sharfman, "The American Railroad Problem" (Century Co., 1921) pp. 305–309.

A criticism of some of the possible economic workings of the "recapture clause" is made by Harry Gunnison Brown in an article, "Railroad Valuation and Rate Regulation" (1925), 33 Journal of Political Economy, 505, 522–528.

Analogous to requiring a high rate on grounds of public policy (other than

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[3] When a company earns in any particular year more or less than a fair return, a possible handling of the situation would be to subtract surpluses from the rate base, and to add deficits thereto, for ensuing years. This method of meeting the situation has been dealt with already in section 2, VI, supra.

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general should be based upon actual cost as shown by the accounts. The costs, let us repeat, would include the prices of materials and labor consumed in current operation, together with depreciation, taxes, and return on investment. The cost of materials and labor would fluctuate with market prices from year to year, while depreciation and return would be fixed by costs as property installations and investments take place and would extend over the life of the property and to the maturity of the securities.[4]

In computing the cost of service we thus have constantly varying elements, and factors fixed for a comparatively long time. In most cases, however, the first constitute the greater percentage and sometimes reach 80 per cent. or more of the total costs. The total, therefore, is subject to constant variation.

If we consider the fluctuating costs in connection with the changing price level, we realize that in general rates charged to consumers must be sufficiently flexible to meet the shifting conditions. Our idea, therefore, is that all the cost elements, both the immediately fluctuating and the relatively permanent, should be under strict accounting control, but that the rates should be readily adjustable upwards or downwards according to the facts established beyond dispute. The return required would be shown by the accounts as definitely as the cost of labor and material, and the rates would be fixed high enough to cover the total costs of operation.

While under our plan rates would be thoroughly adjustable according to changing costs, an important consideration would nevertheless be to make as few rate changes as possible. Provisions should be made for a special reserve sufficient to take up moderate fluctuations without requiring frequent rate adjustments. During a period of declining costs, the reserve would be built up to a point where rate reductions would seem clearly desirable, and during rising costs would

the ground that the company needs the revenue), and then "recapturing" the excess return, would be a policy of requiring rates to be lower than sufficient to yield an adequate return, and then paying the company the deficiency out of the public treasury. Similarly the government could provide part of the equipment, instead of giving money, and permit the company to charge rates sufficient only to yield a return on that part of the equipment which the company itself provides. In the case of any governmentally owned utility, the surpluses would automatically flow into the public treasury and the deficits be paid therefrom as a matter of course. Compare the profitable governmental tobacco monopolies on the continent of Europe, and the free municipal parks and museums. Occasionally, circumstances may arise in which the beneficiaries of a service can be made to pay for it only by the use of the taxing power of the government. The taxes on automobiles and on gasoline are rough forms of payment for the services of building and maintaining the highways. Special assessments on lands specially benefited by the construction of public improvements come in the same category. For the use of special assessments to pay for the construction of traction lines, see infra, pages 1189, 1190.

[4] Taxes, of course, would be fixed by the governmental bodies and have no direct connection with operation. However, they vary according to such governmental action and are not fixed for a period longer than a year.—[Footnote quoted from the author.]

be drawn upon until rate increases would seem to be warranted. The actual cost of the service, however, would not be affected by such an arrangement, which may be called "reserve for equalization of return." The effect upon the rate payers would be negligible; the rates for a time might be slightly higher than actual costs or slightly lower, but never far out of line with the facts shown by the accounts. The investors would always get their stipulated return. The scheme would retain reasonable stability in rates, avoiding the confusion of frequent changes, yet fixing rates upon scientific bases and preserving the exact rights of the investors.

In re SOUTHERN CALIFORNIA EDISON CO.

(Railroad Commission of California, 1921. P. U. R. 1921D, 65.)

BY THE COMMISSION:[5]

* * * The second step in the proposal of the Edison Company—the establishment of a contingency reserve—is primarily an attempt to protect against contingencies and to meet the wide fluctuations in operating expenses and in net income that necessarily result from the variation in rainfall and water supply of hydroelectric plants occurring from year to year. This proposal is applicable to the basis of rate fixing generally followed as well as the proposal of applicant and has much in its favor. California utilities that have been dependent in a large measure upon hydroelectric supply have met the low-water conditions during the past four years by the generation of steam power with oil fuel and have been compelled to seek relief at the hands of the Commission in the form of increased rates to meet the abnormal expense resulting. It is apparent that during periods of wide variation in the amount of hydroelectric power available to a utility, a corresponding fluctuation in its rates must take place unless the variation in conditions from year to year can be absorbed in a reserve, which in dry years will be drawn upon to provide the additional operating expense, and which in wet years will be replenished from the larger net revenues resulting.

It has been clearly shown in the evidence in this proceeding that there is such extreme variation in the operating expenses of a utility, dependent largely upon hydroelectric sources for its power, as to justify some automatic means of preventing these fluctuations from unduly affecting both rates and income, and this is particularly true in the case of applicant. At this time, however, Edison Company has no such reserve and proposes that for a sufficient period in the future it will build up such a reserve out of its earnings so that the reserve will aggregate enough to absorb the fluctuations in rates and earnings

[5] Portions of the opinion are omitted. The portion here printed appears on pages 80–82, of P. U. R. 1921D.

that would otherwise result from a succession of wet and dry years. Applicant proposes that this reserve shall be set aside prior to the accounting for surplus and that it be held at all times in cash or government securities, and that the earnings to be added to the reserve in wet years and the deficiencies to be withdrawn in dry years shall be under the direction of the Commission. While the principal purpose of the reserve is that of meeting the conditions of variable hydroelectric supply, it is also suggested that the reserve can be properly used to meet other unusual changes in operating costs, emergencies not considered in normal operation, and as a means of postponing possible increases or hastening reductions in rates by drawing on the reserve. Under the peculiar conditions incident to hydroelectric operation in California and the unquestioned desirability of electric rates of a stable and uniform character, the proposal relating to the establishment of this reserve should meet with favor by a regulatory body.

It is proposed by applicant that there should be allowed, in addition to all other costs, an item of $650,000 to be used in building up a contingency reserve to insure the continuity of earnings and the stability of rates, this amount to be set aside for a period of three years, so that a basic reserve of approximately $2,000,000 will be maintained.

In selecting this amount to be included in annual requirements applicant has in mind guarding against contingencies such as:

(a) Year 1921 being a year of less than normal rainfall, with the resultant increased costs and operating expenses.

(b) Increase in the price of oil in excess of that estimated.

(c) Unforeseen or sudden increase in cost of labor and supplies.

(d) Unforeseen catastrophes.

At the present time, the general tendency of costs is downward and it can hardly be expected that there will be an increase in labor costs or increase in cost of supplies. Any contingency reserve for these items does not appear necessary at this time. There is some possibility that oil may increase in price if the available supply is further decreased. There appears to be little likelihood that the water conditions during 1921 will be below normal. The economic conditions existing in the territory served by applicant are such that the public should not be burdened at this time with any charges in excess of the absolute minimum. Applicant, from its earnings of 1920, which were largely in excess of those anticipated, should, as hereinafter set forth, set aside a considerable sum to a contingency reserve, and, from its earnings during the first three months of this year, additional amounts can be accrued. In view of these facts, we must conclude that, although the proposal of applicant to establish a contingency reserve should be followed out, no additional amount should be collected from consumers at this time. If special contingencies arise necessitating modification of rates, they will be given consideration

as met. With this in view it does not appear that the lack of a contingency reserve allowance in the 1921 estimate will in any way seriously affect applicant's finances. * * *

IV. Profits and Losses from Collateral Services[6]

STATE ex rel. PUBLIC SERVICE COMMISSION v. SPOKANE & I. E. R. CO.

(Supreme Court of Washington, 1916. 89 Wash. 599, 154 P. 1110, L. R. A 1918C, 675, P. U. R. 1916D, 469.)

MOUNT, J.[7] Respondent brings a mandamus proceeding to compel a disclosure of private contracts. The appellant is a traction company. * * * With the development of its own plant giving approximately 12,000 horse power and the contract holding it to take 3,800 horse power from the Washington Water Power Company, appellant has a yearly supply of approximately 16,000 horse power, or about 6,000 or 7,000 horse power more than its present average need, although at times it uses as much as 12,000 horse power. This surplus it has sold under private contract to others, and it has been put to various uses; its customers being a land company, one or two farmers, who use the power for irrigation purposes, two manufacturing plants, a grain elevator, an irrigation company, and three or four individual owners of local electric light plants in towns and villages in the vicinity of Spokane. The object of this proceeding is to compel appellant to submit its private contracts to the Public Service Commission; it being the theory of the Commission that it has jurisdiction over that part of the appellant's business which heretofore has been regarded as private and in which the state had no interest; that it cannot make an adequate and intelligent survey of the rates charged by appellant in its service to the public without them; and, further, that, to regulate the rates for traction purposes, it must have a disclosure of all contracts and all activities yielding a revenue to appellant, whether they be private, entered into with individuals, or affect a public service only. * * *

At the time the act of 1911 was passed, the law was well defined and certain in its terms. The sale of power to individuals or companies, to be in turn sold, was not a public use. The rule and the cases declaring it must have been well understood by the Legislature. Yet

[6] The discussion here is concerned only with the sale of services, the prices of which are not themselves regulated. When the rates of one of several joint services rendered by the company, all of which are subject to regulation, yield more or less than an adequate return on that service alone, it may of course be possible to regulate the rates of the other utility services so as to make the aggregate returns from all the services equal to the fair return. This subject is treated in section 7, supra.

[7] Portions of the opinion are omitted.

the act nowhere attempts to cover any use theretofore deemed to be private. Its whole context seems to compel the thought that it had in mind only such uses as the public might compel. There is nothing to indicate a legislative intent to declare that the sale of surplus or secondary power pending a future use by a company in the performance of its public functions is a thing that affects the general welfare, the health, peace, or happiness of the citizen, or that it is in any way necessary to sustain the right of the state to govern.

Neither has the business of selling surplus power been so notoriously beset by abuses that we can judicially notice it as having an outlaw character. The right to regulate under the present law must be measured by the public interest. It will hardly be contended that appellant's contracts with those to whom it sells its surplus is of any interest or concern to any one other than the immediate parties. It is not alleged that it is neglecting its public duty because of them. No one has a right to compel appellant to sell its surplus. The act of sale is purely voluntary. Like the merchant, it can sell at one price to one man and at another price to another. The parties to the contracts are not complaining. If either is not content with the offering of the other, he does not have to contract. He can go his way. But it is not so with appellant when exercising its public function; that is, furnishing something—a necessity—that all are entitled to receive upon equal terms, under equal circumstances and without exclusive conditions. Beale & W. Rate Regulation, § 1.

The only interest the state can have in such contracts is that they may not be made and persisted in to the detriment of the public. They are made subject to the paramount undertaking of the company, and must give way to the public interest if necessity requires. If at any time the state, acting through its accredited agency, puts a burden upon a public service corporation which requires the use of its surplus energy, it must devote such energy to the public use and abandon its private contracts, for they are no longer mere incidents to the undertaking in which the public has no interest, but are an incumbrance upon a public service. A private contractor could not compel specific performance of his contract as against an intervening public right. Thus reasoning, it follows that inquiry into these collateral matters is not essential to the performance of the public functions of the respondent. The Commission insists that it cannot find a basis for rate making without knowing the private, as well as the public, affairs of the appellant. Granting that the appellant is entitled to a fair return upon its investment and the public to a fair rate of transportation, to hold that respondent could figure appellant's private contracts as a basis for rate making would, in turn, compel the holding that appellant would be entitled to take from the public enough to make good its losses in its private enterprises. The state has no interest either in appellant's gains or losses in its pri-

vate enterprises. It has not yet assumed to stand as an inquisitor or conservator in private business.

The act creating the Commission reflects no more than an intent to care for every right of the public in so far as they relate to the public functions of a public service corporation. It provides for equality of service, a physical valuation, "the total market value of the property of each public service company operating in this state, used for the public convenience within the state," and that the Commission shall "ascertain the probable earning capacity of each public service company under the rates now charged by such companies," that is, rates for service falling within the scope and intendment of the law; for "rates" must be held to mean a charge to the public for a service open to all and upon the same terms, and not a consideration of a private contract in which the public has no interest.

This holding makes it unnecessary for us to inquire into the power of the Legislature to assume a control over business of a private nature, or whether such an act being passed raises a legislative or judicial question. It is enough that the Public Service Commission Law does not go to that extent in its letter, and cannot be held to have gone to that extent by construction without doing violence to the manifest purpose and spirit of the law.

Remanded, with instructions to deny the writ.

MORRIS, C. J., and CHADWICK and ELLIS, JJ., concur.

FULLERTON, J., concurs in the result.

In re LINCOLN TELEPHONE & TELEGRAPH CO.

(Railway Commission of Nebraska, 1916. P. U. R. 1916D, 572.)

TAYLOR, Commissioner.[8] * * * In the charge for directory expense no allowance is made for the revenue derived from the sale of advertising in the directories. The company contends that the purpose here is to ascertain the actual cost of operating the exchange, and that the revenues are not to be considered in that connection. That view of the matter, however, overlooks the fact that all subscribers furnished with a directory contribute in a measure to the revenue which the directory produces. In theory at least the price of advertising is based on the number of telephone users to whom the directory is distributed; there being no distinction between subscribers and switched patrons. The charge made to switched patrons is presumed to cover the expense of furnishing them with directories. That being true, they are entitled to pay only the net cost of the directories to the company, and have as much right to a deduction by reason of advertising revenue as the company's subscribers. The company readily

[8] Portions of the opinion are omitted. The portion here printed appears on pages 575, 576, of P. U. R. 1916D.

concedes that the advertising receipts are properly a part of the gross earnings of the company, and so includes them in its statement of revenue and expenses in this case. It would be proper, according to the company, to take this advertising revenue into account in a case to determine the reasonableness of the exchange rates as a whole at Milford and Seward. To do so, however, and at the same time deny the benefit of the revenue to the switched subscriber, is to produce a discriminatory condition for which there appears to be no justification. In the present case the combined revenue from the directories issued for both Milford and Seward is $294, whereas the total cost of printing the directories is only $147.55. For the reasons assigned, the Commission is of the opinion that all of the revenue should be deducted from the expense shown by the company in its statement. * * *

In re SWEETWATER WATER CO.

(Railroad Commission of California, 1915. P. U. R. 1916A, 237.)

EDGERTON, Commissioner.[9] * * * At the hearing, the offer of consumers' counsel to produce evidence of the profits made by the builders of this water system in the sale of land was refused by me, and I believe this ruling should be sustained at this time. To hold that profits made out of the sale of land, where a water system has been built primarily for the purpose of serving such land, should be offset against any value of the water system when it comes to fixing rates, would be to deny the owners of the water system the right of property therein.

Of course, if there had been any conveyance of the water property to the purchasers of land, then it should be held that the consumers or landowners owned the system. But there is no evidence in this proceeding of any such conveyance. In fact, the evidence is that the title and possession of Sweetwater Water Company to this system is undisputed by anybody. Therefore, under the law, this Commission must treat the water plant as belonging to applicant, and profits made in a related enterprise cannot be used, in my judgment, to reduce the rates fixed for the service of water.[10] * * *

[9] Portions of the opinion are omitted. The portion here printed appears on pages 241, 242, of P. U. R. 1916A.

[10] For an interesting discussion of the revenues derived by a natural gas company from the sale of gasoline extracted from its gas, see the opinion of the West Virginia Public Service Commission, rendered by Wiles, Commissioner, in Re United Fuel Gas Co., P. U. R. 1918C, 193, 211–218 (1918).

When revenues from collateral businesses are credited to the expenses of the service that is regulated, a subsidiary problem frequently arises as to the proportions in which the credits should be made to the various branches of the regulated service. Apportionments were made by the Wisconsin Commission in Buell v. Chicago, M. & St. P. Ry. Co., 1 Wis. R. C. R. 324, 363 (1907), City of Sheboygan v. Sheboygan Ry. & El. Co., 6 Wis. R. C. R. 353, 367 (1911), In re

Joint Application, Waupaca El. Lt. & R. Co. and Waupaca, 8 Wis. R. C. R. 586, 610 (1912), and Superior Commercial Club v. Duluth Street Ry. Co., 11 Wis. R. C. R. 1, 28 (1912).

Of course if the collateral service were sold at a rate which covered only the separable cost of rendering that service plus its pro rata of the joint costs (if indeed there is any definite amount that can be properly called "its pro rata"), there would be no surplus earnings from the collateral service to present any problem calling for solution. But in these cases we are dealing with a situation, already treated supra, page 1171, note 97, where a rate so fixed would be less than the market value of the service, and more of the service would be demanded at that low rate than could be supplied. Were the supply sufficiently flexible to meet any demand called forth by any rate fixed by the Commission, then that rate would *be* the market value, and every one willing and able to pay the price fixed would obtain as much of the service as he desired under the circumstances. But where a rate fixed on cost would cause the demand to exceed the potential supply, obviously some part of the demand must go unsatisfied, which means that some must pay a higher price for the collateral product when produced by others than the price fixed for the product of this company, based on cost. As long as it sells on the market for that higher price, that price can be said correctly to be the market price, and the lower price fixed for a portion of the supply for a selected number of consumers is a price below the market value. If concessions in railroad stations to parcel-checking concerns, news stands and the like were made on the basis of cost, the concessionaires would constitute a specially favored class. The same would be true of leases of land comprised in railroad terminal property.

Special Assessments of Land as a Means of Crediting the Costs of Street Railways with Profits from a Collateral Service.—When a traction line is built or extended, services are rendered, not only to car riders, in the form of transportation, but to the owners of certain land, in the form of increased rents or (when those rents are capitalized) increased land values. The company, however, ordinarily has power only to charge the former class for the services rendered, and that class must therefore pay the entire cost of the service, although its benefits are shared with others. By the device of an assessment levied by the municipality on the specially benefited lands, the proceeds being used to defray part of the cost of constructing the line, the riders would be relieved of the burden of paying for the *entire* cost thereof. The possibilities along this line are brought out by the following from the Report to the President of the Federal Electric Railways Commission in 1920 (as quoted by Louis B. Wehle in an interesting article, "Low Street Railway Fares with the Help of the Landowner," 10 National Municipal Review, 506, 507, 508):

"Your Commission would urge that in every community, where and to such extent as may be practicable, consideration be given to the advisability of requiring extensions and rapid transit systems of subway and elevated to be paid for, not out of new capital invested through the medium of bonds or stock, which means for all time an added burden upon the car rider, but from special taxes assessed against the owners of property in the district the value of which is enhanced by such extensions. * * *

"The principle is peculiarly applicable to improvement of city transportation systems, because of the enormous increases in real estate values created when new extensions open up new territory or when the creation of rapid transit facilities make outlying territory more available.

"The City Club of New York, in 1908, a few years after the extension of the New York subway from One Hundred and Thirty-Fifth to Two Hundred and Thirtieth streets, in Manhattan, had been built at a cost of $7,375,000, made an authoritative study of new real estate values created by that extension in the district lying between One Hundred and Thirty-Fifth and Two Hundred and Thirtieth streets. After deducting $20,000,000 as a liberal estimate, based upon studies of parallel situations, of the natural increase in property values in that district which would have taken place without the subway extension, it was found that the increase in values clearly brought about by the subway extensions was $49,200,000, an amount upward of seven times the cost of the improvements. The property in the district enjoyed an increase in value of 104 per cent. If, by assessment, it had borne the entire cost of the extension in the district, it would have still retained a new profit on the value of the

land of 89 per cent, or an aggregate of $41,825,000 for the district. The Manhattan extension just referred to, together with the Bronx system beyond One Hundred and Thirty-Fifth street, cost $13,075,000. These two extensions directly created, in a limited area lying near those extensions, new land values, solely due to the extensions, of $80,500,000. Let it be borne in mind that the cost of the entire subway system from the Battery to Two Hundred and Thirtieth street in Manhattan and to Bronx Park was about $43,000,000.

"In Philadelphia recent estimates of improvements in land values expected from rapid transit projects in contemplation have been equally enlightening. Similar results would be certainly obtained in many other cities by studies similar to that made by the City Club of New York.

"*Is it not in accordance with the laws of economic justice, then, that the landowner, as such, should share his benefit of increased land value with the public?* Instead of the cost, $7,375,000, of the Manhattan extension being borne by the owners of the land in the newly served territory, it was capitalized and translated into an annual charge of $350,000 or more, a burden which had to be borne out of the carfares and which to-day helps to intensify the financial predicament in which the company finds itself. If the public pays out of its fares for the cost of maintaining and operating the line which will bring the outlying landowners such enrichment, should the latter not share with the public out of that enrichment, depending upon the degree in which he is benefited, by paying for or by helping to pay for the initial cost of construction of the line? That such a solution is just is rather significantly shown by the fact that in a number of cities, landowners in outlying districts have offered spontaneously to contribute large sums to the company to assist it in constructing certain extensions. The present predicament of the street railway companies is in many places partly due to overbuilding, a fault traceable to political or business pressures exerted by speculators in suburban lands who had little or no financial responsibility in connection with the street railway extensions, which they caused to be built for their immediate benefit. This action of the suburban landowners of certain cities, on the other hand, is a significant expression of enlightened self-interest and a sound, constructive recognition of a fundamental principle of justice. The establishment of that principle by law, whether by changes in city ordinances, state statutes, or state constitutions should, in our opinion, not be delayed. This thought is especially recommended to the attention of a number of communities which are now facing the necessity for extensions or rapid transit improvements."

It should be noted that, if the benefited landowners were charged the full market value of the service rendered to them, they would not only be made to pay the full cost of constructing the extensions, but a large additional amount as well, the interest upon which might be credited to the operating costs of the road. By paying only the construction cost, and still more by paying nothing, they are being selected as special beneficiaries of the building of the subways. And their exemption from special assessment has little, if any, tendency to keep down the rents they charge to their tenants. The special assessment would have no effect on the conditions of supply or demand which constitute the major factors governing rents. This is a commonplace of economic theory. The levy of such an assessment would be likely at most to raise rents only to the extent that landlords have previously been charging less than the maximum that the property was capable of yielding.

APPENDIX

INTERSTATE COMMERCE ACT

Act of Congress of February 4, 1887, c. 104, 24 Statutes at Large, 379, as Amended (Comp. Stat. §§ 8563 et seq.)

Section 1. (1) Carriers and transportation subject to regulation— The provisions of this Act shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or

(c) The transmission of intelligence by wire or wireless;—

from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States.

(2) Same—The provisions of this Act shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid;

(b) To the transmission of intelligence by wire or wireless wholly within one State and not transmitted to or from a foreign country from or to any place in the United States as aforesaid; or

(c) To the transportation of passengers or property by a carrier by water where such transportation would not be subject to the provisions of this act except for the fact that such carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, any switching, terminal, lighterage, car rental, trackage, handling, or other charges by a rail carrier for services within the switching, drayage, lighterage, or corporate limits of a port terminal or district.

(3) Definitions—The term "common carrier" as used in this Act shall include all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this Act it shall be held to mean "common carrier." The term "rail-

road" as used in this Act shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "transmission" as used in this Act shall include the transmission of intelligence through the application of electrical energy or other use of electricity, whether by means of wire, cable, radio apparatus, or other wire or wireless conductors or appliances, and all instrumentalities and facilities for and services in connection with the receipt, forwarding, and delivery of messages, communications, or other intelligence so transmitted, hereinafter also collectively called messages.

(4) Duty to furnish transportation and establish through routes and just and reasonable rates, etc.—It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(5) Just and reasonable charges; classification of messages, and rates therefor; contracts by telegraph, etc., companies with carriers for exchange of services—All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: Provided, That messages by wire or wireless subject to the provisions of this Act may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: And provided further, That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services.

(6) Classification of property for transportation; regulations and practices affecting transportation—It is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other

matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

(7) Free passes or free transportation for passengers—No common carrier subject to the provisions of this Act, shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary care takers of live stock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employees, post-office inspectors, customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: Provided, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: And provided further, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this Act: Provided further, That the term "employees" as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of any such common carrier. Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and any amendment thereof.

(8) Transportation of article or commodity manufactured, mined, or produced by railroad, or which it owns, or in which it has an interest—From and after May first, nineteen hundred and eight, it shall be un-

lawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

(9) Switch connections and tracks—Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the commission, as provided in section thirteen of this Act, and the commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the commission may make an order, as provided in section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the commission, other than orders for the payment of money.

(10) Car service; definition of—The term "car service" in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act.

(11) Same; duty to furnish—It shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

(12) Same; distribution of cars for transportation of coal; failure; forfeiture—It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States.

(13) Same; rules and regulations of carriers as to—The Commission is hereby authorized by general or special orders to require all carriers by railroad subject to this Act, or any of them, to file with it from time to time their

rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation, and be subject to any or all of the provisions of this Act relating thereto.

(14) Same; Commission may establish rules and regulations for—The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this Act, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for nonobservance of such rules, regulations or practices.

(15) Same; suspension of operation of rules and regulations in case of shortage; priority in transportation in case of war—Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

(16) Same; rerouting of traffic over other lines where initial carrier is unable to properly transport—Whenever the Commission is of opinion that any carrier by railroad subject to this Act is for any reason unable to transport the traffic offered it so as properly to serve the public, it may, upon the same procedure as provided in paragraph (15), make such just and reasonable directions with respect to the handling, routing, and movement of the traffic of such carrier and its distribution over other lines of roads, as in the opinion of the Commission will best promote the service in the interest of the public and the commerce of the people, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable.

(17) Same; directions of Commission, how made; duty to obey; penalty for failure—The directions of the Commission as to car service and to the matters referred to in paragraphs (15) and (16) may be made through and

by such agents or agencies as the Commission shall designate and appoint for that purpose. It shall be the duty of all carriers by railroad subject to this Act, and of their officers, agents, and employees, to obey strictly and conform promptly to such orders or directions of the Commission, and in case of failure or refusal on the part of any carrier, receiver, or operating trustee to comply with any such order or direction such carrier, receiver, or trustee shall be liable to a penalty of not less than $100 nor more than $500 for each such offense and $50 for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States: Provided, however, That nothing in this Act shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this Act.

(18) Extension or construction of new lines, etc., or abandonment of all or portion of lines; certificate of Commission—After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) Same; certificate of Commission; application for; procedure—The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) Same; certificate of Commission; issue; unlawful extension, construction, or abandonment of lines; restraining; punishment—The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the

suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(21) Safe and adequate facilities; Commission may authorize or require; penalty for neglect—The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: Provided, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(22) Authority of Commission under paragraphs (18)-(21) not extended to spurs, industrial, etc., tracks located wholly within one state, etc.—The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation. (Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379, amended June 29, 1906, c. 3591, § 1, 34 Stat. 584, April 13, 1908, c. 143, 35 Stat. 60, June 18, 1910, c. 309, § 7, 36 Stat. 544, May 29, 1917, c. 23, 40 Stat. 101, Aug. 10, 1917, c. 51, 40 Stat. 272, and Feb. 28, 1920, c. 91, §§ 400–403, 41 Stat. 474–479.)

Sec. 2. Special rates and rebates prohibited—If any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful. (Act Feb. 4, 1887, c. 104, § 2, 24 Stat. 379, amended Feb. 28, 1920, c. 91, § 404, 41 Stat. 479.)

Sec. 3. (1) Undue preferences prohibited—It shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

(2) Freight to be kept until tariff charges and rates paid—From and after July 1, 1920, no carrier by railroad subject to the provisions of this Act shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to assure prompt payment of all such rates and charges and to prevent unjust discrimination: Provided, That the provisions of this paragraph shall not be construed to prohibit any carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for any State or Territory or political subdivision thereof, or for the District of Columbia.

(3) Equal facilities to connecting lines—All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

(4) Terminal facilities; compensation for—If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be. (Act Feb. 4, 1887, c. 104, § 3, 24 Stat. 380, amended, Feb. 28, 1920, c. 91, § 405, 41 Stat. 479.)

Sec. 4. (1) Charges for long and short hauls; charges on through route; temporary continuance of existing rates—It shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this Act, but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: Provided, That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission

may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section; but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and if a circuitous rail line or route is, because of such circuity, granted authority to meet the charges of a more direct line or route to or from competitive points and to maintain higher charges to or from intermediate points on its line, the authority shall not include intermediate points as to which the haul of the petitioning line or route is not longer than that of the direct line or route between the competitive points; and no such authorization shall be granted on account of merely potential water competition not actually in existence: And provided further, That rates, fares, or charges existing at the time of the passage of this amendatory Act by virtue of orders of the Commission or as to which application has theretofore been filed with the Commission and not yet acted upon, shall not be required to be changed by reason of the provisions of this section until the further order of or a determination by the Commission.

(2) Competition of railroads with water routes—Wherever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points it shall not be permitted to increase such rates unless after hearing by the Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition. (Act Feb. 4, 1887, c. 104, § 4, 24 Stat. 380, amended, June 18, 1910, c. 309, § 8, 36 Stat. 547, and Feb. 28, 1920, c. 91, § 406, 41 Stat. 480.)

Sec. 5. (1) Pooling; division of traffic or earnings—Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this Act, it shall be unlawful for any common carrier subject to this Act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid each day of its continuance shall be deemed a separate offense: Provided, That whenever the Commission is of opinion, after hearing upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, or upon its own initiative, that the division of their traffic or earnings, to the extent indicated by the Commission, will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition, the Commission shall have authority by order to approve and authorize, if assented to by all the carriers involved, such division of traffic or earnings, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises.

(2) Acquisition of control of one carrier by another, when authorized—Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises.

(3) Orders under paragraphs one or two—The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1) or (2), as it may deem necessary or appropriate.

(4) Consolidation of railroad properties into limited number of systems; plan for; cost of transportation by various systems—The Commission shall as soon as practicable prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems. In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained. Subject to the foregoing requirements, the several systems shall be so arranged that the cost of transportation as between competitive systems and as related to the values of the properties through which the service is rendered shall be the same, so far as practicable, so that these systems can employ uniform rates in the movement of competitive traffic and under efficient management earn substantially the same rate of return upon the value of their respective railway properties.

(5) Same; notice of tentative plan; hearings; adoption and publication of plan—When the Commission has agreed upon a tentative plan, it shall give the same due publicity and upon reasonable notice, including notice to the Governor of each State, shall hear all persons who may file or present objections thereto. The Commission is authorized to prescribe a procedure for such hearings and to fix a time for bringing them to a close. After the hearings are at an end, the Commission shall adopt a plan for such consolidation and publish the same; but it may at any time thereafter, upon its own motion or upon application, reopen the subject for such changes or modifications as in its judgment will promote the public interest. The consolidations herein provided for shall be in harmony with such plan.

(6) Consolidation of properties of two or more carriers by railroad; bonds and stock; application for consolidation; notice; hearings; order approving consolidation—It shall be lawful for two or more carriers by railroad, subject to this Act, to consolidate their properties or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership, management, and operation, under the following conditions:

(a) The proposed consolidation must be in harmony with and in furtherance of the complete plan of consolidation mentioned in paragraph (5) and must be approved by the Commission;

(b) The bonds at par of the corporation which is to become the owner of the consolidated properties, together with the outstanding capital stock at par of such corporation, shall not exceed the value of the consolidated properties as determined by the Commission. The value of the properties sought to be consolidated shall be ascertained by the Commission under section 19a of this Act, and it shall be the duty of the Commission to proceed immediately to the ascertainment of such value for the properties involved in a proposed consolidation upon the filing of the application for such consolidation.

(c) Whenever two or more carriers propose a consolidation under this section, they shall present their application therefor to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties sought to be consolidated is situated and the carriers involved in the proposed consolidation, of the time and place for a public hearing. If after such hearing the Commission finds that the public interest will be promoted by the consolidation and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing such consolidation, with such modifications and upon such terms and

conditions as it may prescribe, and thereupon such consolidation may be effected, in accordance with such order, if all the carriers involved assent thereto, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

(7) Consolidation of express companies into American Railway Express Company—The power and authority of the Commission to approve and authorize the consolidation of two or more carriers shall extend and apply to the consolidation of four express companies into the American Railway Express Company, a Delaware corporation, if application for such approval and authority is made to the Commission within thirty days after the passage of this amendatory Act; and pending the decision of the Commission such consolidation shall not be dissolved.

(8) Carriers affected by orders under this section relieved from operation of antitrust laws, etc.—The carriers affected by any order made under the foregoing provisions of this section and any corporation organized to effect a consolidation approved and authorized in such order shall be, and they are hereby, relieved from the operation of the "antitrust laws," as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section.

(9) Owning, leasing, operating, controlling, or having interest in competing carrier by water operated through Panama Canal or elsewhere by carrier subject to act—From and after the first day of July, nineteen hundred and fourteen, it shall be unlawful for any railroad company or other common carrier subject to the Act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense.

(9) [bis] Consolidation of telephone companies—Upon application of one or more telephone companies for authority to consolidate their properties or a part thereof into a single company, or for authority for one or more such companies to acquire the whole or any part of the property of another telephone company or other telephone companies or the control thereof by the purchase of securities or by lease or in any other like manner, when such consolidated company would be subject to this Act, the commission shall fix a time and place for a public hearing upon such application and shall thereupon give reasonable notice in writing to the governor of each of the States in which the physical property affected, or any part thereof, is situated, and to the State public service commission or other regulatory body, if any, having jurisdiction over telephone companies, and to such other persons as it may deem advisable. After such public hearing, if the commission finds that the proposed consolidation, acquisition, or control will be of advantage to the persons to whom service is to be rendered and in the public interest, it shall certify to that effect; and thereupon any Act or Acts of Congress making the proposed transaction unlawful shall not apply. Nothing in this paragraph

contained shall be construed as in any wise limiting or restricting the powers of the several States as now existing to control and regulate telephone companies.

(10) Same; determination of fact of competition; hearings; orders—Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of this section and pray for an order permitting the continuance of any vessel or vessels already in operation, or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. The commission may on its own motion or the application of any shipper institute proceedings to inquire into the operation of any vessel in use by any railroad or other carrier which has not applied to the commission and had the question of competition or the possibility of competition determined as herein provided. In all such cases the order of said commission shall be final.

(11) Continuation of water service where competition not excluded; filing of rates, schedules, and practices; application for extension of service—If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July first, nineteen hundred and fourteen. In every case of such extension the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the act to regulate commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation: Provided, Any application for extension under the terms of this provision filed with the Interstate Commerce Commission prior to July first, nineteen hundred and fourteen, but for any reason not heard and disposed of before said date, may be considered and granted thereafter. (Act Feb. 4, 1887, c. 104, § 5, 24 Stat. 380, amended Aug. 24, 1912, c. 390, § 11, 37 Stat. 566, Feb. 28, 1920, c. 91, §§ 407, 408, 41 Stat. 480–482, and June 10, 1921, c. 20, 42 Stat. 27.)

Sec. 6. (1) Schedule of rates, fares, and charges; filing and inspection of public—Every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such afore-

said rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

(2) Schedule of through rates for freight through foreign country— Any common carrier subject to the provisions of this Act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this Act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production.

(3) Notice of change in rates, fares, and charges; simplification of schedules, etc.—No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: Provided, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: Provided further, That the Commission is hereby authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges or classifications not changed if, in its judgment, not inconsistent with the public interest.

(4) Joint tariffs—The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

(5) Copies of traffic contracts filed—Every common carrier subject to this Act shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this Act to which it may be a party.

(6) Forms of schedules prescribed by Commission—The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged and may change the form from time to time as shall be found expedient.

(7) Transportation of passengers or property, without filing and publishing rates; compensation other than as specified; refund of charges or rates; special privileges or facilities—No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

(8) Preference to shipments for United States—That in time of war or threatened war preference and precedence shall, upon the demand of the President of the United States, be given, over all other traffic, for the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic. And in time of peace shipments consigned to agents of the United States for its use shall be delivered by the carriers as promptly as possible and without regard to any embargo that may have been declared, and no such embargo shall apply to shipments so consigned.

(9) Schedules not giving notice of effective date—The commission may reject and refuse to file any schedule that is tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the commission shall be void and its use shall be unlawful.

(10) Penalty for failure to comply with regulations or orders of Commission—In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with the terms of any regulation adopted and promulgated or any order made by the commission under the provisions of this section, such carrier, receiver, or trustee shall be liable to a penalty of five hundred dollars for each such offense, and twenty-five dollars for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(11) Penalty for failure to give written statement of rates or for misstating rate—If any common carrier subject to the provisions of this Act after written request made upon the agent of such carrier hereinafter in this section referred to, by any person or company for a written statement of the rate or charge applicable to a described shipment between stated places under the schedules or tariffs to which such carrier is a party, shall refuse or omit to give such written statement within a reasonable time, or shall misstate in writing the applicable rate, and if the person or company making such request suffers damage in consequence of such refusal or omission or in consequence of the misstatement of the rate, either through making the shipment over a line or route for which the proper rate is higher than the rate over another available line or route, or through entering into any sale or other contract whereunder such person or company obligates himself or itself to make such shipment of freight at his or its cost, then the said carrier shall be liable to a penalty of two hundred and fifty dollars, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(12) Name of resident agent of carrier by railroad posted; request for information as to rates—It shall be the duty of every carrier by railroad to keep at all times conspicuously posted in every station where freight is received for transportation the name of an agent resident in the city, vil-

lage, or town where such station is located, to whom application may be made for the information by this section required to be furnished on written request; and in case any carrier shall fail at any time to have such name so posted in any station, it shall be sufficient to address such request in substantially the following form: "The Station Agent of the ——— Company at ——— Station," together with the name of the proper post-office, inserting the name of the carrier company and of the station in the blanks, and to serve the same by depositing the request so addressed, with postage thereon prepaid, in any post-office.

(13) Jurisdiction of Commission; transportation by rail and water through Panama Canal or otherwise; dock connections between rail and water carriers; terms and conditions for operation of connecting tracks; through routes and joint rates; maximum proportional rates; extension of arrangements between rail and water carriers to other vessels—When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:

(a) To establish physical connection between the lines of the rail carrier and the dock at which interchange of passenger or property is to be made by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of the railroad right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a track or tracks to the dock. The Commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier: Provided, That construction required by the Commission under the provisions of this paragraph shall be subject to the same restrictions as to findings of public convenience and necessity and other matters as is construction required under section 1 of this Act.

(b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

(c) To establish proportional rates or maximum, or minimum, or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

(d) If any rail carrier subject to the act to regulate commerce enters into arrangements with any water carrier operating from a port in the United States to a foreign country, through the Panama Canal or otherwise, for the handling of through business between interior points of the United States and such foreign country, the Interstate Commerce Commission may require such railway to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country. (Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380, amended March 2, 1889, c. 382, § 1, 25 Stat. 855, June 29, 1906, c. 3591, § 2, 34 Stat. 586, June 18, 1910, c. 309, § 9, 36 Stat.

548, Aug. 24, 1912, c. 390, § 11, 37 Stat. 568, Aug. 29, 1916, c. 417, 39 Stat. 604, and Feb. 28, 1920, c. 91, §§ 409–413, 41 Stat. 483.)

Sec. 7. Combinations to prevent continuous carriage of freight to destination prohibited—It shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act. (Act Feb. 4, 1887, c. 104, § 7, 24 Stat. 382.)

Sec. 8. Liability for violation of act—In case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case. (Act Feb. 4, 1887, c. 104, § 8, 24 Stat. 382.)

Sec. 9. Remedies of persons damaged—Any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district [or circuit] court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding. (Act Feb. 4, 1887, c. 104, § 9, 24 Stat. 382.)

Sec. 10. (1) Violation of act by carrier or officer—Any common carrier subject to the provisions of his Act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this Act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this Act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this Act for which no penalty is otherwise provided, or who

shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: Provided, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property or the transmission of intelligence, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

(2) False billing or classification by carrier or officer for transportation of property at less than regular rates—Any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

(3) Obtaining or attempting to obtain transportation for property at less than regular rates by false billing or classification, or by making false claim for damages—Any person, corporation, or company, or any agent or officer thereof, who shall deliver property for transportation to any common carrier subject to the provisions of this Act, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and willfully, directly, or indirectly, himself or by employé, agent, officer, or otherwise, by false billing, false classification, false weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent, or officer, obtain or attempt to obtain transportation for such property at less than the regular rates then established and in force on the line of transportation; or who shall knowingly and willfully, directly or indirectly, himself or by employé, agent, officer, or otherwise, by false statement or representation as to cost, value, nature, or extent of injury, or by the use of any false bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to be false, fictitious, or fraudulent, or to contain any false, fictitious, or fraudulent statement or entry, obtain or attempt to obtain any allowance, refund, or payment for damage or otherwise in connection with or growing out of the transportation of or agreement to transport such property, whether with or without the consent or connivance of the carrier, whereby the compensation of such carrier for such transportation, either before or after payment, shall in fact be made less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was wholly or in part committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court: Provided, That the penalty of imprisonment shall not apply to artificial persons.

(4) Inducing or attempting to induce, by payment of money or solicitation, carrier or officer to discriminate unjustly in transportation of property—If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common carrier subject to the provisions of this Act, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom. (Act Feb. 4, 1887, c. 104, § 10, 24 Stat. 382, amended, March 2, 1889, c. 382, § 2, 25 Stat. 857, June 18, 1910, c. 309, § 10, 36 Stat. 549, and Feb. 28, 1920, c. 91, § 414, 41 Stat. 483.)

Sec. 11. Interstate Commerce Commission; appointment, term of service, and removal of Commissioners—A commission is hereby created and established to be known as the Inter-State Commerce Commission, which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. The Commissioners first appointed under this act shall continue in office for the term of two, three, four, five, and six years, respectively, from the first day of January, anno Domini eighteen hundred and eighty-seven, the term of each to be designated by the President; but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the Commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said Commissioners shall not engage in any other business, vocation, or employment. No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission. (Act Feb. 4, 1887, c. 104, § 11, 24 Stat. 383.)

Sec. 12. (1) Authority, powers, and proceedings of Commission; witnesses—The Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney-General of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof, and the costs and expenses of such

prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this act the Commission shall have power to require, by subpœna, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

(2) Attendance of witnesses and production of documents—Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpœna the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

(3) Compelling attendance of witnesses, etc.—And any of the [circuit] courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Text in brackets superseded by Act March 3, 1911, c. 231, § 289, 36 Stat. 1167.

(4) Depositions—The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation depending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

(5) Same—Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

(6) Same; foreign country—If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

(7) Same; fees—Witnesses whose depositions are taken pursuant to this act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States. (Act Feb. 4, 1887, c. 104, § 12, 24 Stat. 383, amended, March 2, 1889, c. 382, § 3, 25 Stat. 858, Feb. 10, 1891, c. 128, 26 Stat. 743, and Feb. 28, 1920, c. 91, § 415, 41 Stat. 484.)

Sec. 13. (1) Complaint to Commission of violation of law by carrier; statement to carrier; reparation; investigation—Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

(2) Complaint to Commission by State Railroad Commission; inquiry on Commission's own motion—Said commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. And the said commission shall have the same powers and authority to proceed with any inquiry instituted on its motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(3) Notice to States of investigations involving rates, etc.—Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State reg-

ulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act.

(4) Commission to prescribe rates, etc., when; effect of state laws— Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding. (Feb. 4, 1887, c. 104, § 13, 24 Stat. 383, amended, June 18, 1910, c. 309, § 11, 36 Stat. 550, and Feb. 28, 1920, c. 91, § 416, 41 Stat. 484.)

Sec. 14. (1) Reports of investigations by Commission—Whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

(2) Record of reports; copies—All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

(3) Publication of reports and decisions; printing and distribution of annual reports—The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports. (Act Feb. 4, 1887, c. 104, § 14, 24 Stat. 384, amended, March 2, 1889, c. 382, § 4, 25 Stat. 859, June 29, 1906, c. 3591, § 3, 34 Stat. 589, and Feb. 28, 1920, c. 91, § 417, 41 Stat. 484.)

Sec. 15. (1) Commission empowered to determine and prescribe rates or classifications—Whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is

hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(2) Orders of Commission—Except as otherwise provided in this Act, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

(3) Establishment of through routes, joint classifications, joint rates, fares, or charges—The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a water line. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character; nor shall the Commission have the right to establish any route, classification, or practice, or any rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water.

(4) Through routes established to embrace entire length of railroad; temporary through routes—In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established: Provided, That in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) es-

tablish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

(5) Transportation of livestock in carload lots to include unloading, reloading, delivery, etc.—Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards.

(6) Commission empowered to establish just divisions of joint rates, fares, or charges—Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

(7) Commission authorized to determine lawfulness of new rates, fares, charges, or classifications; suspension of operation of such new rates, etc.; burden of proof—Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and

defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If any such hearing cannot be concluded within the period of suspension, as above stated, the Commission may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period, but, in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate, fare, or charge increased after January 1, 1910, or of a rate, fare, or charge sought to be increased after the passage of this Act, the burden of proof to show that the increased rate, fare, or charge, or proposed increased rate, fare, or charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

(8) Designation by shipper of one of two or more through routes for transportation; issue of through bill of lading, and transportation over such route; determination between competing railroads, portions of through line or through route—In all cases where at the time of delivery of property to any railroad corporation being a common carrier for transportation subject to the provisions of this Act to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this Act provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: Provided, however, That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported.

(9) Liability of carriers where property is diverted or delivered by one carrier to another contrary to routing instructions in bill of lading—Whenever property is diverted or delivered by one carrier to another carrier contrary to routing instructions in the bill of lading, unless such diversion or delivery is in compliance with a lawful order, rule, or regulation of the Commission, such carriers shall, in a suit or action in any court of competent

jurisdiction, be jointly and severally liable to the carrier thus deprived of its right to participate in the haul of the property, for the total amount of the rate or charge it would have received had it participated in the haul of the property. The carrier to which the property is thus diverted shall not be liable in such suit or action if it can show, the burden of proof being upon it, that before carrying the property it had no notice, by bill of lading, waybill or otherwise, of the routing instructions. In any judgment which may be rendered the plaintiff shall be allowed to recover against the defendant a reasonable attorney's fee to be taxed in the case.

(10) Direction of routing by Commission—With respect to traffic not routed by the shipper, the Commission may, whenever the public interest and a fair distribution of the traffic require, direct the route which such traffic shall take after it arrives at the terminus of one carrier or at a junction point with another carrier, and is to be there delivered to another carrier.

(11) Disclosure of information concerning shipments, and soliciting such information—It shall be unlawful for any common carrier subject to the provisions of this Act, or any officer, agent, or employee of such common carrier, or for any other person or corporation lawfully authorized by such common carrier to receive information therefrom, knowingly to disclose to or permit to be acquired by any person or corporation other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier for interstate transportation, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor; and it shall also be unlawful for any person or corporation to solicit or knowingly receive any such information which may be so used: Provided, That nothing in this Act shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any state or federal court, or to any officer or agent of the Government of the United States, or of any State or Territory, in the exercise of his powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime; or information given by a common carrier to another carrier or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers.

(12) Violation of provisions of preceding paragraph—Any person, corporation, or association violating any of the provisions of the next preceding paragraph of this section shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not more than one thousand dollars.

(13) Allowance of service rendered or instrumentality furnished by owner of property transported; determination of reasonable charge as maximum—If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

(14) Other powers of Commission not excluded by foregoing enumerations—The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this Act. (Act Feb. 4, 1887, c. 104, § 15, 24 Stat. 384, amended,

June 29, 1906, c. 3591, § 4, 34 Stat. 589, June 18, 1910, c. 309, § 12, 36 Stat. 551, Aug. 9, 1917, c. 50, § 4, 40 Stat. 272, and Feb. 28, 1920, c. 91, §§ 418–421, 41 Stat. 484–488.)

Sec. 15a. (1) Definitions—When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices, relating thereto; the term "carrier" means a carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to this Act, excluding (a) sleeping-car companies and express companies, (b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight, and (d) any belt-line railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated, and controlled by any State or political subdivision thereof; and the term "net railway operating income" means railway operating income, including in the computation thereof debits and credits arising from equipment rents and joint facility rents.

(2) Commission to initiate, modify, establish, or adjust rates so that carriers may earn fair return on value of properties—In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: Provided, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different portions of the country.

(3) What constitutes fair return; determination by Commission; basis of determination for two years—The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: Provided, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

(4) What constitutes aggregate value of properties—For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this Act, in so far as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a of this Act the value of the railway property of any carrier held for and

used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value.

(5) Amounts received by carriers in excess of fair return payable to United States—Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States.

(6) Amounts received by carriers in excess of 6 per cent. of value of properties; disposition of; reserve fund; general railroad contingent fund—If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purposes of this paragraph the value of the railway property and the net railway operating income of a group of carriers, which the Commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of section 209 of this amendatory Act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the Commission in the manner provided in paragraph (4).

(7) Payment of dividends or interest from reserve fund—For the purpose of paying dividends or interest on the stocks, bonds, or other securities, or rent for leased roads, a carrier may draw from the reserve fund established and maintained by it under the provisions of this section to the extent that its net railway operating income for any year is less than a sum equal to 6 per centum of the value of the railway property held for and used by it in the service of transportation, determined as provided in paragraph (6); but such fund shall not be drawn upon for any other purpose.

(8) Maximum amount of reserve fund—Such reserve fund need not be accumulated and maintained by any carrier beyond a sum equal to 5 per centum of the value of its railway property determined as herein provided, and when such fund is so accumulated and maintained the portion of its excess income which the carrier is permitted to retain under paragraph (6) may be used by it for any lawful purpose.

(9) Rules and regulations for recovery of excess income; computation of excess income—The Commission shall prescribe rules and regulations for the determination and recovery of the excess income payable to it under this section, and may require such security and prescribe such reasonable terms and conditions in connection therewith as it may find necessary. The

Commission shall make proper adjustments to provide for the computation of excess income for a portion of a year, and for a year in which a change in the percentage constituting a fair return or in the value of a carrier's railway property becomes effective.

(10) General railroad contingent fund; custody, administration, and use of—The general railroad contingent fund so to be recoverable by and paid to the Commission and all accretions thereof shall be a revolving fund and shall be administered by the Commission. It shall be used by the Commission in furtherance of the public interest in railway transportation either by making loans to carriers to meet expenditures for capital account or to refund maturing securities originally issued for capital account, or by purchasing transportation equipment and facilities and leasing the same to carriers, as hereinafter provided. Any moneys in the fund not so employed shall be invested in obligations of the United States or deposited in authorized depositaries of the United States subject to the rules promulgated from time to time by the Secretary of the Treasury relating to Government deposits.

(11) Same; loans to carriers from; applications for—A carrier may at any time make application to the Commission for a loan from the general railroad contingent fund, setting forth the amount of the loan and the term for which it is desired, the purpose of the loan and the uses to which it will be applied, the present and prospective ability of the applicant to repay the loan and meet the requirements of its obligations in that regard, the character and value of the security offered, and the extent to which the public convenience and necessity will be served. The application shall be accompanied by statements showing such facts and details as the Commission may require with respect to the physical situation, ownership, capitalization, indebtedness, contract, obligations, operations, and earning power of the applicant, together with such other facts relating to the propriety and expediency of granting the loan applied for and the ability of the applicant to make good the obligation, as the Commission may deem pertinent to the inquiry.

(12) Same; loans to carriers from; terms and conditions of—If the Commission, after such hearing and investigation, with or without notice, as it may direct, finds that the making, in whole or in part, of the proposed loan from the general railroad contingent fund is necessary to enable the applicant properly to meet the transportation needs of the public, and that the prospective earning power of the applicant and the character and value of the security offered are such as to furnish reasonable assurance of the applicant's ability to repay the loan within the time fixed therefor, and to meet its other obligations in connection with such loan, the Commission may make a loan to the applicant from such railroad contingent fund, in such amount, for such length of time, and under such terms, and conditions as it may deem proper. The Commission shall also prescribe the security to be furnished which shall be adequate to secure the loan. All such loans shall bear interest at the rate of 6 per centum per annum, payable semiannually to the Commission. Such loans when repaid, and all interest paid thereon, shall be placed in the general railroad contingent fund.

(13) Lease to carriers of transportation equipment or facilities purchased from general railroad contingent fund; applications for—A carrier may at any time make application to the Commission for the lease to it of transportation equipment or facilities, purchased from the general railroad contingent fund, setting forth the kind and amount of such equipment or facilities and the term for which it is desired to be leased, the uses to which it is proposed to put such equipment or facilities, the present and prospective ability of the applicant to pay the rental charges thereon and to meet the requirements of its obligations under the lease, and the extent to which the public

convenience and necessity will be served. The application shall be accompanied by statements showing such facts and details as the Commission may require with respect to the physical situation, ownership, capitalization, indebtedness, contract obligations, operation, and earning power of the applicant, together with such other facts relating to the propriety and expediency of leasing such equipment or facilities to the applicant as the Commission may deem pertinent to the inquiry.

(14) Same; terms and conditions of—If the Commission, after such hearing and investigation, with or without notice, as it may direct, finds that the leasing to the applicant of such equipment or facilities, in whole or in part, is necessary to enable the applicant properly to meet the transportation needs of the public, and that the prospective earning power of the applicant is such as to furnish reasonable assurance of the applicant's ability to pay promptly the rental charges and meet its other obligations under such lease, the Commission may lease such equipment or facilities purchased by it from the general railroad contingent fund, to the applicant for such length of time, and under such terms and conditions as it may deem proper. The rental charges provided in every such lease shall be at least sufficient to pay a return of 6 per centum per annum, plus allowance for depreciation determined as provided in paragraph (5) of section 20 of this Act, upon the value of the equipment or facilities leased thereunder. All rental charges and other payments received by the Commission in connection with such equipment and facilities, including amounts received under any sale thereof, shall be placed in the general railroad contingent fund.

(15) Purchase, etc., of equipment, etc., by Commission—The Commission may from time to time purchase, contract for the construction, repair and replacement of, and sell, equipment and facilities, and enter into and carry out contracts and other obligations in connection therewith, to the extent that moneys included in the general railroad contingent fund are available therefor, and in so far as necessary to enable it to secure and supply equipment and facilities to carriers whose applications therefor are approved under the provisions of this section, and to maintain and dispose of such equipment and facilities.

(16) Rules and regulations—The Commission may from time to time prescribe such rules and regulations as it deems necessary to carry out the provisions of this section respecting the making of loans and the lease of equipment and facilities.

(17) Reparation to shippers in case of overcharges, etc.—The provisions of this section shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates, but no shipper shall be entitled to recover upon the sole ground that any particular rate may reflect a proportion of excess income to be paid by the carrier to the Commission in the public interest under the provisions of this section.

(18) Retention of all of earnings from new lines constructed—Any carrier, or any corporation organized to construct and operate a railroad, proposing to undertake the construction and operation of a new line of railroad may apply to the Commission for permission to retain for a period not to exceed ten years all or any part of its earnings derived from such new construction in excess of the amount heretofore in this section provided, for such disposition as it may lawfully make of the same, and the Commission may, in its discretion, grant such permission, conditioned, however, upon the completion of the work of construction within a period to be designated by the Commission in its order granting such permission. (Act Feb. 4, 1887, c. 104, § 15a, added, Feb. 28, 1920, c. 91, § 422, 41 Stat. 488.)

Sec. 16. (1) Orders by Commission for payment of damages—If, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

(2) Same; proceedings in courts to enforce; costs; attorney's fee—If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the [circuit court] of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the [circuit court] of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

(3) Same; limitations—(a) All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after.

(b) All complaints against carriers subject to this Act for the recovery of damages not based on overcharges shall be filed with the commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d).

(c) For recovery of overcharges action at law shall be begun or complaint filed with the commission against carriers subject to this Act within three years from the time the cause of action accrues, and not after, subject to subdivision (d), except that if claim for the overcharge has been presented in writing to the carrier within the three-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

(d) If on or before expiration of the two-year period of limitation in subdivision (b) or of the three-year period of limitation in subdivision (c) a carrier subject to this Act begins action under subdivision (a) for recovery of charges in respect of the same transportation service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier.

(e) The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after.

(f) A petition for the enforcement of an order of the commission for the payment of money shall be filed in the district court or the State court within one year from the date of the order, and not after.

(g) The term "overcharges" as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the commission.

(h) The provisions of this paragraph (3) shall extend to and embrace cases in which the cause of action has heretofore accrued as well as cases in which the cause of action may hereafter accrue, except that actions at law begun or

complaints filed with the commission against carriers subject to this Act for the recovery of overcharges where the cause of action accrued on or after March 1, 1920, shall not be deemed to be barred under subdivision (c) if such actions shall have been begun or complaints filed prior to enactment of this paragraph or within six months thereafter.

(4) Same; parties; process; judgment—In such suits all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff.

(5) Same; service of orders of Commission—Every order of the commission shall be forthwith served upon the designated agent of the carrier in the city of Washington or in such other manner as may be provided by law.

(6) Same; suspension or modification of orders—The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

(7) Same; compliance with orders—It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

(8) Failure to obey orders made under sections 3, 13, or 15—Any carrier, any officer, representative, or agent of carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of sections 3, 13, or 15 of this Act shall forfeit to the United States the sum of $5,000 for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

(9) Suit for recovery of forfeiture—The forfeiture provided for in this Act shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.

(10) District attorneys to prosecute for forfeitures; costs and expenses—It shall be the duty of the various district attorneys, under the direction of the Attorney-General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

(11) Employment of attorneys by Commission—The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

(12) Proceedings in Commerce Court to enforce orders other than for payment of money; injunction or other process—If any carrier fails or neglects to obey any order of the commission other than for the payment of

money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney-General, may apply to the [commerce court] for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

(13) Schedules, tariffs, and contracts filed with Commission, and reports to Commission, kept as public records; evidence—The copies of schedules and classifications and tariffs of rates, fares, and charges, and of all contracts, agreements and arrangements between common carriers filed with the commission as herein provided, and the statistics, tables, and figures contained in the annual or other reports of carriers made to the commission as required under the provisions of this Act shall be preserved as public records in the custody of the secretary of the commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the commission and in all judicial proceedings; and copies of and extracts from any of said schedules, classifications, tariffs, contracts, agreements, arrangements, or reports, made public records as aforesaid, certified by the secretary, under the commission's seal, shall be received in evidence with like effect as the originals. (Act Feb. 4, 1887, c. 104, § 16, 24 Stat. 384, amended, March 2, 1889, c. 382, § 5, 25 Stat. 859, June 29, 1906, c. 3591, § 5, 34 Stat. 590, June 18, 1910, c. 309, § 13, 36 Stat. 554, Feb. 28, 1920, c. 91, §§ 423–429, 41 Stat. 491, 492, and June 7, 1924, c. 325, 43 Stat. 633.)

Sec. 16a. Rehearings by Commission; stay; decisions—After a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order. (Act Feb. 4, 1887, c. 104, § 16a, added June 29, 1906, c. 3591, § 6, 34 Stat. 592.)

Sec. 17. (1) Conduct of proceedings of Commission; seal; oaths and affirmations; subpœnas; quorum; participation in hearings having interest therein; rules of procedure; right of parties to be heard; records—The commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. The commission shall have an official seal, which shall be judicially noticed. Any member of the commission may administer oaths and affirmations and sign subpœnas. A majority of the commission shall constitute a quorum for the transaction of business, except as may be otherwise herein provided, but no commissioner shall participate in any hearing or proceeding in which he

has any pecuniary interest. The commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, or before any division of the commission, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before the commission or any division thereof and be heard in person or by attorney. Every vote and official act of the commission, or of any division thereof, shall be entered of record, and its proceedings shall be public upon the request of any party interested.

(2) Divisions of Commission; assignment of Commissioners to divisions—The Commission is hereby authorized by its order to divide the members thereof into as many divisions (each to consist of not less than three members) as it may deem necessary, which may be changed from time to time. Such divisions shall be denominated, respectively, division one, division two, and so forth. Any Commissioner may be assigned to and may serve upon such division or divisions as the Commission may direct, and the senior in service of the Commissioners constituting any of said divisions shall act as chairman thereof. In case of vacancy in any division, or of absence or inability to serve thereon of any Commissioner thereto assigned, the chairman of the Commission or any Commissioner designated by him for that purpose, may temporarily serve on said division until the Commission shall otherwise order.

(3) Reference of matters to divisions—The commission may by order direct that any of its work, business, or functions arising under this Act, or under any Act amendatory thereof, or supplemental thereto, or under any amendment which may be made to any of said Acts, or under any other Act or joint resolution which has been or may hereafter be approved, or in respect of any matter which has been or may be referred to the commission by Congress or by either branch thereof, be assigned or referred to any of said divisions for action thereon, and may by order at any time amend, modify, supplement, or rescind any such direction. All such orders shall take effect forthwith and remain in effect until otherwise ordered by the commission.

(4) Powers of divisions; orders, decisions, or reports of divisions; rehearings by whole Commission—In conformity with and subject to the order or orders of the commission in the premises, each division so constituted shall have power and authority by a majority thereof to hear and determine, order, certify, report, or otherwise act as to any of said work, business, or functions so assigned or referred to it for action by the commission, and in respect thereof the division shall have all the jurisdiction and powers now or then conferred by law upon the commission, and be subject to the same duties and obligations. Any order, decision, or report made or other action taken by any of said divisions in respect of any matters so assigned or referred to it shall have the same force and effect, and may be made, evidenced, and enforced in the same manner as if made, or taken by the commission, subject to rehearing by the commission as provided in section sixteen-a hereof for rehearing cases decided by the commission. The secretary and seal of the commission shall be the secretary and seal of each division thereof.

(5) No powers of Commission divested—Nothing in this section contained, or done pursuant thereto, shall be deemed to divest the commission of any of its powers. (Act Feb. 4, 1887, c. 104, § 17, 24 Stat. 385, amended March 2, 1889, c. 382, § 6, 25 Stat. 861, Aug. 9, 1917, c. 50, § 2, 40 Stat. 270, and Feb. 28, 1920, c. 91, §§ 430–432, 41 Stat. 492, 493.)

Sec. 18. (1) Commissioner's salaries; secretary and employés; compensation; witness fees—Each Commissioner shall receive an annual salary of seven thousand five hundred dollars, payable in the same manner as the judges of the courts of the United States. The Commission shall appoint a secretary, who shall receive an annual salary of three thousand five hundred

dollars, payable in like manner. The Commission shall have authority to employ and fix the compensation of such other employés as it may find necessary to the proper performance of its duties. Until otherwise provided by law, the Commission may hire suitable offices for its use, and shall have authority to procure all necessary office supplies. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(2) Expenses of Commission—All of the expenses of the Commission, including all necessary expenses for transportation incurred by the Commissioners, or by their employés under their orders, in making any investigation, or upon official business in any other places than in the City of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman of the Commission. (Act Feb. 4, 1887, c. 104, § 18, 24 Stat. 386, amended March 2, 1889, c. 382, § 7, 25 Stat. 861, and Feb. 28, 1920, c. 91, § 433, 41 Stat. 493.)

Sec. 19. Sessions—The principal office of the Commission shall be in the city of Washington, where its general sessions shall be held; but whenever the convenience of the public or of the parties may be promoted or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States. It may, by one or more of the Commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this act. (Act Feb. 4, 1887, c. 104, § 19, 24 Stat. 386.)

Sec. 19a. (a) Physical valuation of property of carriers; investigation by Commission; experts; examiners; classification and inventory—The commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this Act. To enable the commission to make such investigation and report, it is authorized to employ such experts and other assistants as may be necessary. The commission may appoint examiners who shall have power to administer oaths, examine witnesses, and take testimony. The commission shall make an inventory which shall list the property of every common carrier subject to the provisions of this Act in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission.

(b) Cost of property used for carrier purposes; value of other property; cost and value of real property; property held for other than carrier purposes; history of corporate organization; increase or decrease of stocks; earnings and expenditures; amount and value of grants to carriers; value of concessions made by carrier—First. In such investigation said commission shall ascertain and report in detail as to each piece of property, other than land, owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any. The commission shall in like manner ascertain and report separately other values, and elements of value, if any, of the property of such common carrier, and an analysis of the methods of valuation employed, and of the reasons for any differences between any such value and each of the foregoing cost values.

Second. Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purpose of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same.

Third. Such investigation and report shall show separately the property held for purposes other than those of a common carrier, and the original cost and present value of the same, together with an analysis of the methods of valuation employed.

Fourth. In ascertaining the original cost to date of the property of such common carrier the commission, in addition to such other elements as it may deem necessary, shall investigate and report upon the history and organization of the present and of any previous corporation operating such property; upon any increases or decreases of stocks, bonds, or other securities, in any reorganization; upon moneys received by any such corporation by reason of any issues of stocks, bonds, or other securities; upon the syndicating, banking, and other financial arrangements under which such issues were made and the expense thereof; and upon the net and gross earnings of such corporations; and shall also ascertain and report in such detail as may be determined by the commission upon the expenditure of all moneys and the purposes for which the same were expended.

Fifth. The commission shall ascertain and report the amount and value of any aid, gift, grant of right of way, or donation, made to any such common carrier, or to any previous corporation operating such property, by the Government of the United States or by any State, county, or municipal government, or by individuals, associations, or corporations; and it shall also ascertain and report the grants of land to any such common carrier, or any previous corporation operating such property, by the Government of the United States, or by any State, county, or municipal government, and the amount of money derived from the sale of any portion of such grants and the value of the unsold portion thereof at the time acquired and at the present time, also, the amount and value of any concession and allowance made by such common carrier to the Government of the United States, or to any State, county, or municipal government in consideration of such aid, gift, grant, or donation.

(c) Investigation; procedure—Except as herein otherwise provided, the commission shall have power to prescribe the method of procedure to be followed in the conduct of the investigation, the form in which the results of the valuation shall be submitted, and the classification of the elements that constitute the ascertained value, and such investigation shall show the value of the property of every common carrier as a whole and separately the value of its property in each of the several States and Territories and the District of Columbia, classified and in detail as herein required.

(d) Same; time for beginning; reports to Congress—Such investigation shall be commenced within sixty days after the approval of this Act and shall be prosecuted with diligence and thoroughness, and the result thereof reported to Congress at the beginning of each regular session thereafter until completed.

(e) Same; documents, to aid; access of agents to property; rules and regulations; inspection of records—Every common carrier subject to the provisions of this Act shall furnish to the commission or its agents from time to time and as the commission may require maps, profiles, contracts, reports of engineers, and any other documents, records, and papers, or copies of any or all of the same, in aid of such investigation and determination of the value of the property of said common carrier, and shall grant to all agents of the commission free access to its right of way, its property, and its accounts, records, and memoranda whenever and wherever requested by any such duly authorized agent, and every common carrier is hereby directed and required to cooperate with and aid the commission in the work of the valuation of its property in such further particulars and to such extent as the commission may require and direct, and all rules and regulations made by the commission for the purpose of administering the provisions of this section and section twenty of

this Act shall have the full force and effect of law. Unless otherwise ordered by the commission, with the reasons therefor, the records and data of the commission shall be open to the inspection and examination of the public.

(f) Valuation of extensions and improvements; reports to Congress—Upon the completion of the valuation herein provided for the commission shall thereafter in like manner keep itself informed of all extensions and improvements or other changes in the condition and value of the property of all common carriers, and shall ascertain the value thereof, and shall from time to time, revise and correct its valuations, showing such revision and correction classified and as a whole and separately in each of the several States and Territories and the District of Columbia, which valuations, both original and corrected, shall be tentative valuations and shall be reported to Congress at the beginning of each regular session.

(g) Reports and information by carriers—To enable the commission to make such changes and corrections in its valuations of each class of property, every common carrier subject to the provisions of this Act shall make such reports and furnish such information as the commission may require.

(h) Notice of completion of tentative valuation; protests; finality of valuation—Whenever the commission shall have completed the tentative valuation of the property of any common carrier, as herein directed, and before such valuation shall become final, the commission shall give notice by registered letter to the said carrier, the Attorney General of the United States, the governor of any State in which the property so valued is located, and to such additional parties as the commission may prescribe stating the valuation placed upon the several classes of property of said carrier, and shall allow thirty days in which to file a protest of the same with the commission. If no protest is filed within thirty days, said valuation shall become final as of the date thereof.

(i) Protests; hearings; changes in valuations; effect of final valuation and classification—If notice of protest is filed the commission shall fix a time for hearing the same, and shall proceed as promptly as may be to hear and consider any matter relative and material thereto which may be presented in support of any such protest so filed as aforesaid. If after hearing any protest of such tentative valuation under the provisions of this Act the commission shall be of the opinion that its valuation should not become final, it shall make such changes as may be necessary, and shall issue an order making such corrected tentative valuation final as of the date thereof. All final valuations by the commission and the classification thereof shall be published and shall be prima facie evidence of the value of the property in all proceedings under the Act to regulate commerce as of the date of the fixing thereof, and in all judicial proceedings for the enforcement of the Act approved February fourth, eighteen hundred and eighty-seven, commonly known as "the Act to regulate commerce," and the various Acts amendatory thereof, and in all judicial proceedings brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission.

(j) Effect of evidence as to values; modification of orders; judgment on original orders—If upon the trial of any action involving a final value fixed by the commission, evidence shall be introduced regarding such value which is found by the court to be different from that offered upon the hearing before the commission, or additional thereto and substantially affecting said value, the court, before proceeding to render judgment shall transmit a copy of such evidence to the commission, and shall stay further proceedings in said action for such time as the court shall determine from the date of such transmission. Upon the receipt of such evidence the commission shall consider the same and may fix a final value different from the one fixed in the first instance, and may alter, modify, amend or rescind any order which it has made involving said final value, and shall report its action thereon to said court within the

time fixed by the court. If the commission shall alter, modify, or amend its order, such altered, modified, or amended order shall take the place of the original order complained of and judgment shall be rendered thereon as though made by the commission in the first instance. If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order.

(k) Receivers and trustees of carriers; compliance with law—The provisions of this section shall apply to receivers of carriers and operating trustees. In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with all the requirements of this section and in the manner prescribed by the commission such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in section sixteen of the Act to regulate commerce.

(*l*) Mandamus to compel compliance with law—That the district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the commission, alleging a failure to comply with or a violation of any of the provisions of this section by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of this section. (Act Feb. 4, 1887, c. 104, § 19a, added, March 1, 1913, c. 92, 37 Stat. 701, and amended, Feb. 28, 1920, c. 91, § 433, 41 Stat. 493, and June 7, 1922, c. 210, §§ 1, 2, 42 Stat. 624.)

Sec. 20. (1) Annual reports from carriers and owners of railroads, and answers to questions of Commission; contents of reports; uniform system of accounts—The Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, and from the owners of all railroads engaged in interstate commerce as defined in this Act, to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employés and the salaries paid each class; the accidents to passengers, employés, and other persons, and the causes thereof; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require; and the Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe a period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

(2) Period covered by and time for making reports; failure to make reports or answer questions; monthly and special reports—Said detailed reports shall contain all the required statistics for the period of twelve months ending on the thirtieth day of June in each year, or on the thirty-first day of December in each year if the commission by order substitute that period for the year ending June thirtieth, and shall be made out under oath and filed with the commission at its office in Washington within three months after the

close of the year for which the report is made, unless additional time be granted in any case by the commission; and if any carrier, person, or corporation subject to the provisions of this Act shall fail to make and file said annual reports within the time above specified, or within the time extended by the commission, for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such party shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The commission shall also have authority by general or special orders to require said carriers, or any of them, to file monthly reports of earnings and expenses and to file periodical or special, or both periodical and special, reports concerning any matters about which the commission is authorized or required by this or any other law to inquire or to keep itself informed or which it is required to enforce; and such periodical or special reports shall be under oath whenever the commission so requires; and if any such carrier shall fail to make and file any such periodical or special report within the time fixed by the commission, it shall be subject to the forfeitures last above provided.

(3) Recovery of forfeitures—Said forfeitures shall be recovered in the manner provided for the recovery of forfeitures under the provisions of this Act.

(4) Administration of oath—The oath required by this section may be taken before any person authorized to administer an oath by the laws of the State in which the same is taken.

(5) Forms of accounts and records; access thereto by Commission, and examination; classes of property for which depreciation charges may be included under operating expenses—The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys. The Commission shall, as soon as practicable, prescribe, for carriers subject to this Act, the classes of property for which depreciation charges may properly be included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. The carriers subject to this Act shall not charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses. The commission shall at all times have access to all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by carriers subject to this Act, and the provisions of this section respecting the preservation and destruction of books, papers, and documents shall apply thereto, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by such carriers. This provision shall apply to receivers of carriers and operating trustees. The provisions of this section shall also apply to all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter

existing, kept during the period of Federal control, and placed by the President in the custody of carriers subject to this Act.

(6) Failure to keep accounts and records, or submit same to inspection—In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this Act.

(7) False entries in accounts and records kept by carrier, or destruction, mutilation or alteration thereof, or failure to make entries or keeping other accounts and records than those prescribed—Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars, or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment: Provided, That the commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, or documents of carriers which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved.

(8) Examiner divulging facts or information—Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both.

(9) Jurisdiction of courts to compel compliance with law by mandamus—That the circuit and district courts of the United States shall have jurisdiction, upon the application of the Attorney-General of the United States at the request of the Commission, alleging a failure to comply with a violation of any of the provisions of said Act to regulate commerce or of any Act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said Acts, or any of them.

(10) Special agents or examiners—And to carry out and give effect to the provisions of said Acts, or any of them, the Commission is hereby authorized to employ special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence.

(11) Issue by carrier receiving property for transportation; liability to holder for loss; limitation of liability; statement of value of goods, and rates dependent thereon; times for notice and filing of claims and for suits thereon—Any common carrier, railroad, or transportation company subject to the provisions of this Act receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in an-

other State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property, caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory shall be liable to the lawful holder of said receipt, or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: Provided, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by and under the laws and regulations applicable to transportation by water, and the liability of the initial carrier shall be the same as that of such carrier by water: Provided, however, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section ten of this Act to regulate commerce, as amended; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared or agreed upon; and the commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary live stock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: Provided further, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: Provided further, That it shall be unlawful for any such common carrier to provide by rule, contract, regu-

lation, or otherwise a shorter period for giving notice of claims than ninety days, for the filing of claims than four months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: Provided, however, That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.

(12) Recovery by carrier, issuing bill, of amount of loss paid, from carrier on whose line loss occurred—The common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof. (Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386, amended, June 29, 1906, c. 3591, § 7, 34 Stat. 593, Feb. 25, 1909, c. 193, 35 Stat. 649, June 18, 1910, c. 309, § 14, 36 Stat. 555, March 4, 1915, c. 176, § 1, 38 Stat. 1196, Aug. 9, 1916, c. 301, 39 Stat. 441, and Feb. 28, 1920, c. 91, §§ 434–436, 41 Stat. 493, 494.)

Sec. 20a. (1) Carrier defined—As used in this section the term "carrier" means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this Act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this Act.

(2) Consent of commission to issue stock or bonds, or assumption of obligation or liability as lessor, etc.; application for—From and after one hundred and twenty days after this section takes effect it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

(3) Same; granting or denying application—The Commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the Commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds

thereof may be applied, subject always to the requirements of the foregoing paragraph (2).

(4) Same; form of and oath to application—Every application for authority shall be made in such form and contain such matters as the Commission may prescribe. Every such application, as also every certificate of notification hereinafter provided for, shall be made under oath, signed and filed on behalf of the carrier by its president, a vice president, auditor, comptroller, or other executive officer having knowledge of the matters therein set forth and duly designated for that purpose by the carrier.

(5) Same; sale, etc., of such securities—Whenever any securities set forth and described in any application for authority or certificate of notification as pledged or held unencumbered in the treasury of the carrier shall, subsequent to the filing of such application or certificate, be sold, pledged, repledged, or otherwise disposed of by the carrier, such carrier shall, within ten days after such sale, pledge, repledge, or other disposition, file with the Commission a certificate of notification to that effect, setting forth therein all such facts as may be required by the Commission.

(6) Same; notice of application to Governors of states; hearings—Upon receipt of any such application for authority the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which the applicant carrier operates. The railroad commissions, public service or utilities commissions, or other appropriate State authorities of the State shall have the right to make before the Commission such representations as they may deem just and proper for preserving and conserving the rights and interests of their people and the States, respectively, involved in such proceedings. The Commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority.

(7) Same; jurisdiction of Commission—The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein.

(8) Same; no guaranty or obligation assumed by United States—Nothing herein shall be construed to imply any guaranty or obligation as to such securities on the part of the United States.

(9) Same; securities excepted—The foregoing provisions of this section shall not apply to notes to be issued by the carrier maturing not more than two years after the date thereof and aggregating (together with all other then outstanding notes of a maturity of two years or less) not more than 5 per centum of the par value of the securities of the carrier then outstanding. In the case of securities having no par value, the par value for the purposes of this paragraph shall be the fair market value as of the date of issue. Within ten days after the making of such notes the carrier issuing the same shall file with the Commission a certificate of notification, in such form as may from time to time be determined and prescribed by the Commission, setting forth as nearly as may be the same matters as those required in respect of applications for authority to issue other securities: Provided, That in any subsequent funding of such notes the provisions of this section respecting other securities shall apply.

(10) Same; reports by carriers—The Commission shall require periodical or special reports from each carrier hereafter issuing any securities, including such notes, which shall show, in such detail as the Commission may require, the disposition made of such securities and the application of the proceeds thereof.

(11) Securities issued contrary to section void; punishment—Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the Commission is required, shall be void, if issued or assumed without such authorization therefor having first been obtained, or if issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization. If any security so made void or any security in respect to which the assumption of obligation or liability is so made void, is acquired by any person for value and in good faith and without notice that the issue or assumption is void, such person may in a suit or action in any court of competent jurisdiction hold jointly and severally liable for the full amount of the damage sustained by him in respect thereof, the carrier which issued the security so made void, or assumed the obligation or liability so made void, and its directors, officers, attorneys, and other agents, who participated in any way in the authorizing, issuing, hypothecating, or selling of the security so made void or in the authorizing of the assumption of the obligation or liability so made void. In case any security so made void was directly acquired from the carrier issuing it the holder may at his option rescind the transaction and upon the surrender of the security recover the consideration given therefor. Any director, officer, attorney or agent of the carrier who knowingly assents to or concurs in any issue of securities or assumptions of obligation or liability forbidden by this section, or any sale or other disposition of securities contrary to the provisions of the Commission's order or orders in the premises, or any application not authorized by the Commission of the funds derived by the carrier through such sale or other disposition of such securities, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than $1,000 nor more than $10,000, or by imprisonment for not less than one year nor more than three years, or by both such fine and imprisonment, in the discretion of the court.

(12) Holding position of officer or director of more than one carrier; interest in transactions by officer or director; punishment—After December 31, 1921, it shall be unlawful for any person to hold the position of officer or director of more than one carrier, unless such holding shall have been authorized by order of the Commission, upon due showing, in form and manner prescribed by the Commission, that neither public nor private interests will be adversely affected thereby. After this section takes effect it shall be unlawful for any officer or director of any carrier to receive for his own benefit, directly or indirectly, any money or thing of value in respect of the negotiation, hypothecation, or sale of any securities issued or to be issued by such carrier, or to share in any of the proceeds thereof, or to participate in the making or paying of any dividends of an operating carrier from any funds properly included in capital account. Any violation of these provisions shall be a misdemeanor, and on conviction in any United States court having jurisdiction shall be punished by a fine of not less than $1,000 nor more than $10,000, or by imprisonment for not less than one year nor more than three years, or by both such fine and imprisonment, in the discretion of the court. (Act Feb. 4, 1887, c. 104, § 20a, added, Feb. 28, 1920, c. 91, § 439, 41 Stat. 494.)

Sec. 21. Annual report of Commission—The Commission shall, on or before the first day of December in each year, make a report, which shall be

transmitted to Congress, and copies of which shall be distributed as are the other reports transmitted to Congress. This report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary; and the names and compensation of the persons employed by said Commission. (Act Feb. 4, 1887, c. 104, § 21, 24 Stat. 387, amended, March 2, 1889, c. 382, § 8, 25 Stat. 862.)

Sec. 22. Restrictions on operation of act; interchangeable mileage or scrip coupon tickets—(1) Nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes. Nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies: Provided, That no pending litigation shall in any way be affected by this act: Provided further, That nothing in this Act shall prevent the issuance of joint interchangeable five-thousand-mile tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles. But before any common carrier, subject to the provisions of this Act, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section six of this Act; and all the provisions of said section six relating to joint rates, fares, and charges shall be observed by said common carriers and enforced by the Interstate Commerce Commission as fully with regard to such joint interchangeable mileage tickets as with regard to other joint rates, fares, and charges referred to in said section six. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint interchangeable mileage tickets than that required by the rate, fare, or charge specified in the copies of the joint tariff of rates, fares, or charges filed with the Commission in force at the time. The provisions of section ten of this Act shall apply to any violation of the requirements of this proviso.

(2) The commission is directed to require, after notice and hearing, each carrier by rail, subject to this Act, to issue at such offices as may be prescribed by the commission interchangeable mileage or scrip coupon tickets at just and reasonable rates, good for passenger carriage upon the passenger trains of all carriers by rail subject to this Act. The commission may in its discretion

exempt from the provisions of this amendatory Act either in whole or in part any carrier where the particular circumstances shown to the commission shall justify such exemption to be made. Such tickets may be required to be issued in such denominations as the commission may prescribe. Before making any order requiring the issuance of any such tickets the commission shall make and publish such reasonable rules and regulations for their issuance and use as in its judgment the public interest demands; and especially it shall prescribe whether such tickets are transferrable or nontransferrable, and if the latter, what identification may be required; and especially, also to what baggage privileges the lawful holders of such tickets are entitled.

(3) Any carrier which, through the act of any agent or employee, willfully refuses to issue or accept any such ticket demanded or presented under the lawful requirements of this Act, or willfully refuses to conform to the rules and regulations lawfully made and published by the commission hereunder, or any person who shall willfully offer for sale or carriage any such ticket contrary to the said rules and regulations shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined not to exceed $1,000. (Act Feb. 4, 1887, c. 104, § 22, 24 Stat. 387, amended, March 2, 1889, c. 382, § 9, 25 Stat. 862, Feb. 8, 1895, c. 61, 28 Stat. 643, and Aug. 18, 1922, c. 280, 42 Stat. 827.)

Sec. 24. Commission enlarged; terms of office; salaries; salary of Secretary—The Commission is hereby enlarged so as to consist of eleven members, with terms of seven years, and each shall receive $12,000 compensation annually. The qualifications of the members and the manner of payment of their salaries shall be as already provided by law. Such enlargement of the Commission shall be accomplished through appointment by the President, by and with the advice and consent of the Senate, of two additional Interstate Commerce Commissioners, one for a term expiring December 31, 1923, and one for a term expiring December 31, 1924. The terms of the present commissioners, or of any successor appointed to fill a vacancy caused by the death or resignation of any of the present commissioners, shall expire as heretofore provided by law. Their successors and the successors of the additional commissioners herein provided for shall be appointed for the full term of seven years, except that any person appointed to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. Not more than six commissioners shall be appointed from the same political party. Hereafter the salary of the secretary of the Commission shall be $7,500 a year. (Act Feb. 4, 1887, c. 104, § 24, added, June 29, 1906, c. 3591, § 8, 34 Stat. 595, and amended, Aug. 9, 1917, c. 50, § 1, 40 Stat. 270 and Feb. 28, 1920, c. 91, § 440, 41 Stat. 497.)

Sec. 25. (1) Schedules to be filed by carriers by water in foreign commerce owning registered vessels; contents—Every common carrier by water in foreign commerce, whose vessels are registered under the laws of the United States, shall file with the Commission, within thirty days after this section becomes effective and regularly thereafter as changes are made, a schedule or schedules showing for each of its steam vessels intended to load general cargo at ports in the United States for foreign destinations (a) the ports of loading, (b) the dates upon which such vessels will commence to receive freight and dates of sailing, (c) the route and itinerary such vessels will follow and the ports of call for which cargo will be carried.

(2) Schedules of vessel rates; making specific rate—Upon application of any shipper a carrier by railroad shall make request for, and the carrier by water shall upon receipt of such request name, a specific rate applying for such sailing, and upon such commodity as shall be embraced in the inquiry, and shall name in connection with such rate, port charges, if any, which accrue in addition to the vessel's rates and are not otherwise published by the railway as in addition to or absorbed in the railway rate. Vessel rates, if conditioned

upon quantity of shipment, must be so stated and separate rates may be provided for carload and less than carload shipments. The carrier by water, upon advices from a carrier by railroad, stating that the quoted rate is firmly accepted as applying upon a specifically named quantity of any commodity, shall, subject to such conditions as the Commission by regulation may prescribe, make firm reservation from unsold space in such steam vessel as shall be required for its transportation and shall so advise the carrier by railroad, in which advices shall be included the latest available information as to prospective sailing date of such vessel.

(3) Same; changes and modifications; publication—As the matters so required to be stated in such schedule or schedules are changed or modified from time to time, the carrier shall file with the Commission such changes or modifications as early as practicable after such modification is ascertained. The Commission is authorized to make and publish regulations not inconsistent herewith governing the manner and form in which such carriers are to comply with the foregoing provisions. The Commission shall cause to be published in compact form, for the information of shippers of commodities throughout the country, the substance of such schedules, and furnish such publications to all railway carriers subject to this Act, in such quantities that railway carriers may supply to each of their agents who receive commodities for shipment in such cities and towns as may be specified by the Commission, a copy of said publication; the intent being that each shipping community sufficiently important, from the standpoint of the export trade, to be so specified by the Commission shall have opportunity to know the sailings and routes, and to ascertain the transportation charges of such vessels engaged in foreign commerce. Each railway carrier to which such publication is furnished by the Commission is hereby required to distribute the same as aforesaid and to maintain such publication as it is issued from time to time, in the hands of its agents. The Commission is authorized to make such rules and regulations not inconsistent herewith respecting the distribution and maintenance of such publications in the several communities so specified as will further the intent of this section.

(4) Bills of lading—When any consignor delivers a shipment of property to any of the places so specified by the Commission, to be delivered by a railway carrier to one of the vessels upon which space has been reserved at a specified rate previously ascertained, as provided herein, for the transportation by water from and for a port named in the aforesaid schedule, the railway carrier shall issue a through bill of lading to the point of destination. Such bill of lading shall name separately the charge to be paid for the railway transportation, water transportation, and port charges, if any, not included in the rail or water transportation charge; but the carrier by railroad shall not be liable to the consignor, consignee, or other person interested in the shipment after its delivery to the vessel. The Commission shall, in such manner as will preserve for the carrier by water the protection of limited liability provided by law, make such rules and regulations not inconsistent herewith as will prescribe the form of such through bill of lading. In all such cases it shall be the duty of the carrier by railroad to deliver such shipment to the vessel as a part of its undertaking as a common carrier.

(5) Through bills of lading—The issuance of a through bill of lading covering shipments provided for herein shall not be held to constitute "an arrangement for continuous carriage or shipment" within the meaning of this Act. (Act Feb. 4, 1887, c. 104, § 25, added, Feb. 28, 1920, c. 91, § 441, 41 Stat. 497.)

Sec. 26. Automatic train-stop or train-control or other safety devices—The Commission may, after investigation, order any carrier by railroad subject to this Act, within a time specified in the order, to install automatic

train-stop or train-control devices or other safety devices, which comply with specifications and requirements prescribed by the Commission, upon the whole or any part of its railroad, such order to be issued and published at least two years before the date specified for its fulfillment: Provided, That a carrier shall not be held to be negligent because of its failure to install such devices upon a portion of its railroad not included in the order; and any action arising because of an accident happening upon such portion of its railroad shall be determined without consideration of the use of such devices upon another portion of its railroad. Any common carrier which refuses or neglects to comply with any order of the Commission made under the authority conferred by this section shall be liable to a penalty of $100 for each day that such refusal or neglect continues, which shall accrue to the United States, and may be recovered in a civil action brought by the United States. (Act Feb. 4, 1887, c. 104, § 26, added, Feb. 28, 1920, c. 91, § 441, 41 Stat. 498.)

Sec. 27. Citation of act—This Act may be cited as the "Interstate Commerce Act." (Act Feb. 4, 1887, c. 104, § 27, added, Feb. 28, 1920, c. 91, § 441, 41 Stat. 499.)

ELKINS ACT

Act Feb. 19, 1903, c. 708, 32 Stat. 848 (Comp. St. §§ 8597–8599)

Sec. 1. (1) Corporation common carriers liable for violations of law; failure to file and publish tariff; rebates, concessions, and discriminations; imprisonment as penalty; jurisdiction of prosecutions—Anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. Provided, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be lia-

ble to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

(2) Liabilities for acts of agents; departure from published rates— In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereto, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.

(3) Receiving rebates from carriers; additional penalty, and recovery thereof—Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of this Act, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, who shall knowingly by employé, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in this Act, shall in addition to any penalty provided by this Act forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney-General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be. (Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847, amended, June 29, 1906, c. 3591, § 2, 34 Stat. 587.)

Sec. 2. Parties to proceedings to enforce law—In any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any [circuit court] of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent,

and subject to the same provisions as are or shall be authorized by law with respect to carriers. (Act Feb. 19, 1903, c. 708, § 2, 32 Stat. 848.)

Text in brackets superseded by Act March 3, 1911, c. 231, § 289, 36 Stat. 1167.

Sec. 3. Proceedings in equity to enforce tariffs, and prohibition of discriminations; duties of district attorneys; recovery of damages; witnesses; precedence given hearings—Whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the [circuit court] of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several district attorneys of the United States, whenever the Attorney-General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by this Act shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by said Act approved February fourth, eighteen hundred and eighty-seven, entitled An Act to regulate commerce and the Acts amendatory thereof. And in proceedings under this Act and the Acts to regulate commerce the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence documentary or otherwise in such proceeding: Provided, That the provisions of an Act entitled "An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that may be hereafter enacted, approved February eleventh, nineteen hundred and three," shall apply to any case prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission. (Act Feb. 19, 1903, c. 708, § 3, 32 Stat. 848.)

Text in brackets superseded by Act March 3, 1911, c. 231, § 289, 36 Stat. 1167.

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WEST PUBLISHING CO., PRINTERS, ST. PAUL, MINN.

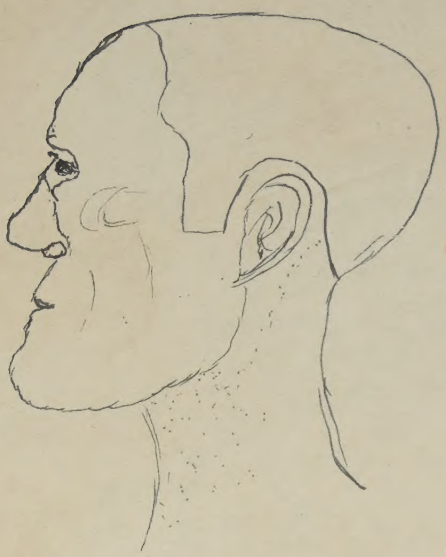
Operating Costs:

Utility is entitle to get enough gross income large enough to pay operating expense plus fair return on investment.

Brewer J.

not fair return but an opportunity to make a fair return.

In case there is no delivery, there is no presumption that terminal carrier lost them. -

In case of a partial lost there is a presumption that terminal carrier lost them. -

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